Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd
Meeting date: 14 September 2015
Meeting time: 14.30

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1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

(Pages 1 – 6)

CLA(4)-21-15 – Paper 1 – Statutory Instruments with clear reports

Attached Documents:

CLA(4)-21-15 – Papur 1

Negative Resolution Instruments

CLA558 – The Building (Amendment) (Wales) Regulations 2015

Negative procedure: Date made: 7 July 2015; Date laid: 9 July 2015; Coming into force in accordance with Regulation 1(3)

CLA559 – The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

Negative procedure: Date made: 7 July 2015; Date laid: 9 July 2015; Coming into force date: 31 July 2015

CLA560 - The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015

Negative procedure: Date made: 7 July 2015; Date laid: 9 July 2015; Coming into force date: 31 July 2015

CLA561 - The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015

Negative procedure: Date made: 7 July 2015; Date laid: 10 July 2015; Coming into force date: 6 April 2016

CLA562 - The Education (Student Support) (Wales) (Amendment) Regulations 2015

Negative procedure: Date made: 8 July 2015; Date laid: 13 July 2015; Coming into force date: 3 August 2015

CLA563 - The Honey (Wales) Regulations 2015

Negative procedure: Date made: 8 July 2015; Date laid: 13 July 2015; Coming into force date: 3 August 2015

CLA564 - The Smoke Control Areas (Exempted Fireplaces) (Wales) Order 2015

Negative procedure: Date made: 8 July 2015; Date laid: 13 July 2015; Coming into force date: 3 August 2015

CLA565 - The Country of Origin of Certain Meats (Wales) Regulations 2015

Negative procedure: Date made: 13 July 2015; Date laid: 16 July 2015; Coming into force date: 10 August 2015

CLA566 - The Government of Maintained Schools (Change of Category) (Wales) Regulations 2015

Negative procedure: Date made: 14 July 2015; Date laid: 16 July 2015; Coming into force date: 1 September 2015

CLA567 - The Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2015

Negative procedure: Date made: 8 July 2015; Date laid: 15 July 2015; Coming into force date: 4 August 2015

CLA568 - The Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015

Negative procedure: Dater made: 7 July 2015; Date laid: 10 July 2015; Coming into force date: 6 April 2016

CLA569 - The Town and Country Planning (Local Development Plan) (Wales) (Amendment) Regulations 2015

Negative procedure; Date made: 3 August 2015; Date laid: 7 August 2015; Coming into force date: 28 August 2015

CLA570 - The Planning (Hazardous Substances) (Wales) Regulations 2015

Negative procedure; Date made: 3 August 2015; Date laid: 7 August 2015; Coming into force date: 4 September 2015

CLA571 - The National Curriculum (Desirable Outcomes, Educational Programmes and Baseline and End of Phase Assessment Arrangements for the Foundation Phase) (Wales) Order 2015

Negative procedure; Date made: 5 August 2015; Date laid: 10 August 2015; Coming into force date: 1 September 2015

CLA572 - The Education (Inspection of Nursery Education) (Wales) Regulations 2015

Negative procedure; Date made: 5 August 2015; Date laid: 10 August 2015; Coming into force date: 1 September 2015

CLA573 - The National Health Service (Optical Charges and Payments) (Amendment) (Wales) (No.2) Regulations 2015

Negative procedure; Date made: 4 August 2015; Date laid: 10 August 2015; Coming into force date: 31 August 2015

CLA574 - The Education (National Curriculum) (Attainment targets and Programmes of Study) (Wales) (Amendment) Order 2015

Negative procedure; Date made: 5 August 2015; Date laid: 11 August 2015; Coming into force date: 1 September 2015

3 Subsidiarity Monitoring Report

(Pages 7 - 17)

CLA(4)-21-15 - Paper 2 - Subsidiarity Monitoring Report

Attached Documents:

4 Papers to note

(Pages 18 – 198)

CLA(4)-21-15 – Paper 3 – Letter from the Secretary of State for Wales regarding the Committee's Report: The UK Government's Proposals for Further Devolution to Wales

CLA(4)-21-15 – Paper 4 – Letter from the First Minister to the Chair regarding Privy Council approval of the National Assembly for Wales (Disqualification) Order 2015

CLA(4)-21-15 – Paper 5 – Protocol between the Welsh Ministers and the Law Commission

CLA(4)-21-15 – Paper 6 – Law Commission consultation on its Inquiry into The Form and Accessibility of Law Applicable to Wales

CLA(4)-21-15 – Paper 7 – House of Lords Constitution Committee consultation on its Inquiry into the Union and Devolution

CLA(4)-21-15 – Paper 8 – Correspondence from Mike Goodall regarding the Public Health (Wales) Bill

CLA(4)-21-15 – Paper 9 – Evidence from the Presiding Officer to the Procedure Committee of the House of Commons regarding certification of legislation within devolved competence

CLA(4)-21-15 – Paper 10 – Correspondence from the Presiding Officer regarding the Constitutional implications of the UK Government's proposal to establish a system of 'English Votes for English Laws'

CLA(4)-21-15 – Paper 11 – Letter from the Chair to the Electoral Commission regarding the European Union Referendum Bill: Referendum Question Assessment

CLA(4)-21-15 – Paper 11 A – Referendum Membership of the European Union: Assessment of the Electoral Commission on the Proposed Question

CLA(4)-21-15 – Paper 12 – Letter from the Minister for Health and Social Services regarding the Stage 1 Report on the Regulation and Inspection of Social Care (Wales) Bill

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;

Final Report Environment (Wales) Bill

(Pages 199 – 217)

CLA(4)-21-15 – Paper 13 – Final Report

Draft Report Historic Environment (Wales) Bill

(Pages 218 – 239)

CLA(4)-21-15 – Paper 14 – Draft Report Historic Environment (Wales) Bill

Draft Report Making Laws in the Fourth Assembly

(Pages 240 – 345)

CLA(4)-21-15 – Paper 15 – Draft Report

Forward Work Programme

(Pages 346 – 351)

CLA(4)-21-15 – Paper 16 – Forward Work Programme

CLA(4)-21-15 – Paper 17 – Draft Wales Bill

CLA(4)-21-15 – Oral Update – Brussels Visit

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Agenda Item 2

Statutory Instruments with Clear Reports

14 September 2015

CLA558 - The Building (Amendment) (Wales) Regulations 2015

Procedure: Negative

These Regulations amend the Building Regulations 2010 (S.I.2010/2214) ('the 2010 Regulations') in relation to Wales. They substitute the table in Schedule 3 (Self-certification schemes and exemptions from requirement to give building notice or deposit full plans) to the 2010 Regulations with a revised and updated table. They also amend regulation 43(4) (pressure testing) of the 2010 Regulations in relation to bodies who may certify compliance with that regulation.

CLA559 - The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

Procedure: Negative

These Regulations make provision in respect of directions under section 11 of the Higher Education (Wales) Act 2015 and the issue and review of those notices and directions specified in section 41(1) of the same Act.

