Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
16 March 2015

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 Inquiry into Making Laws in the Fourth Assembly (Pages 1 - 36)

(Indicative time 13.30)

Jane Hutt AM, Minister for Finance and Government Business
Jeff Godfrey, Welsh Government
Gill Lambert, Welsh Government

CLA(4)-08-15 - Paper 1 - Written Evidence
CLA(4)-08-15 - Research Service Briefing

3 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Page 37)

CLA(4)-08-15 - Paper 2 - Statutory instruments with clear reports

Affirmative Resolution Instruments

CLA495 - The Regulation of Private Rented Housing (Designation of Licensing Authority) (Wales) Order 2015
Affirmative procedure; Date laid: Not stated; Date laid: 2 March 2015; Coming into force date: 1 April 2015

4 Papers to note (Pages 38 - 43)

CLA(4)-08-15 - Paper 3 - Letter from the Minister for Public Services: The Non-Domestic Rating (Multiplier) (Wales) (No. 2) Order 2014
CLA(4)-08-15 - Paper 4 - Letter from the Chair to the Minister for Public Services: The Non-Domestic Rating (Multiplier) (Wales) (No. 2) Order 2014

CLA(4)-08-15 - Paper 5 - Written Statement: Statutory Instruments under Part 2 of the Housing (Wales) Act 2014

CLA(4)-08-15 - Paper 6 - Letter from the Presiding Officer

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

(vi) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish or is preparing itself to take evidence from any person;

6 Evidence in relation to the Inquiry into Making Laws in the Fourth Assembly (Pages 44 - 58)

Public session

(Indicative time 15.00)

The Rt.Hon Sir David Lloyd Jones, Chair, Law Commission
Elaine Lorimer, Chief Executive, Law Commission

CLA(4)-08-15 - Paper 7 - Written Evidence
CLA(4)-08-15 - Research Service Briefing

7 Motion under Standing Order 17.42 to resolve to exclude the public

from the meeting for the following business:

(vi) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish, or is preparing itself to take evidence from any person;

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

Bae Caerdydd • Cardiff Bay
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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)

Document is Restricted

Constitutional and Legislative Affairs Committee
Statutory Instruments with Clear Reports
16 March 2015

CLA495 - The Regulation of Private Rented Housing (Designation of Licensing Authority) (Wales) Order 2015

Procedure: Affirmative

This Order is made under section 3 of the Housing (Wales) Act 2014 ("the Act") and designates the County Council of the City and County of Cardiff as the licensing authority for the whole of Wales for the purposes of Part 1 of the Act.

Agenda Item 4

Leighton Andrews AC / AM
Y Gweinidog Gwasanaethau Cyhoeddus
Minister for Public Services

Llywodraeth Cymru
Welsh Government

David Melding AM
Chair, Constitutional & Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

5 March 2015

Dear David,

I am writing in relation to your letter of 10 February regarding the making of subordinate legislation which is dependent on the Chancellor's Autumn Statement.

I welcome your suggestions for ways in which the process for making such subordinate legislation can be improved and agree there are steps that can be taken to assist the Constitutional and Legislative Affairs Committee (CLAC) in its scrutiny process.

I will endeavour to write to you by 31 October to advise you of the expected date of the Chancellor's Autumn Statement and to provide you with notice of subordinate legislation which I will potentially need to make together with any associated timescales and constraints. However, this will not be definitive as advance notice of policy measures the Chancellor intends to announce, along with any consequential funding, is not normally provided in advance of his Statement.

Where possible, I will also seek to adhere to the second and third points you propose. I cannot guarantee this as such subordinate legislation is dependent on a number of factors which are outside my control. This includes the timely provision of information from UK Government departments.

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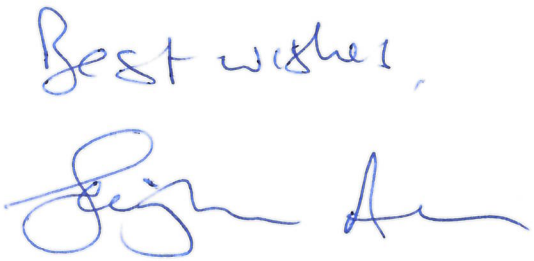
In addition to this, the consequences of not making such subordinate legislation within the time constraints are significant, for example, not reflecting cost of living increases in the amount of Council Tax support applicants receive or delaying Local Authorities' budget setting preparations.

I would like to reiterate my thanks to the Committee for its assistance in the making of the Council Tax Reduction Schemes (Prescribed Requirements and Default Scheme) (Wales) (Amendment) Regulations 2015 and the Non-Domestic Rating (Multiplier) (Wales) (No.2) Order 2014 and I look forward to working with you in the new financial year.