CLA560 - The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015

Procedure: Negative

These Regulations prescribe the qualifying courses and qualifying persons for the purposes of section 5 of the Higher Education (Wales) Act 2015, which sets out that fee and access plans must specify (or provide for the determination of) fee limits in relation to qualifying courses each academic year. Fee limits are the maximum amount which a qualifying person will have to pay an institution for undertaking a qualifying course.

CLA561 - The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015

Procedure: Negative

These Regulations establish an adult's ordinary residence where that adult is living in accommodation of a specified type. The Regulations provide that care home accommodation is accommodation of a specified type for the purpose of section 194(1) of the Social Services and Well-being Act 2014.

The effect of the Regulations is that where an adult is accommodated in care home accommodation, and the adult has care and support needs which can only be met by living in this kind of accommodation, that adult is treated as ordinarily resident in the local authority area where the adult was ordinarily resident before moving into the care home.

Members may wish to note that CLA568 makes provision for resolving dispute between local authorities about the ordinary residence of an adult.

CLA562 - The Education (Student Support) (Wales) (Amendment) Regulations 2015

Procedure: Negative

These Regulations amend the Education (Student Support) (Wales) Regulations 2015 which provide for financial support for students who are ordinarily resident in Wales and taking designated higher education courses in respect of academic years beginning on or after 1 September 2015.

CLA563 - The Honey (Wales) Regulations 2015

Procedure: Negative

These Regulations implement Council Directive 2001/110 EC relating to honey (the Honey Directive). The Regulations regulate the use of names such as 'honey', 'blossom honey', 'nectar honey', 'filtered honey' and 'baker's honey'. The Regulations also specify compositional requirements for certain types of honey. For example, the sum of the fructose and glucose content in blossom honey must not be less than 60g per 100g. The Regulations also impose additional labelling requirements, for example, the country of origin must be stated on labels.

The Regulations impose a duty on food authorities to enforce the Regulations and give enforcement powers to those food authorities.

CLA564 - The Smoke Control Areas (Exempted Fireplaces) (Wales) Order 2015

Procedure: Negative

This Order revokes and replaces with amendments the Smoke Control Areas (Exempted Fireplaces) (Wales) Order 2014 (S.I 2014/694) and allows the use of a number of boilers and stoves capable of smokeless operation within smoke control areas. The use of boilers / stoves is subject to strict conditions.

CLA565 - The Country of Origin of Certain Meats (Wales) Regulations 2015

Procedure: Negative

These Regulations enable the enforcement of, and provide penalties for, non-compliance with the requirements of EU law relating to the indication of the country of origin or place of provenance of certain meats.

These Regulations give food authorities (i.e. county councils and county borough councils) and port health authorities' relevant powers of enforcement in relation to Wales.

CLA566 - The Government of Maintained Schools (Change of Category) (Wales) Regulations 2015

Procedure: Negative

These Regulations make provision in respect of dealing with the making of a new instrument of government for a school that will be changing its category in accordance with a proposal made under the Schools Standards and Organisation (Wales) Act 2013.

CLA567 - The Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2015

Procedure: Negative

These Regulations revoke and replace with amendments the Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2014 (S.I. 2014/684 (W. 74)) ("the 2014 Regulations").

These Regulations specify all fuels which are currently authorised for use in smoke control areas in Wales for the purposes of section 20 of the Clean Air Act 1993. All the fuels that were listed in the Schedule to

the 2014 Regulations immediately prior to the coming into force of these Regulations continue to be authorised fuels. Nine additional fuels are authorised for the first time.

CLA568 - The Care and Support (Disputes about Ordinary Residence etc) (Wales) Regulations 2015

Procedure: Negative

These Regulations make provision about the resolution of disputes between local authorities about where a person is ordinarily resident in Wales for the purposes of the Social Services and Well-being Act 2014, including disputes between sending and receiving authorities in relation to portability of care and support and those which may arise in relation to the temporary duty of a local authority in the event of the failure of a residential care provider.

By virtue of section 117(4) of the Mental Health Act 1983, these Regulations apply to disputes between local authorities relating to mental health after care services.

CLA569 -The Town and Country Planning (Local Development Plan) (Wales) (Amendment) Regulations 2015

Procedure: Negative

These Regulations amend The Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 (SI 2005/2839) to simplify certain aspects of the local development plan process. In particular, these Regulations:

- remove the statutory requirement to advertise consultation stages in the local press;
- allow local planning authorities to make revisions to the local development plan where the issues involved are not of sufficient significance to warrant the full procedure, without going through the full revision process;
- eliminate the need to consult on alternative sites following the deposit consultation; and
- make minor and consequential amendments.

CLA570 -The Planning (Hazardous Substances) (Wales) Regulations 2015

Procedure: Negative

These Regulations consolidate, with amendments, the Planning (Hazardous Substances) Regulations 1992 and subsequent amending instruments insofar as they apply to Wales. They also include provision relating to the period for determination of procedure under sections 20 and 21 of the Planning

(Hazardous Substances) Act 1990. They also implement the land-use aspects of Directive 2012/18EU of the European Parliament and the Council on the control of major accident hazards involving dangerous substances.

CLA571 -The National Curriculum (Desirable Outcomes, Educational Programmes and Baseline and End of Phase Assessment Arrangements for the Foundation Phase) (Wales) Order 2015

Procedure: Negative

This Order amends the Education (National Curriculum) (Foundation Phase) (Wales) Order 2014. It gives legal effect to a document titled "Curriculum for Wales: Foundation Phase Framework", which sets out the revised desirable outcomes and educational programmes for the Areas of Learning.

The Order also introduces assessment arrangements that must be carried out by practitioners in relation to each pupil in the reception class of the Foundation Phase. Article 7 set out that this assessment should be carried out within 6 weeks of a child first attending as a pupil in a Reception class in a maintained school or as soon as reasonably practicable after that if, for exceptional reasons, it was not possible for it be carried out in that period.

Article 8 of this Order sets out the assessment arrangements that must be carried out by a practitioner in relation to each pupil in the final year of the Foundation Phase. Article 9 places a duty on the practitioner to complete a record of attainment of the assessment.

CLA572 - The Education (Inspection of Nursery Education) (Wales) Regulations 2015

Procedure: Negative

These Regulations largely replicate the Education (Inspection of Nursery Education) (Wales) Regulations 1999 ("the 1999 Regulations"). However, these Regulations do increase the time period prescribed for when the completion of an inspection report to 45 working days from the date on which the inspection began. The 1999 Regulations are revoked (regulation 1(3)).

These Regulations prescribe the period within which a report of an inspection of nursery education under Schedule 26 to the School Standards and Framework Act 1998 must be made; the authorities and persons to whom a copy of the report must be sent; and the intervals at which nursery education is to be inspected under that Schedule (regulations 3 and 4).

CLA573 - The National Health Service (Optical Charges and Payments) (Amendment) (Wales) (No.2) Regulations 2015

Procedure: Negative

These Regulations amend the National Health Service (Optical Charges and Payments) Regulations 1997 by providing for an increase in the NHS sight test fees by 1% with effect from 1 April 2015.

The retrospective effect of the Regulations is permissible under section 76(9) of the National Health Service (Wales) Act 2006.