Leighton Andrews AC / AM
Y Gweinidog Gwasanaethau Cyhoeddus
Minister for Public Services

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
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Leighton Andrews AM
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10 February 2015

Dear Leighton

Thank you for your letter of 23 December 2014 regarding *The Non-Domestic Rating (Multiplier) (Wales) (No. 2) Order 2014,* which we considered at our meeting on 12 January 2015.

We understand the difficulties that the Welsh Government has faced in making this legislation in this and previous years. Similar issues have also arisen in relation to the making of subordinate legislation relating to council tax.

Nevertheless, and as we suggested in our report on the Council tax regulations in 2013, we believe there is scope for smoothing the passage and scrutiny of subordinate legislation that is dependent on the timing of the Chancellor's Autumn Statement.

We agreed that it would be helpful to suggest our preferred way of handling the scrutiny of this legislation in the future. We propose therefore three key

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milestones as part of the scrutiny process, namely:

i. written notice from the Welsh Government, by the 31 October, of the position regarding the making of any subordinate legislation related to the Chancellor's Autumn Statement. Subsequent correspondence could provide updates as necessary.

ii. provision of draft subordinate legislation to our lawyers by the 21 November, without the relevant figures that are dependent on the Chancellor's statement. This would be in line with current practice and enable the committee to be briefed at a meeting prior to the Christmas recess.

iii. aiming to debate the relevant subordinate legislation in plenary at least 5 working days after the regulations have been scrutinised by the committee. This would allow the committee to report within a fair amount of time and avoid a situation in which the committee's work is constrained by untypical timetables that deviate markedly from normal practice.

I would welcome your thoughts on these proposals and look forward to hearing from you in due course.

Yours sincerely

David Melding AM
Chair

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **'Statutory Instruments under Part 2 of the Housing (Wales) Act 2014'**

DATE **10 March 2015**

BY **Lesley Griffiths – Minister for Communities & Tackling Poverty**

In January, I issued a consultation on the Statutory Instruments associated with Part 2 of the Housing (Wales) Act 2014. I am pleased today to publish a summary report of the responses to the consultation.

Part 2 of the Housing (Wales) Act 2014 specifically relates to reform of homelessness law, including placing a stronger duty on Local Authorities to prevent homelessness. The three Statutory Instruments consulted upon related to the suitability of accommodation, the review process and the process for having regard to intentionality.

The consultation generated 27 responses from a range of stakeholders and members of the public. I am grateful to all those who took time to submit their views. The summary of responses has been published on the Welsh Government's website.

The Welsh Government has reflected on l the comments received and a number of the responses have been incorporated into the revised orders. I have today submitted them for further scrutiny by the Constitutional and Legislative Affairs Committee.

http://gov.wales/consultations/housing-and-regeneration/statutory-instruments-under-part-2-of-housing-wales-act-2014/?status=closed&lang=en

Y Fonesig Rosemary Butler AC
Dame Rosemary Butler AM

Llywydd
Presiding Officer

David Rees AM
Chair
Health and Social Care Committee National Assembly for Wales
Cardiff Bay
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11 March 2015

Dear David

At its meeting this week, the Business Committee considered a paper from the Government regarding a supplementary Legislative Consent Memorandum (Memorandum No. 4) in relation to the UK Government's Small Business, Enterprise and Employment Bill.

The LCM relates to amendments to provide that the Secretary of State may make regulations which prohibit an NHS employer from discriminating against a prospective employee because he/she has previously made a protected disclosure (a whistle-blowing declaration).

As the Bill is at a very late stage in its progress through Parliament and due to the time constraints, the Business Committee agreed not to refer the LCM to a Committee for scrutiny and noted that the Government would schedule the LCM for debate in Plenary on Tuesday 17 March 2015. However, as the subject matter of the LCM falls within the remit of Health and Social Care Committee, I am writing to draw your attention to the LCM, in case the committee should wish to pursue the matters covered by the LCM in any way.

I am also sending a copy of this letter to the Chair of the Constitutional and Legislative Affairs Committee to note the decision of the Business Committee.

Rosemary

Dame Rosemary Butler AM
Presiding Officer
Chair, Business Committee

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CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

MAKING LAWS IN THE FOURTH ASSEMBLY

WRITTEN EVIDENCE SUBMITTED BY THE LAW COMMISSION OF ENGLAND AND WALES, DECEMBER 2014

1.1 The Law Commission of England and Wales ("the Commission") welcomes the invitation to give evidence to the Constitutional and Legislative Affairs Committee ("the Committee") in relation to how laws are being made by the National Assembly for Wales. As this Inquiry considers "the principles applied to the legislative drafting of Bills, and amendments, for the Assembly and identifying respects in which they conform with or depart from best practice in the United Kingdom and comparable jurisdictions", we hope that it may be of assistance to the Committee to outline our experience at the Law Commission.

1.2 In producing this evidence, we have drawn from our 50 years experience of law reform work, including statute law repeals and the consolidation of legislation. We also offer some thoughts on principles for better legislation, which might usefully be applied outside the Commission.

1.3 This note is divided into four sections:

(1) Background to the Law Commission and the importance of good legislative drafting;

(2) The ways in which the Commission seeks to improve legislative standards in its approach to its work;

(3) Implementation; and

(4) Principles for better legislation, which might usefully apply outside the Commission.

SECTION 1: ABOUT THE LAW COMMISSION

1.4 Established by the Law Commissions Act 1965, the role of the Law Commission includes keeping all the law of England and Wales under review, providing advice and information to Government, and recommending reform where it is needed. The driving principle of all our law reform work is to ensure that the law is fair, modern, accessible and as cost-effective as possible. We believe that, for the law to be fair, it must be capable of being understood. We strive to remove ambiguity and make the law easy to understand and use for the courts, legal practitioners and citizens.

1.5 Recommendations that the Law Commission should review an area of law are made by the judiciary, often in judgments, by Members of Parliament, Government Departments and other Government bodies, as well as by many voluntary and private sector organisations and individuals. Periodically the Commission holds a consultation, calling for ideas for projects for the next 3 year programme of law reform.

The Law Commission's work in Wales

1.6 The Commission has undertaken a number of law reform projects relating to Welsh devolved matters. In particular, our recommendations on Adult Social Care have been implemented by the National Assembly in the Social Services and Well-being (Wales) Act 2014.[1] Welsh Ministers have announced their intention to introduce into the Assembly in 2015 a Bill which would implement in Wales the Commission's recommendations on Renting Homes.[2] The Commission has recently begun two further projects on Welsh law: Planning Law in Wales and The Form and Accessibility of the Law in force in Wales.

1.7 Clauses in the Wales Bill, currently before Parliament, will, once they are in force, amend the Law Commissions Act 1965. The amendments will authorise the Commission to provide advice and information to Welsh Ministers.[3] It will then be possible for Welsh Ministers to refer law reform projects directly to the Commission. In addition, once these amending provisions are brought into force, they will impose on Welsh Ministers a duty to report annually to the National Assembly on progress made in implementation of Commission proposals relating to Welsh devolved matters.[4]

1.8 The Bill makes provision for the Welsh Ministers and the Commission to agree a protocol about the Commission's work relating to Welsh devolved matters. It provides that the protocol may include provision about

(1) the principles and methods to be applied in deciding the work relating to such matters to be carried out by the Law Commission and in the carrying out of that work;

(2) the assistance and information that the Welsh Ministers and the Commission are to give each other;

(3) the way in which the Welsh Ministers are to deal with Commission proposals so far as they relate to Welsh devolved matters.[5]

1 Adult Social Care, Law Commission No. 326, April 2011.

2 Renting Homes: The Final Report, Law Commission No. 297, May 2006. Further updated in Renting Homes in Wales / Rhentu Cartrefi yng Nghymru, Law Commission No. 337, March 2013 as a result of discussions with the Welsh Government.

3 Wales Bill 2014, clause 25(2) amending section 3(1), Law Commissions Act 1965.

4 Wales Bill 2014, clause 25(4) inserting a new section 3C into the Law Commissions Act 1965.

5 Wales Bill 2014, clause 25(4) inserting section 3D(2) into the Law Commissions Act 1965.

1.9 The protocol and any amendment of it are required to be approved by the Lord Chancellor.[6]

The importance of good legislative drafting

1.10 The Commission is frequently made aware of the impact on the courts and the citizen of legislation that has been poorly drafted or badly conceived. For example, our current project on Sentencing Procedure in Criminal Courts has become necessary because the frequency of amendments to the statutory provisions has resulted in a statutory scheme of such complexity that even judges and other expert professionals are experiencing acute difficulty in identifying and applying the applicable law.

1.11 In some situations, existing legislative provisions need review in light of ambiguity or incoherence. The project on the Form and Accessibility of the Law in force in Wales was proposed by the Commission's Welsh Advisory Committee and will address how access to the emerging body of Welsh law may be improved.

1.12 Finally, some areas of law have simply fallen out of step with modern society. Our statute law repeals (SLR) team makes proposals for the repeal of laws that have become obsolete. The purpose of SLR is to modernise and simplify the statute book, reduce its size and save the time of lawyers and others who use it. This in turn helps to avoid unnecessary costs. It also stops people being misled by obsolete laws that masquerade as live law.

1.13 It is also the case that legislation on a topic can become disjointed and inaccessible as Parliament passes successive Acts over several years. Our consolidation work can greatly improve the form, structure and accessibility of legislation.

SECTION 2: THE WAYS IN WHICH THE COMMISSION SEEKS TO IMPROVE LEGISLATIVE STANDARDS

1.14 In this section we describe for the Committee the part played in the design and delivery of draft Bills by:

(a) the way in which the Commission works

(b) the process by which we conduct law reform

(c) how we use consultation and specialist advice to inform our work

(d) our independent status, and

(e) scrutiny and review.