CLA574 - The Education (National Curriculum) (Attainment targets and Programmes of Study) (Wales) (Amendment) Order 2015

Procedure: Negative

This Order gives legal effect to the new Programmes of Study for Mathematics, English, Welsh and Welsh Second Language in the National Curriculum in Wales.

This statutory instrument amends the Education (National Curriculum) (Attainment Targets and Programmes of Study) (Wales) Order 2008.

Y Gwasanaeth Ymchwil | Research Service

Subsidiarity monitoring report June to August 2015

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol | Medi 14, 2015
Constitutional and Legislative Affairs Committee | 14 September 2015

Research Briefing

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RS Ref: 15/2102

1. Introduction

Under Standing Order 21, a 'responsible committee' in the Assembly (currently the Constitutional and Legislative Affairs Committee) is empowered to consider draft EU legislation that relates to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General, to identify whether it complies with the principle of subsidiarity.

The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
>
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
>
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
>
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

In addition, the application of the principle is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The relevant part in relation to the work of the Assembly is included in the first paragraph of Article 6:

> Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or

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each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

2. The monitoring process

In order to ensure that the Constitutional and Legislative Affairs Committee fulfils its subsidiarity monitoring function effectively as set out in Standing Orders, Assembly officials monitor all draft EU legislative proposals that apply to Wales on a systematic basis to check whether they raise any subsidiarity concerns. The way in which Assembly officials monitor these proposals is outlined below for information:

- The Assembly in the first instance is notified of all proposals published by the European Commission for consideration through a list (known as the "batch list") which is sent by the Foreign and Commonwealth Office on behalf of the UK Government to the Assembly's Research Service for information.
- The relevant UK Government department will then prepare an Explanatory Memorandum (EM) based on the proposals included on the batch list usually within 4 to 6 weeks of the initial notification by the Foreign and Commonwealth Office. Each EM includes an assessment of the policy impact of the proposals (including whether the UK Government department believes the proposal raises any subsidiarity concerns). Copies of each EM are sent to the Assembly via the Research Service.
- The Research Service filters the EMs received to check whether the proposal they relate to are 'legislative' or 'non-legislative' and whether they encompass issues which may be of interest to the Assembly (i.e. relating to devolved matters).
- Those EMs that relate to proposals that are both 'legislative' and deal with issues of interest to the Assembly are then checked further by officials from the Assembly's Legal Services, Brussels Office and the Research Service to see whether they raise any potential subsidiarity concerns.
- If a proposal raises subsidiarity concerns, Assembly officials will alert the Constitutional and Legislative Affairs Committee immediately whereupon Members will be asked to consider whether the Committee should ask either or both Houses at Westminster to issue a 'reasoned opinion' on the proposal or not.
- Those proposals which are 'legislative' and relate to devolved matters but raise no subsidiarity concerns are then collated in a monitoring report produced by the Research Service which is considered as a paper to note by the Constitutional and Legislative Affairs Committee usually during each term in an Assembly year (Autumn [September-December], Spring [January-April] and Summer [May – August]).

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This report therefore includes a general overview of those draft EU legislative proposals received by the Assembly's Research Service between 1 June 2015 and 31 August 2015, and provides further information about those proposals that were identified by Assembly officials as being both 'legislative' in nature and relating to devolved matters.

Please note however that this report primarily monitors 'legislative' proposals, in the main it does not contain details of 'non-legislative proposals' that may be relevant to the work of the Assembly. These are monitored on a separate basis by the Research Service.

3. Overview of draft EU proposals received (June 2015 to August 2015)

A total of 176 UK Government EMs relating to EU proposals were received by the Assembly's Research Service from the UK Government between 1 June 2015 and 31 August 2015.

Of these, 51 EMs were of policy interest to the Assembly and were shared with the Research Service and 8 were identified by Assembly officials as being both 'legislative' in nature and of interest to the Assembly.

Following further analysis by officials from the Assembly's Legal Service, Brussels Office and Research Service, none of the proposals were identified as raising subsidiarity concerns although details of other concerns are included for information.

Information is also included in section 4 on the *European Commission Annual Report 2014 on Subsidiarity*.

Legislative proposals under the new European Commission

In general the number of EU legislative proposals has declined under the new European Commission following the European elections in May 2014. There has been a quite radical shift in approach by the European Commission to its forward planning; one of a number of changes introduced by the new Juncker Commission which took office in November 2014. President Juncker's deputy, First Vice President Frans Timmermans (ex-Dutch Foreign Minister), has control of the Work Programming process and he is a strong advocate of a more streamlined approach to policy and law-making by the EU.

New European Commission President Jean-Claude Juncker, in his Political Guidelines has called for a much clearer focus for EU level interventions, and respect for principles of subsidiarity and proportionality, stating:

> …I want a European Union that is bigger and more ambitious on big things, and smaller and more modest on small things…

This translates into 10 key priorities for EU level action over the coming five years, which will be the focus of the European Commission's Work Programmes and planned activities, with the

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emphasis on leaving Member States (and sub-State authorities) to deal with issues outside of these areas.

This new approach is very much reflected in the first Work Programme of the new Juncker Commission which was published in December 2014. It proposed 23 new legislative initiatives, which is a major departure from previous years where the European Commission would on average table over 100 legislative proposals. The other innovation of the 2015 Work Programme was an Annex proposing a list of ongoing proposals that the European Commission intended to withdraw due to lack of progress in the decision-making process, with stalemate in Council or between Council and Parliament on particular dossiers.

The fact that only 23 new legislative initiatives have been proposed will have (and has had) a direct impact on the number of proposals that the Constitutional and Legislative Affairs Committee will need to reflect on with regard to subsidiarity concerns.

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3.1 EU legislative proposals that did not raise any subsidiarity concerns

Date emailed	Title and description
04/06/2015	*Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1829/2003 as regards the possibility for the member states to restrict or prohibit the use of genetically modified food and feed on their territory* (COM(2015) 177). **Note that the Committee considered this legislative proposal at its meeting on 22 June 2015.** Legal Services provided a note for that meeting. In 2014 the European Commission undertook to review the decision making process for authorising the use of GMOs for food and feed, the rules for which are laid down in Regulation (EC) No 1829/2003. This arose from the failure of the Council of Ministers to achieve the necessary qualified majority in favour or against proposals on the subject, leaving decisions to be taken by the European Commission. The European Commission proposal would enable Member States to restrict or prohibit the use, within their territories, of GMOs authorised under Regulation (EC) No 1829/2003 on GM food and feed, providing such measures are in accordance with EU law, reasoned, proportionate, non-discriminatory (including in respect of trade) and based on compelling grounds unrelated to the risk assessment undertaken at EU level. The UK Government states in the EM that it agrees with the Commission that the proposal would introduce a **new element of subsidiarity** by giving Member States the discretion to ban or restrict the use of EU-approved GM products on non-safety grounds. However, the UK Government also states that it "cannot support this proposal" because of a number of concerns, including the impact on the EU single market and international trade, which it believes may adversely affect the UK livestock sector which is heavily dependent on imported GM feed. A number of parliaments and regional assemblies have highlighted concerns about the proposals, including the Thüringen (German), Romanian and Irish parliaments. At its meeting on 22 June the Committee agreed to write to the Welsh Government to ask whether it expects to take decisions on the use of genetically modified food and feed in Wales under the proposed EU Directive. On 24 August 2015 UK Government issued a **supplementary EM** on the

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proposal. In relation to devolved administrations ("DAs") the EM states:

> 5. Whilst the UK Government retains competence on import and export controls, the normal devolution of food and feed policy means that the DAs have competence to decide on the use of GM food and feed within their territories. Consequently, were the proposal to be adopted, it is possible that differing positions could be taken across the constituent parts of the UK. The DAs would be responsible for the consequences of any restriction on use which does not meet EU or WTO legal obligations. As relations with the EU are reserved, the UK Government would be responsible for notifying on the DAs' behalf any restrictions they may wish to impose. The DAs have been consulted in the preparation of this Supplementary Explanatory Memorandum.