[6] Wales Bill 2014, clause 25(4) inserting section 3D(4) into the Law Commissions Act 1965.

How the Commission works

Specialist teams led by experts

1.15 The Commission is led by a Lord Justice of Appeal as Chairman. Four specialist teams of lawyers and researchers work under the supervision of the Chairman and 4 full-time Law Commissioners. The reputation of the Law Commission – as expert, authoritative and independent – and the respect with which it is held in the legal and academic arenas, enables us to attract Commissioners of the highest calibre.

1.16 Having teams that are able to devote their attention to specialist areas of law reform improves legislation by allowing us to undertake projects of a length and complexity that may not be possible for Government Departments. It has, for example, enabled us to undertake a long and demanding project on insurance contract law. Since starting work on this project in 2007, the Commercial Law team has been able to accumulate a high degree of knowledge and expertise in the area of insurance contract law, and build solid and productive relationships with highly influential stakeholders. The team is responsible for the Third Parties (Rights against Insurers) Act 2010 and the Consumer Insurance (Disclosure and Representations) Act 2012. A third Law Commission Bill, the Insurance Bill 2014 which is currently before the House of Lords, addresses pre-contract disclosure and misrepresentation in business insurance law and warranties.

In house Parliamentary Counsel

1.17 Most of our reports on law reform are accompanied by draft legislation which would implement our proposed reforms. From the start, the Law Commission has always included a team of Parliamentary Counsel within the organisation.

1.18 The Parliamentary Counsel team is responsible for drafting the Law Commission's law reform Bills on the instructions of the relevant law reform team. Working closely with the teams on a daily basis enables Parliamentary Counsel to develop a thorough understanding of the team's intentions and to ensure that these are reflected accurately and appropriately in draft legislation. The discipline of translating proposals for law reform into draft legislation is also of enormous benefit in our development of good law, in that it provides us with an opportunity to test the viability of our provisional proposals.

1.19 The team of Parliamentary Counsel is also available to give advice on questions relating to legislation and Parliamentary procedure arising in the course of the Commission's work. This has been particularly valuable on the occasions when we have supported the implementation of Law Commission Bills.

The process by which we conduct law reform

Programmes of law reform and selection of projects

1.20 The Law Commission is required, by the 1965 Act, to "prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform" (section 3(1)(b)). We received 250 suggestions for projects for inclusion in our 12th Programme and formally adopted nine new projects in July 2014, two of which relate to Welsh devolved law. Under the terms of the Protocol agreed between the Lord Chancellor (on behalf of the Government) and the Law Commission, only projects that are appropriate for the Commission and have a reasonable expectation of implementation are selected for the Programme. The selection criteria include an examination of the extent to which the law is unsatisfactory (for example, unfair, unduly complex, inaccessible or outdated).

1.21 In addition to our programmes of law reform, we also undertake projects referred directly to us by Ministers. For example, in March 2014 we completed a law reform project on the regulation of health care professionals and social workers, referred to the Commission by the Department of Health.[7]

Consolidation of legislation

1.22 The consolidation of statute law has been an important function of the Law Commission since its creation. The Commission has been responsible for over 200 enacted consolidation Bills since it was established in 1965.[8] Consolidation aims to make statute law more accessible and comprehensible by drawing together different enactments on the same subject matter to form a rational structure and making the cumulative effect of different layers of amendment more intelligible. In all purely consolidation exercises, the intention is that the effect of the current law should be preserved. However, there is usually scope for modernising language and removing the minor inconsistencies or ambiguities that can result both from successive Acts on the same subject and more general changes in the law.

1.23 Modern methods of updating legislation have reduced the pressure to consolidate simply to take account of amendments. There is still, however, a need for consolidation as a process. This is usually because the law on a subject is found in a number of different Acts or instruments, or because layers of amending legislation have distorted the structure of the original Act. A good consolidation does much more than produce an updated text. And the need to consolidate may be particularly acute after repeated legislative activity in a particular area of law over a period of several years, without the original legislation having been replaced. The language can become out of date and the content obsolete or out of step with developments in the general law.

[7] Regulation of Health Care Professionals, Law Commission No. 345, March 2014.

[8] Our most recent consolidation exercise resulted in the Co-operative and Community Benefit Societies Act 2014.

1.24 It is not always possible to remedy minor defects in legislation without altering its effect. We have, therefore, established a procedure whereby the Commission may recommend that small changes of substance be made in order to facilitate consolidation.

1.25 In approaching consolidation, the senior Parliamentary Counsel at the Commission will consider any proposed topic for consolidation with a view to determining whether it is suitable, how acute is the need for consolidation and whether there is likely to be anyone available to draft it within a reasonable time. Larger consolidations can take two or three years to complete. Usually, there is little point in starting a consolidation unless the underlying law is likely to remain stable for the period the project will take.