The EM also states that the proposal was discussed at the July Agriculture and Fisheries Council during which the majority of Member States expressed concern about the legal soundness of restrictive measures that could be brought in under it. Member States also voiced concern about the implications it may have for the European single market and international trade obligations. The UK and many Member States, also asked the Commission to carry out a detailed impact assessment in line with better regulation principles.

A draft rejection report for the proposal prepared by the Rapporteur Giovanni la Via recommending rejection of the proposal was discussed by the EP Environment Committee. The Committee will vote on the report in October. A draft rejection opinion has also been prepared by Agriculture Committee Rapporteur, Albert Dess.

02/07/2015 *Proposal for a Regulation concerning the establishment of a **Union framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy** (RECAST)* (COM(2015)294).

Annex to the Proposal for a Regulation concerning the establishment of a Union framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy (recast) (COM(2015)294).

***Commission staff working document.** Towards a new Union Framework for collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy.*

The proposal presents a recast of the European framework for the collection, management and use of data in the fisheries sector. Data Collection is considered essential for the implementation of the reformed

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Common Fisheries Policy (CFP), enabling decisions to be based on the best scientific advice.

The proposal states that reducing the level of detail decided by or reported to the Commission should lead to simplification of the current system. Collecting data once to use for several purposes should also increase efficiency. The proposal sets out to improve the availability and flexibility of data, as well as reduce the complexity of the framework, removing much of the duplication and prescriptive detail.

This proposal falls under the exclusive competence of the European Union and therefore the Subsidiarity principle does not apply.

14/08/15

Proposal for a Regulation of the European Parliament and of the Council setting a ***framework for energy efficiency labelling*** *and repealing Directive 2010/30/EU.* (COM(2015)341)
Report from the Commission to the European Parliament and the Council on the review of Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication of labelling and standard product information of the consumption of energy and other resources by energy-related products. (COM(2015)345)

These documents include the European Commission's review of the Ecodesign and Energy Labelling Directives and the legislative proposals that the Commission has brought forward as a result, together with supporting documentation.

Legislative proposals.

The Commission has proposed to strengthen the current energy labelling regime and replace the current Directive with a Regulation having direct effect across the EU; the Commission justifies this change as simplifying the regulatory regime in Member States and bringing a more uniform approach across the EU by removing the need for transposition.

Review of the Ecodesign and Energy Labelling Directives.

The Commission report (COM(2015)345), and the accompanying evaluation report (SWD(2015)143):

a. sets out an evaluation of the effectiveness of the Energy Labelling Directive (2010/30/EU).

b. reports on the delegation of powers and provide a synthesis of the national market surveillance reports that Member States have to submit

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	every four years. c. reviews specific aspects of the Ecodesign Directive (2009/125/EC) such as the effectiveness of implementing measures and harmonised standards and a closer coordination between the implementation of two Directives.
14/08/15	*Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments* (COM (2015) 337). The European Commission has issued a proposal for a Decision of the European Parliament and of the Council to **amend the EU Emissions Trading System Directive** (Directive 2003/87/EC) which sets out the rules that govern the EU Emissions Trading System (EU ETS). The proposals relate to the next phase of the EU ETS, covering the period 2021-2030 ('Phase IV'). The EU ETS is designed to deliver cost effective emissions reduction and provide an incentive for investment in low carbon technologies. It sets an overarching emissions reduction target for industrial installations, power plants and aviation operators. The ETS works by allowing participants permits or 'emissions allowances' to emit greenhouse gas emissions. The total number of allowances is fixed, and reduces over time to put a declining cap on the total level of emissions. These allowances can be traded among participants, allowing emissions reductions to occur where abatement is most cost-effective.

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4. European Commission Annual Report 2014 on Subsidiarity

This section includes information on the European Commission's Annual Report for 2014 on subsidiarity and proportionality, and the UK Government's Explanatory Memorandum in response to it. It is included for information purposes and to provide an overall picture of how national parliaments across the EU engaged with the subsidiarity early warning system during 2014, including the UK Parliament.

29/08/2014 The European Union Commission's *Annual Report 2014 on Subsidiarity and Proportionality* (COM(2015) 315)

The European Commission published its 2014 annual report on the application of the principles of subsidiarity and proportionality in EU law-making in July 2014.

The report looks at how the EU institutions and bodies have implemented these two principles and how practice has evolved as compared with previous years. It also provides a more detailed analysis of a number of Commission proposals that were the subject of reasoned opinions submitted by national parliaments on the basis that they believed Commission proposals did not meet subsidiarity criteria.

In 2014 national parliaments issued 21 reasoned opinions, (the instruments which can be used to trigger a "yellow card" review), on 15 different proposals, a reduction of 76 per cent compared to the 88 issued in 2013.

Fifteen out of 41 chambers issued reasoned opinions (compared to 34 in 2013). The Austrian Bundesrat issued three, and the Swedish Riksdag and French Senat issued two each. In the UK the **House of Commons** issued three and the **House of Lords** none. Devolved legislatures may ask either or both Houses at Westminster to issue a reasoned opinion where they believe it is necessary.

The House of Commons issued reasoned opinions on:

- the proposal for a directive on strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings;
- the proposal for a Council directive on the placing on the market of food from animal clones, and
- the proposal for a decision on establishing a European platform to enhance co-operation in the prevention and deterrence of undeclared work.

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No yellow cards were issued in 2014, compared with one issued in 2013. However, it is worth noting that European elections were held in 2014 and a new Commission appointed, which meant fewer legislative proposals.

In addition, the Danish Folketing, Dutch Tweede Karmer and the House of Lords submitted **reports recommending a strengthened role for national parliaments in EU decision making, including reforms relating to subsidiarity**. The subsidiarity and proportionality report notes that discussions continue on these potential reforms.

In 2014, the **Committee of the Regions** adopted and implemented its second Subsidiarity Work Programme, which included the following three initiatives selected from the Commission Work Programme: (i) the Clean Air policy package; (ii) The proposal on organic production; (iii) The waste legislation in the framework of the Circular Economy package.

The Committee of the Regions was due to publish its Subsidiarity Annual Report 2014 in June 2015. The report is not yet available but will be posted here when published. The Assembly is represented on the Committee of the Regions by Rhodri Glyn Thomas AM and Mick Antoniw AM.

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

Ref: 94SOS 15

31 July 2015

Dear David,

Thank you for your letter of 15 July enclosing a copy of the Constitutional and Legislative Affairs Committee's report on the UK Government's plans for further devolution to Wales.

As you are aware, work is ongoing to prepare the Wales Bill which will implement the legislative commitments made in the St David's Day Agreement. I intend to publish the bill in draft for pre-legislative scrutiny in the autumn and introduce it into Parliament early next year.

I would welcome your Committee's views on the detail of the draft Bill once it is published.

Rt Hon Stephen Crabb MP
Secretary of State for Wales

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/0682/15

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

3 August 2015

Dear David,

I am writing to confirm that the National Assembly for Wales (Disqualification) Order 2015 was made by the Privy Council on 15 July and will come into force on 1 September 2015.

Please note that, while the content of the Order is unchanged from that approved by the Assembly, the ordering of the English and Welsh text has changed following a late request from the S.I. Registrar, relayed via the Privy Council Office. A copy of the Order as approved by the Privy Council can be found on the Legislation.gov website at the attached address: http://www.legislation.gov.uk/uksi/2015/1536/contents/made

As you know, the recommendations in your report played a crucial part in the development of the Order, and the disqualification principles you suggested formed the basis of our criteria for making decisions on whether posts should be disqualified. I am pleased that we have been able to work together on this, and deliver the Order in good time before the next Assembly elections.

I would also like to provide an update on the actions we have take in response to Recommendations 17, 18 and 19, which were not directly related to the Disqualification Order itself.

Recommendation 17
Your recommendation was "that every public body in Wales reviews its rules governing political activities to ensure that all staff are clear about the internal rules that apply in the event that they wish to seek nomination for, and are eventually successful in, election to the National Assembly for Wales. Such rules should take account of any legislation that arises from this report and be subject to review at least 2 years before Assembly general elections that take place after 2016."

The Welsh Government Response was:

"Accept in principle. This recommendation is fully in accord with our general approach in relation to the staff of public bodies, that (with the possible exception of the staff of the Assembly Commission) they should be eligible to seek elected public office. We will give

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further consideration to how this recommendation should be communicated to, and given effect by, Welsh public bodies. “

Action taken
The Welsh Government is writing to the Chief Executives of all Welsh Government Sponsored Bodies to highlight the action they may need to take to ensure their staff are aware if their posts are disqualifying offices under the Disqualification Order; and, for staff whose posts are not disqualifying offices, the action they may need to take to ensure there is a coherent internal policy on political activity and what arrangements would apply to a member of staff who wishes to stand for election to the Assembly.

Recommendation 18
You recommended “that the Welsh Government reviews the terms of appointment and guidance it gives to appointees, sponsored bodies and other relevant bodies regarding political activity.”

The Welsh Government Response was:
“Accept.”

Action taken
Welsh Government officials have reviewed the current terms of appointment and guidance documents. We considered it was important that the terms of appointment and guidance for candidates should do two things: (1) inform candidates/ appointees that taking up the office in question would disqualify them from Assembly membership, if the post is a disqualifying post under the Order; and (2) if the post itself is not a disqualifying post, that the terms of appointment include a section dealing with political activity on the part of the appointee, and explaining they may be required to resign if they do engage in political activity or wish to stand for election. We found that both these aspects are covered in the standard letters of appointment and public appointments guidance documents given to candidates, for all appointments dealt with by Ministers. I am therefore content that we have arrangements in place to deal with political activity by those appointed through a Welsh Government public appointment process, and to ensure those appointed are made aware of these arrangements.

Recommendation 19
You recommended “that the Electoral Commission reviews its existing guidance on disqualification from membership of the National Assembly for Wales to ensure it is comprehensive and covers all of the relevant policy issues and legislation that apply.”

The Welsh Government Response was:
“This is a matter for the Electoral Commission, but as noted in paragraph 12 above, the Welsh Government intends to produce a comprehensive, non-statutory, list of all of the disqualifying provisions of which we are aware, from whatever source, and make it publicly available to parties and potential candidates; and we will work with the Electoral Commission as necessary on this. “

Action taken
Welsh Government officials are working with the Electoral Commission to produce a comprehensive list of disqualifying provisions. We agree with the Electoral Commission that it would be appropriate for the list to be published as part of the Electoral Commission guidance to candidates.
I hope you have found this update useful. So far as I am aware, there are no other outstanding recommendations for the Welsh Government, apart from those relating to creating two categories of disqualifying office, which we cannot take forward with our current Order-making powers. However, we will return to those recommendations when powers

over the Assembly's electoral arrangements have been devolved by provision in the forthcoming Wales Bill..

Thank you again for all your assistance with this important matter.

Yours sincerely

CARWYN JONES

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Protocol between the Welsh Ministers and the Law Commission**

DATE **9th July 2015**

BY **Rt. Hon. Carwyn Jones AM, First Minister of Wales**

The Wales Act 2014 amends the Law Commissions Act 1965 by placing a new duty on the Law Commission to provide advice and information to the Welsh Ministers. This makes it clear that the Welsh Ministers will be directly able to refer law reform matters to the Law Commission and benefit from its advice. The 2014 Act also inserts a new section into the 1965 Act providing that the Welsh Ministers and the Law Commission may agree a protocol as to how we will work together.

I am pleased to inform Members that on 2nd July 2015, I signed a protocol between the Welsh Ministers and the Law Commission on the Law Commission's work relating to Welsh devolved matters. A copy of the protocol has today been laid in the Assembly.

The Welsh Government's relationship with the Law Commission has been on an upward trajectory in recent years, with ever increasing engagement. In addition to the protocol, the Welsh Government has introduced the Renting Homes (Wales) Bill which is based on earlier work of the Law Commission following the completion of their project into the reform of the rented housing sector. The Renting Homes (Wales) Bill is one of the most significant pieces of legislation to be introduced during this Assembly and will help over one million people in Wales who rent their homes.

The Law Commission's Twelfth Programme of law reform also contains an advisory project and a full law reform project relating to Wales. The advisory project on the form and accessibility of the law applicable in Wales will shortly be the subject of a consultation paper and I look forward to its publication. Discussions continue on the Planning Law project.

Finally I wish to express my gratitude to Sir David Lloyd Jones, who leaves his post as Chairman of the Law Commission in August., I would like to thank him especially for his commitment to ensuring that Welsh matters feature strongly in the Commission's work. I am confident that his successor, Sir David Bean, will build strongly on those foundations.

PROTOCOL BETWEEN

(1) THE WELSH MINISTERS AND

(2) THE LAW COMMISSION

CONTENTS

INTRODUCTION

We are pleased to present this protocol, agreed between the Welsh Ministers and the Law Commission for England and Wales and laid before the National Assembly for Wales, on how we should work together on law reform projects.

The Wales Act 2014 amended the Law Commissions Act 1965 to take account of Welsh devolution. It inserted a new section 3D which provides the statutory basis for making this protocol. It also inserted a new section 3C which requires the Welsh Ministers to report annually on the implementation of Law Commission proposals relating to devolved Welsh matters and it inserted paragraph (ea) in section 3(1) to enable the Law Commission to accept law reform projects referred to it by the Welsh Ministers.

In accordance with section 3D(4) of the Law Commissions Act 1965 this protocol has been approved by the Lord Chancellor.