1.26 Since 2010, the Commission will not agree to a proposal that it produce a consolidated statute unless that Department is fully committed to supporting the project by making contributions both in terms of human resources (typically, a lawyer made available to answer queries from the drafter and to comment on his or her work) and funding. It is also now expected that a draft consolidation Bill will usually be published by the Department for wider consultation before it is introduced.

Statute Law Repeals (SLR)

1.27 SLR work is carried out by a specialist team at the Law Commission, with assistance from colleagues at the Scottish Law Commission. The team examines the statute law in particular fields, publishing a report recommending the repeal of those Acts or provisions which have been identified as obsolete.

1.28 Implementation of the Law Commission's SLR proposals is by means of Statute Law (Repeals) Bills. The Commission's most recent SLR Bill, its nineteenth, resulted in the Statute Law (Repeals) Act 2013 which repealed 817 Acts in their entirety and partially repealed a further 50 Acts. On 27 November 2014 the Commissions published a consultation paper which involves proposals for the twentieth SLR Bill. These concentrate primarily on obsolete legislation from the twentieth century under subject heads including agriculture, criminal law, police, social security and taxation.

1.29 SLR Bills are drafted by the SLR team; but they have the facility of consulting the Law Commission's Parliamentary Council on points of difficulty or for assistance in specialist details (for example savings provisions).

How we use consultation and specialist advice to inform our work

Consultation

1.30 Our law reform and statute law repeals projects involve extensive public consultation.

1.31 Consultation is the fulcrum of our law reform projects. It is critical to the final outcome of quality legislation in that it allows us to gain a thorough understanding of the operation of the area of law with which we are concerned, the problems that arise and how they are experienced by the public. Driven by the publication of a detailed consultation paper, our extensive consultation process informs and strengthens our final recommendations.

1.32 Our consultees will normally include politicians, officials and legal advisers from Government departments, the judiciary, practising lawyers, legal academics, local government, trade and industry, consumer groups, representative and campaigning organisations in the business and voluntary sectors and the public at large.

1.33 We make substantial efforts to ensure our target audiences are aware of our consultations. These include direct contact from the legal teams or via the members of our advisory groups, issuing notices via the traditional media and the tailored use of social media. We conduct a large number of face-to-face meetings with interested consultees. For example, in our project on adult social care and that on taxis and private hire services we conducted, in each case, between 60 and 80 meetings, seminars, workshops and conferences as part of the consultation process.

1.34 Our experience suggests that developing concrete provisional proposals leads to a more productive consultation process, and consequently better law, than asking open-ended, high-level, abstract questions.

1.35 To encourage response we publish all our papers online, along with executive summaries. We use a range of accessible formats, including short video clips, to provide information to specific audiences, in particular those who are not legal experts. In line with the Government's "Digital by Default" initiative, we have begun to offer consultees an opportunity to respond to our consultations online.

1.36 We also invite and receive a great many written responses. These often provide us with an enormously detailed exposition of an issue, set out by people who are experts and experienced practitioners in the field under consideration.

Specialist advice

1.37 For many of our projects we will convene an advisory group to give us specialist advice. They can give us a unique insight into the impact of legal issues on, for example, the courts, practitioners, business interests and the public. They help us to build a clear understanding of an existing situation, the experiences of those upon whom it impacts and the likely implications of reform. This assists us in the preparation of our provisional consultation proposals and impact assessments, and to ensure that we are able to reach and engage all potential interested parties. Depending on the project, an advisory group might consist of half a dozen legal experts, or 50 organisations representing a far greater number of relevant stakeholders.

The Commission's independent status

1.38 The Commission is an independent body created by Parliament. This improves our ability to draft good law in a number of ways. First, it means that when Parliament considers Bills produced by the Commission it knows that they have not been influenced in any way by political considerations. Secondly, many stakeholders are willing to engage with the Commission precisely because it is independent. This perception of the Commission proved particularly valuable in our work on disclosure and misrepresentation in insurance contracts. The Commission achieved such a level of consensus between the insurance industry and consumer groups that the Government was able to introduce the Bill which became the Consumer Insurance (Disclosure and Representations) Act 2012 under the House of Lords procedure for non-controversial Law Commission Bills.

1.39 The independence of the Commission can allow it to propose reform in areas where the public might have reservations about Government formulation of policy. For example, a current project on misconduct in public office stems from the March 2010 report of the Committee on Issues of Privilege (Police Searches on the Parliamentary Estate).

1.40 Often, necessary law reform is concerned with highly technical matters which are unlikely to capture the imagination of the public or the attention of politicians. An independent Commission is free to review areas of law that may not be high on the political agenda, popular or easy to deal with. It is also able to complete long-term projects that might not otherwise survive a change in Government.