SCOPE

1. The Law Commission of England and Wales ("the Commission") is the statutory independent body created by the Law Commissions Act 1965. Its role is to keep under review the law of England and Wales with a view to its systematic development and reform.

2. The Commission may undertake a law reform project relating to Welsh devolved matters (as defined by section 3D(8) of the Wales Act 2014) either by including it in a programme of law reform adopted in accordance with the relevant provisions of section 3(1)(b) and (c) of the Law Commissions Act 1965 or by accepting the project on a reference from the Welsh Ministers under section 3(1)(ea) of that Act.

3. This protocol sets out the Welsh Ministers' and the Commission's approach to the Commission's law reform work relating to Welsh devolved matters. It covers the various stages of a project (before the Commission takes the project on; at the outset of the project; during the currency of the project; and after the project). It applies to projects set out in the Commission's regular programmes of law reform, and to projects which arise out of individual referrals made to the Commission.

4. The protocol applies only to projects which the Commission takes on after the date on which the protocol has been agreed, although the Welsh Ministers and the Commission have agreed to take it into account, so far as practicable, in relation to projects which are ongoing as at that date.

FORMAL CONTACT POINTS

5. The formal contact points for the purposes of this agreement are:

   (1) for the Law Commission, the Chief Executive; and

   (2) for the Welsh Government, the Director of Constitutional Affairs.

BEFORE TAKING ON A PROJECT

6. Where the Welsh Ministers ask the Commission to take on a new project, either in a regular programme of law reform or as a referral, they must:

   (1) explain why the law in that area is unsatisfactory and the potential benefits that would flow from reform;

(2) commit to providing sufficient Welsh Government staff to liaise with the Commission during the currency of the project (normally, a policy lead, a lawyer and an economist);

(3) give an undertaking that there is a serious intention by the Welsh Ministers to take forward law reform in this area (if applicable in the case of the particular project);

(4) provide views on what they consider to be the most appropriate form of output for the project (for example, policy recommendations, a draft bill, draft guidance), the likely method of implementation and any risks associated with that method of implementation which might lead to non-implementation or significantly delayed implementation (for example, difficulties in obtaining legislative time if the method of implementation is legislation), insofar as is possible at this stage; and

(5) provide funding to meet the expenses of the project, in accordance with section 5(4) of the Law Commissions Act 1965.

7. In deciding whether to recommend a project concerning Welsh devolved matters to the Lord Chancellor for inclusion in any programme of law reform and in deciding whether or not to accept a referral of an ad hoc project, the Commission will take into account:

(1) the extent to which the law in that area is unsatisfactory, and the potential benefits that would flow from reform (including the Welsh Ministers' views on these matters (under paragraph 6 above);

(2) whether the Commission is the most suitable body to conduct a review in that area of the law in view of its independent and non-political nature;

(3) whether the Commissioners and staff have or have access to the relevant experience, or could commission services from those with relevant experience;

(4) the information provided by the Welsh Ministers (under paragraph 6 above), including whether sufficient funding is available;

(5) the priority that should attach to the project when compared with other ongoing or potential projects, including both projects concerning Welsh devolved matters and other projects;

(6) whether there is a Scottish or Northern Irish dimension to the project that would need the involvement of the Scottish and/or Northern Ireland Law Commissions.

OUTSET OF A PROJECT

8. At the outset of a project, the Welsh Minsters and the Commission will agree:

(1) the terms of reference for the project, including the proposed output;

(2) appropriate review points at which the Commission will consult with the Welsh Ministers on the progress of the project;

(3) the overall timescale for the project.

9. At the outset of a project, Welsh Government officials (to include, unless otherwise agreed, a nominated policy lead, a lawyer and an economist) and the Commission will agree a programme of regular communication, to include meetings which will normally be at least every quarter while the project is live.

DURING THE CURRENCY OF A PROJECT

10. Welsh Government officials and the Commission will maintain the programme of communication agreed at the outset of the project, subject to any agreed changes.

11. The Commission will communicate promptly and openly with the officials about the progress of the project. Officials will also communicate promptly and openly with the Commission about wider policy developments and changes in priorities that may affect implementation, on the mutual understanding that the confidentiality of information will be respected (subject to any applicable legal obligations).

12. The Commission will keep the progress of the project under review and may decide, in discussion with the relevant department, to change one or more elements of the project or to discontinue the project.

13. The Welsh Ministers may not require the Commission to stop working on an ongoing project but in deciding whether, and if so how, to continue with the project at the review points, the Commission will take full account of the Welsh Ministers' views and all relevant factors affecting the prospects for implementation.

14. The Commission will prepare an impact assessment (which will comply with the government guidance on impact assessments) of the proposed reform to accompany a final report.

15. Welsh Government officials will assist the Commission in drawing up the impact assessment, including by providing information (where available) and by commenting on the impact assessment in draft. Where possible, the impact assessment will be jointly agreed.

16. Welsh Government officials and the Commission will assess any issues related to the legislative competence of the National Assembly for Wales that may arise during the project and bring them to the attention of the other party as soon as possible.

AFTER THE PROJECT

17. The Welsh Ministers will provide an interim response to a report to the Commission as soon as possible and in any event within six months of publication of the report unless otherwise agreed with the Commission.

18. The Welsh Ministers will provide a full response to the Commission as soon as possible after delivery of the interim response and in any event within one year of publication of the report unless otherwise agreed with the Commission. The response will set out which recommendations the Welsh Ministers accept, reject or intend to implement in modified form. If applicable, the Welsh Ministers will also provide the timescale for implementation.

19. If the Welsh Minsters are minded either to reject or substantially modify any significant recommendations, they will first give the Commission the opportunity to discuss and comment on their reasons before finalising the decision.

20. The Welsh Ministers will then send their final response to the Chairman of the Commission.

21. If the Welsh Ministers intend to implement recommendations, the Commission and the Welsh Government will agree what additional support (if any) the Commission will provide to Welsh Government to assist implementation and whether additional funding is necessary for this purpose.

The role of the Welsh Government in other Law Reform Projects

22. Some law reform projects undertaken by the Commission may cover both significant devolved Welsh matters and significant non-devolved matters (whether affecting England only or England and Wales). In such cases:
    (1) this protocol applies (with any necessary modifications) in relation to the part of the Commission's project that relates to Welsh devolved matters in the same way as it applies to a project relating only to Welsh devolved matters; and
    (2) the protocol between the Lord Chancellor and the Law Commission under section 3B of the Law Commissions Act applies to the part relating to non-devolved matters.

C.Jones

First Minister of Wales, on behalf of the Welsh Ministers

David Lloyd Jones

Chairman of the Law Commission of England and Wales

2nd July 2015

Law Commission
Reforming the law

Form and Accessibility of the Law Applicable in Wales
Summary of Consultation Paper

Consultation Paper No 223 (Summary)

THE LAW COMMISSION – HOW WE CONSULT

About the Commission: The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones (Chairman), Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation paper: The form and accessibility of the law applicable in Wales.

Availability of materials: This consultation paper is available on our website at http://www.lawcom.gov.uk.

Duration of the consultation: 9 July 2015 to 9 October 2015.

How to respond

Please send your responses either:

By email to: welsh.law@lawcommission.gsi.gov.uk or

By post to: Sarah Young, Law Commission, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne's Gate, London SW1H 9AG

Tel: 020 3334 3953

If you send your comments by post, it would be helpful if, where possible, you also send them to us electronically.

After the consultation: In the light of the responses we receive, we will decide our final recommendations and we will present them to the Welsh Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Commission: We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Commission.

The Commission will process your personal data in accordance with the Data Protection Act 1998.

THE LAW COMMISSION

FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES

SUMMARY OF CONSULTATION PAPER

CONTENTS

FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES
SUMMARY OF CONSULTATION PAPER

PART 1: THE CURRENT POSITION

CHAPTER 1: INTRODUCTION

1.1 This is a summary of the Law Commission consultation paper on the form and accessibility of the law applicable in Wales. This summary provides a brief overview of the issues we consider in the consultation paper and sets out all of the consultation questions we ask. Both the consultation paper and this summary are available in both Welsh and English, and are available at http://www.lawcom.gov.uk/.

1.2 The consultation paper and the suggestions put forward here represent our preliminary views about solutions to the problems identified. We welcome comments and feedback on the merits of those solutions and also on their costs and benefits. We will carefully review our understanding and develop proposals on the basis of the responses made to the consultation paper.

Background

1.3 In Wales, as in England, it is becoming increasingly difficult to find out what the law is. Legislation is amended and re-amended by the United Kingdom Parliament and by the National Assembly for Wales. Successive amendments to existing legislation by newer legislation can make it difficult to find a statement of the law that is accurate and up to date unless the legislation is consolidated on a regular basis. The legislative process and the way that legislation is drafted both contribute to the problem. In addition, there is no publicly available, free to use source of legislation that shows the legislation as it stands, including all the amendments made to date.

1.4 This lack of accessibility makes it difficult for people to understand the effect of the law without engaging in time-consuming and specialist research, and can lead to people relying on sources which are wrong or misleading. It is also difficult for those wanting to reform the law to see how the law stands and to decide what changes need to be made.

1.5 The Welsh Government has been aware of difficulties in this area for some time, as have the judiciary. The Lord Chief Justice, amongst others, has spoken of the need to take the opportunity to set up structures and practices to improve the situation while the National Assembly and Welsh Government are still young.[1]

1.6 This project was proposed by the Welsh Government, particularly the Office of Legislative Counsel, and by the Law Commission's Welsh Advisory Committee as part of our Twelfth Programme of Law Reform. It is one of two projects relating

[1] See the Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "The Role of the Judiciary in a Rapidly Changing Wales", Legal Wales Conference (Cardiff 11 October 2013).

only to Wales. The other is looking at planning law in Wales.

Scope of the project

1.7 The terms of reference for this project as agreed between the Law Commission and the Welsh Government are

> [t]o consider the current arrangements for the form, accessibility and presentation of the law applicable in Wales, and make recommendations to secure improvements of those aspects of both the existing law and future legislation.

1.8 This project concerns access to justice, but focuses on particular aspects of that important topic. Lord Thomas of Cwmgiedd, the Lord Chief Justice has said:

> When there is a discussion of access to justice, it is generally a discussion about the availability of legal advice and representation (at a cost that is either covered by state funding or reasonable charges by lawyers) or the location of courts at a convenient point for the delivery of local justice. These are two vital considerations, but I do not think we should lose sight of two others, one of general application and one of particular application in Wales.
>
> The first is good, well-drafted law …There cannot be access to justice, unless the laws that govern us are first written in language that is intelligible and second organised in a way such as the laws on a particular subject can be found in one place and in an organised manner …
>
> … The second vital consideration – one particular to Wales – is language and bilingualism. As legislation has to be bilingual, it is important that bilingualism enhances access to justice by drafting that produces texts that read fluently in each language and are not merely a translation from one to the other.[2]

1.9 We are aware of the inquiry being carried out by the Constitutional and Legislative Affairs Committee on Making Laws in the Fourth Assembly. There is some overlap between the questions before the inquiry and this project. The Law Commission has given written and oral evidence to the inquiry and we shall take account of the report to be published in the autumn.[3]

Consultation process and report

1.10 We shall consult as widely as we can from 9 July to 9 October 2015. During that time, we will meet with stakeholders to discuss the issues and will receive formal consultation responses. We will then consider the consultation responses, carry out further research necessary and draft final recommendations for presentation

[2] The Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "The Role of the Judiciary in a Rapidly Changing Wales", *Legal Wales Conference* (Cardiff 11 October 2013).

to the Welsh Government. We hope to do so in time for our recommendations to be considered before the National Assembly elections in May 2016.

The problems

1.11 In summary, the problems are:

(1) the sheer volume of primary and secondary legislation and the frequency with which it is amended;

(2) a failure to consolidate or codify the legislation;

(3) Parliamentary and National Assembly procedures, pressure on the time available for the scrutiny of legislation and pressure on Parliamentary Counsel and the Office of Legislative Counsel's resources;

(4) the understandable desire of the Welsh government and Assembly Members to focus on areas of law where policy is driving reform with the result that there is little time for consolidation;

(5) the lack of a single body with the responsibility for overseeing the health of the law overall and considering the impact of law reform in individual areas on the law as a whole; legislative counsel perform this role to an extent, but with limited powers;

(6) drafting practices, the style and language used in legislation;

(7) the form in which legislation is presented and updated following amendments, both in paper forms, and, increasingly on online databases and the non-availability of public, free to access sources of up to date legislation;

(8) the incremental development of devolution in Wales which has compounded these difficulties; and

(9) the fact that the law in Wales needs to be drafted and made available in both Welsh and English and both versions must be equally authoritative.

1.12 One problem particular to Wales is that functions under a large number of statutes have been transferred to the Welsh Ministers, but this is not apparent on the face of the statutes in question. The example below illustrates this (and other) issues.

1.13 Further complexity is introduced by the rapidly increasing divergence of the law applicable in Wales from that applicable in England, an inevitable consequence of devolution. The law in Wales relating to social care, housing and homelessness law, family law and education law is now significantly different from that applicable in England. We consider some of these areas of the law further below.

[3] Information on the Constitutional and Legislative Affairs Committee, *Inquiry into Making Laws in the Fourth Assembly* may be found at: http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054 (

1.14 The following example illustrates some of the problems noted above.

Example

Wildlife and Countryside Act 1982 section 45.

This relates to Nature Conservation, Countryside and National Parks.[4] "Environment" is a devolved subject under Schedule 7 to the 2006 Act and therefore within the Assembly's legislative competence.

Section 45 reads**:**

> **Natural England** (as well as **the Secretary of State**) shall have power to make an order amending an order made under section 5 of the 1959 Act designating a National Park, and –
>
> (a) Section 7(5) and (6) of that Act (consultation and publicity in connection with orders under section 5 or 7) shall apply to an order under this section as they apply to an order under section 7(4) of that Act with the substitution for the reference in section 7(5) to the **Secretary of State** of a reference to **Natural England**… (emphasis added).