Scrutiny and review

1.41 Scrutiny of the Law Commission's work comes both internally and externally. The internal process of peer review greatly enhances the quality of proposals we make for reform. Fortnightly meetings allow each Commissioner to draw on the considerable expertise of his or her fellow Commissioners, and provide Commissioners as a group with an opportunity to challenge each other's work. This adds to the external scrutiny of projects through consultation. Peer review takes place at each of the key stages in a project, up to and including the final report and draft Bill.

Parliamentary scrutiny of Law Commission law reform

1.42 The work of the Law Commission is transparent and available at a number of stages for scrutiny by Parliament. The Commission lays detailed information about its programmes of reform before Parliament prior to commencement, in accordance with the Law Commissions Act 1965. It also lays before Parliament its recommendations for reform in the form of Law Commission reports. These reports include a full statement of the existing law and the issues and problems identified, a summary of the consultation and responses received, and an assessment of the likely economic and social impact of the proposed reforms, were they to be implemented.

1.43 The Commission also produces an annual report to the Lord Chancellor in which it gives a full account of the progress and status of all its work.

We should be grateful for the opportunity to discuss with the Committee the most appropriate procedures by which the Commission may in future report to the Welsh Assembly on its activities.

The Lord Chancellor's annual report

1.44 The Law Commission Act 2009 imposes a duty on the Lord Chancellor to report to Parliament annually on implementation of Law Commission proposals.[9] The Lord Chancellor's annual report must set out the Law Commission's proposals for reform that have been implemented during the year and those that have not yet been implemented, including "plans for dealing with any of those proposals" and, where any decision has been taken not to implement, "the reasons for the decision". This is important in that it increases the transparency of the Government's approach to the Commission's work and allows Parliament an opportunity to exercise oversight of Government's response to our proposals.

1.45 When the provisions currently in the Wales Bill are brought into force, the Welsh Ministers will be subject to corresponding duties to report to the Assembly on progress made in implementation of Commission proposals relating to Welsh devolved matters.[10]

SECTION 3: IMPLEMENTATION

1.46 The Law Commission cannot introduce a Bill into Parliament. To implement legislative reform, we are dependent on Government or occasionally, as with the Estates of Deceased Persons (Forfeiture Rule and the Law of Succession) Act 2011, upon the support of an individual Parliamentarian who can carry our work forward by means of a private member's Bill.

1.47 Once Government is ready to introduce a Law Commission Bill in Parliament, there are two additional routes that can be taken: the Law Commission House of Lords procedure and the procedures for statute law repeals and consolidation.

House of Lords Procedure

1.48 The House of Lords procedure for scrutinising Law Commission Bills was adopted by the House in October 2010, following a successful trial. The procedure allows for the second reading of uncontroversial Law Commission Bills to be taken off the floor of the House, enabling valuable legislation to proceed to the statute book that might otherwise find it difficult to secure a place in the main legislative programme. The Insurance Bill currently before the House of Lords was introduced under this procedure in July 2014. While this procedure is efficient and economical in its use of Parliamentary time, it is in no sense an easy route to the statute book. The Lords Committee stage has been the occasion of rigorous scrutiny of the provisions of each Bill.

[9] Section 1.

[10] Wales Bill, clause 25(4) inserting a new section 3C into the Law Commissions Act 1965.

1.49 This is a convenient point at which to draw attention to a recent development in the procedure of the Scottish Parliament which has created a Delegated Powers and Law Reform Committee, the functions of which include scrutinising Bills proposed by the Scottish Law Commission. The first Bill chosen by the Scottish Parliament to go through this new procedure is the Legal Writings (Counterparts and Delivery) (Scotland) Bill which was introduced on 14 May 2014.[11]

Statute Law Repeals

1.50 The Law Commission's draft Statute Law (Repeals) Bills and associated reports are laid before Parliament as Command Papers. SLR Bills enjoy a fast-track route into and through Parliament. They are generally introduced into the House of Lords within weeks of their publication by the Commission. After Lords Second Reading, SLR Bills are considered by the Joint Committee on Consolidation Bills, a Committee appointed by both Houses to consider consolidation Bills and SLR Bills, before returning to the House of Lords for the remaining stages. The Ministry of Justice has responsibility for SLR Bills in both Houses.

Consolidation

1.51 Consolidation Bills benefit from a special Parliamentary procedure similar to that used for SLR Bills: being considered by a joint committee before following more or less formal proceedings through the other Parliamentary stages. A Law Commission consolidation would not recommend changes that were sufficiently significant to require the introduction of a normal Bill. For that reason, some Consolidation Bills are preceded by a programme Bill that includes amendments to the legislation being consolidated.

SECTION 4: PRINCIPLES FOR BETTER LEGISLATION – TRANSFERABLE TO OTHER ORGANISATIONS?

1.52 In the preceding sections we have concentrated on describing the functions and working practices of the Commission. It might be of assistance to the Committee if we focus more closely on the advantages we enjoy in the Commission when preparing proposals for substantive law reform and whether these may be transferrable to draft legislation which does not emanate from the Commission. In doing so we make clear that we do not suggest for a moment that legislation which has its origins in the work of the Commission should be regarded as a paragon; on the contrary there is always room for improvement when seeking to achieve accuracy, clarity and accessibility in legislation.

[11] The new procedure is described in Malcolm McMillan, "Law Reform in the Scottish Parliament: A New Process – A New Era?" (2014) *The Scottish Parliamentary Review* 95.

1. Policy formulation

1.53 In the context of policy formulation, the Law Commission is in a very different position from government. The Commission is an advisory rather than an executive body; it is politically and intellectually independent; and its projects are rarely driven by political imperatives or event-led timings. Our particular focus and corporate structure, underpinned by lawyers with specialist knowledge, mean that we can tackle longer, more complex and more technical projects, which government departments may not find practicable through lack of time or resources.

1.54 The Law Commission seeks to ensure that its policy proposals are formulated only after detailed research into the problems at which they are targeted. Before embarking on a project, it assesses the benefits that are likely to flow from legal reform through a scoping exercise and preliminary research. It then undertakes detailed research into the law and its policy context. At this stage, the Commission benefits from the specialist expertise of its Commissioners and lawyers, who bring a high level of technical background knowledge to the table. However, it also holds extensive consultations with experts in the field and, where appropriate, creates specialist advisory groups to help with the formulation of proposals. For example, our consultation on adult social care included:

(1) workshops with disabled people and carers, service providers and local authority staff in Camden, Conwy and Newport organised, inter alia by Sense, Conwy Connect and Reach;

(2) a joint conference organised by the Older People's Commissioner for Wales and Age Cymru for over 100 people in Cardiff, including service users, carers, professionals and academics;

(3) a consultation stand at a Young Carers' Festival in Southampton

(4) a full-day conference with local authority lawyers, social workers and advocates in Newcastle, and

(5) visiting disabled service users in their own homes in Newport, Barry and Neath.

1.55 This allowed us to engage directly with service users, to gain a deeper understanding of the problems with the current law, and to formulate policy in an informed and contextual manner.

1.56 Once the Commission's analysis and preliminary proposals have been presented to the public and to specific stakeholders in a consultation paper, we carefully analyse and evaluate their responses. The Commission then reconsiders its views in the light of this new evidence. The recommendations in the final report are accompanied by economic impact assessments, and usually by a draft bill.

1.57 We consider that better legislation can be promoted by:

- identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;

- formulating well thought-through policy objectives, with transparent impact assessment;

- carefully assessing whether a legislative or non-legislative solution would be more appropriate; and

- setting aside adequate time and resources for pre-introduction public consultation and solution-testing.

2. Drafting of bills

1.58 Law Commission policy is refined twice before it is translated into instructions to parliamentary counsel: once in the consultation paper and once before working up the final report. In most cases, a draft bill encompassing and elaborating on our recommendations is annexed to our report. If accepted for implementation, the draft bill may then be subjected to reworking by its receiving department before it is introduced.

1.59 Law Commission bills are drafted by specially seconded parliamentary counsel, to the same exacting standards as government programme bills. Counsel prepare bills based on written instructions, which are underpinned by the draft text of the Commission's final report. The quality of their drafting work is facilitated by the finality of the bill's underlying policy, and by the physical proximity of the bill's legal and policy team, who can aid in the refining process.

1.60 With government bills, these advantages are sometimes lost. If policy is still evolving through the drafting process, there is a risk that bill instructions may be undermined. The bill may fail accurately to reflect the initial policy thrust behind it. Furthermore, the mechanisms for implementing that policy can have unintended consequences. As the Renton Committee Report (1975) observed, awareness of this risk can lead to the drafting of statutes in exhaustive detail, in an attempt to forestall any unintended construction of the text. This in turn can make a bill difficult to understand. In its 1969 report on Interpretation of Statutes, the Law Commission argued that over-refinement of drafting can damage the "general intelligibility of the law", and is often fruitless, owing to the "inherent frailty of language" and the impossibility of foreseeing every contingency.[12]

1.61 Inadequate initial preparation can also give rise to the tabling of a disproportionate number of government amendments. These take up valuable Parliamentary time and can compromise the integrity of a bill. The Law Commission's 1969 Report observed that late amendments are more likely to result in a text that loses sight of the Bill's overall structure.

1.62 We consider therefore that the quality of legislation could be improved by:

- ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;

[12] The Interpretation of Statutes (1969) Law Commission No 21; Scot Law Commission No 11, para 5.

- having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;

- minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;

- making greater use of Keeling Schedules (as part of the Explanatory Notes) to clarify changes that a bill makes to previous enactments; and

- providing for the clear repeal of any existing enactments that are superseded by the bill.

3. Pre-enactment scrutiny

1.63 The Law Commission is a recommending body only, and has no direct responsibility for implementing its bills. Any Law Commission bills entering the Parliamentary process will have been adopted by the government (or, occasionally, a private member). However, there are certain aspects to the passage of Law Commission legislation which are noteworthy.

1.64 By the time the Law Commission drafts a bill, the proposals on which it is based have already been subject to significant public scrutiny. The bill must then pass the hurdle of acceptance (and possible modification) by the relevant government department, before being approved by the Cabinet PBL committee. The Law Commission report acts as the detailed explanatory note on the bill as originally drafted. Special Parliamentary procedures exist for consolidation and statute law repeal bills, and for certain technical or non-controversial law reform bills. This speeds up the passage of such bills and reduces their impact on a crowded legislative programme.

1.65 Publication of draft bills by government is meant to be the default position. However, time pressure means that relatively few Bills go down this route. For example, we understand that during the 2009-10 session, the government introduced 23 bills, only four of which had previously been published in draft, and two of which drafts had been scrutinised by a select committee. (By contrast, we understand that eight draft bills have been published in the current session of Parliament). Leaving scrutiny to post-introduction consideration by a Public Bill Committee has its downsides. Committees have limited time to consider policy and drafting, and can be hampered by government tabling late (and sometimes voluminous) amendments. In this way the effectiveness of Parliamentary scrutiny can be compromised.

1.66 We consider that better legislation could be promoted by:

- government ensuring that there is adequate opportunity for pre-legislative scrutiny;

- thorough scrutiny of bills by a relevant committee, with proper opportunity to review public comments; and

- setting aside adequate time for debate both on the bill and on any tabled amendments.

4. Post-legislative scrutiny

1.67 In 2006 the Law Commission undertook a project on post-legislative scrutiny. It was asked to undertake a study of the options as to post-legislative scrutiny and who would most appropriately take on the role. In its report[13] the Commission concluded that the reasons for having more systematic post-legislative scrutiny included the following

- to see whether legislation is working out in practice as intended
- to contribute to better regulation
- to improve the focus on implementation and delivery of policy aims
- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.

1.68 More specifically, it considered that

- The clarification of policy objectives is critical and that Regulatory Impact Assessments should be enhanced in order to provide clarification of policy objectives and to set out criteria for monitoring and review.
- Strengthened guidance from the centre of government to departments would help to ensure that there is greater commitment from departments to post-enactment review work.
- Consideration should be given to the setting up of a new Parliamentary joint committee on post-legislative scrutiny. Under this proposal select committees would retain the power to undertake post-legislative review but if they decided not to do so, the potential for review would then pass to a dedicated committee. That committee, supported by the Scrutiny Unit, could be involved at pre-legislative as well as post-legislative stages in considering what should be reviewed, could undertake the review work itself or commission others to do so and would develop organically within its broad terms of reference.
- There was no need to create a new body independent of Parliament to carry out post legislative scrutiny.
- Whether or not a Bill has formal pre-legislative scrutiny, departments should give routine consideration to whether and if so how legislation will be monitored and reviewed. A new joint committee on post-legislative scrutiny might also consider Bills and whether and, if so, how they should be reviewed post enactment.
- Any system of post-legislative scrutiny should ensure that interested parties are able to channel their concerns about the operation of legislation to the reviewing body and participate in any subsequent review.

[13] Post-legislative Scrutiny, Law Commission No. 302, September 2006.

- For Parliamentary review, a new joint committee would be best placed to decide which legislation should be reviewed. For departmental review, the decision should be for the department in accordance with guidance from the centre of Government.

1.69 The Commission also considered that there was scope for Parliamentary post-legislative scrutiny of secondary legislation. In addition it recommended that government give more thought to consolidation of secondary legislation with the aim of improving the management and accessibility of secondary legislation.

1.70 In its response to the Law Commission report the government accepted that there were clear benefits in selective post-legislative scrutiny of Acts. However, it considered that the basis for a new process for post-legislative scrutiny should be for the Commons departmental select committees themselves, on the basis of a Memorandum on appropriate Acts submitted by the relevant government department and published as a Command paper, to decide whether to conduct post-legislative scrutiny of the Act in question. It accepted that in some cases it might be appropriate for a different parliamentary body to conduct further scrutiny. The government stated that in this way the prime role of the Commons committees would be recognised and duplication of work would be avoided.

1.71 The Commission understands that since about 2009 government departments have been expected to carry out a post-legislative review of most new Acts (other than Finance Acts and certain other categories of Act listed in the Cabinet Office's Guide to Legislation). This takes place between 3 and 5 years after enactment and will culminate in a memorandum on the Act in question that is published as a Command paper and submitted to the relevant select Committee. That committee can if it wishes enquire further into the matter or to carry out their own review of the operation of the particular Act. However, the Commission is not in a position to offer an opinion as to how the system is operating in practice or whether it could be improved (for example by adopting our recommendation that a joint committee of both Houses should be tasked with a more systematic role in reviewing the operation of Acts).