The section, as it applies to Wales, should actually read:

> **The Natural Resources Body for Wales** (as well as **the Welsh Ministers**) shall have power to make an order amending an order made under section 5 of the 1959 Act designating a National Park, and –
>
> (a) Section 7(5) and (6) of that Act (consultation and publicity in connection with orders under section 5 or 7) shall apply to an order under this section as they apply to an order under section 7(4) of that Act with the substitution for the reference in section 7(5) to the **Welsh Ministers** of a reference to **the Natural Resources Body for Wales**… (emphasis added).

A reader wishing to identify the relevant law as it applies to Wales would have to take the following steps.

(1) Establish that the section applies to Wales. The reader may infer that the Act relates to Wales due to the fact that it is contained in an England and Wales statute and the Act has a number of specific references to Wales within it. There is no clear provision that defines how the Act *applies* to Wales.

(2) Discover section 41A, which is not referred to in section 45, and which states:

[4] This example was suggested to us by Keith Bush QC.

In relation to land in Wales, sections 42 to 45 (which relate to Natural Parks) have effect as if references to Natural England were references to the Natural Resources Body for Wales.[5]

(3) Discover that the Secretary of State's functions under section 45 were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999.

(4) Discover that the Government of Wales Act 2006 Schedule 11 paragraph 30 transferred all executive functions, including those under section 45, from the Assembly to the Welsh Ministers.

The need for consolidation

1.15 There is widespread demand for the legislation to be consolidated into fewer, up to date pieces of legislation, expressed in modern language and laid out in a style that is accessible to readers.

1.16 Consolidation is a complex, time-consuming process requiring expert drafting skills and Assembly time. In Westminster and also in Holyrood there are special procedures designed to expedite the passage of technical Bills. We discuss these procedures, and the options for consolidation or even codification of the legislation applicable in Wales below.

Making law available

1.17 We discuss the need for a free and up to date online source of legislation in Wales, and consider how other materials, such as textbooks and guidance, could improve understanding of the law in Wales.

The Welsh language

1.18 We examine Welsh as a legal language. We look at Welsh legal terminology, the form of bilingual legislation and bilingual drafting, drawing on practices in other jurisdictions and consider what methods of bilingual drafting might work best for Wales. We then consider how bilingual legislation is interpreted, drawing on the experiences of bilingual interpretation in jurisdictions such as Canada and Hong Kong.

The cost of accessibility

1.19 Our research and pre-consultation meetings with stakeholders in Wales suggest that there is a real demand for improvements in the accessibility of law in Wales.

1.20 However, in order for the Welsh Government to be able to make reasoned judgements about whether it is justifiable to spend public funds on any consolidation, codification or other work to make the law more accessible, the Government will need to know what the economic impact of those changes are likely to be.

[5] Wildlife and Countryside Act 1981, s 41A. It is worth noting too that as it is displayed on Legislation.gov.uk, section 41A has not been brought up to date and refers to the defunct Countryside Council for Wales which was replaced by the Natural Resources Body for Wales.

1.21 Our final report will provide recommendations for reform and will be accompanied by an impact assessment.[6] Impact assessments place a strong emphasis on valuing costs and benefits in monetary terms. However, there are important aspects of the present law, and of proposals for reform, that cannot sensibly be monetised. These include impacts on fairness, public confidence, and the benefits that could result from no longer having to battle against inaccessibility.

1.22 To take an example, there is considerable demand for the consolidation of legislation. If the Welsh Government were to fund an exercise to consolidate an area of law, such a project would involve costs such as:

(1) legislative counsel's time to research and draft the consolidation; this would be the largest area of expenditure;

(2) Government lawyers and other officials' time to categorise the legislation and assist legislative counsel;

(3) Parliamentary time taken to consider the consolidated legislation;

(4) Government officials' time in preparing guidance and informing the relevant industries and the public of the consolidated legislation and its effect (even if the effect was not to change the law); and

(5) time taken in the relevant industries to understand and apply any changes in the legislation (even if there are no substantive changes to the law), forms, notices or guidance might need to be changed to refer to the new legislation, and training might need to take place.

1.23 A consolidation project might take several years to complete, so that the costs would be spread out over a long time and any benefits would not start to accrue for several years.

1.24 Benefits might include:

(1) a reduction in the amount of time taken to look up relevant legislation for members of the public, Government lawyers, the Welsh Assembly's Research Service, lawyers in private practice, advisers and other professionals;

(2) a reduction in errors caused by members of the public not having access to the correct up to date legislation;

(3) a reduction in court costs as less time is taken in court where errors have been made as a result of inaccessibility, or less time is needed for lawyers and judges to find the correct law and possibly even less higher court time is needed where courts have made errors as a result of inaccessible legislation.

1.25 The costs would also have to be compared with any alternative options. As we discuss in chapter 7, consolidation may take place in a number of different ways

[6] The Welsh Government publishes regulatory impact assessments for all primary legislation and most subordinate legislation.

and the costs and benefits of each procedure would need to be compared.

1.26 In addition, we will be carrying out research on some case studies, providing a detailed analysis of costs of carrying out a particular proposal and recording, in as much detail as possible, the possible savings and other non-monetised benefits. For example, a solicitors firm could record how long it takes to look up the law in an area where there is a lack of consolidation, and could compare that with an area where there has been consolidation of the legislation. Government lawyers could compare the hours spent preparing a Bill in an area where there has been consolidation with the time spent preparing a Bill of a similar size in an area where consolidation has not taken place.

1.27 We ask consultees to keep the question of costs and benefits in mind when reading this summary and the full consultation paper.

Consultation question 1-1: We ask consultees to provide information and examples of the costs and benefits of the proposals we make in this consultation paper.

CHAPTER 2: THE LEGAL HISTORY OF WALES

Phases of devolution

2.1 The last two decades have seen major changes in the government of Wales and its constitutional status.[7] In this chapter we provide a brief legal history of Wales, and the incremental development of devolution that Wales has experienced.

2.2 The Government of Wales Act 1998 established the National Assembly for Wales ('the National Assembly'). Executive powers, including powers to make subordinate legislation by statutory instrument in eighteen defined "fields", were transferred to the new Assembly, but it was given no primary legislative powers.[8] Since then two further systems of devolution under the Government of Wales Act 2006 have followed in rapid succession.

2.3 The Government of Wales Act 2006 formally separated the executive and the legislature and created the Welsh Ministers. [9] Many of the executive powers and duties of the Assembly, including powers to make subordinate legislation, were transferred to the Welsh Ministers. The Assembly was given power for the first time to enact primary legislation in the form of Assembly Measures. Assembly Measures have the same effect as Acts of the Assembly. Assembly Measures could be made where legislative competence was granted in that particular field, by an enactment of the Westminster Parliament or by an Order in Council known as a legislative competence order.[10] The Welsh Assembly enacted some 22

[7] See, generally, T G Watkin, *The Legal History of Wales* (2nd ed 2012) chapter 10; Supperstone, Goudie and Walker, Judicial Review (5th ed2014) 21.17.1 – 21.18.2.

[8] Government of Wales Act 1998, sch 2.

[9] Government of Wales Act 2006, s 48.

[10] Government of Wales Act 2006, s 94 and sch 5.

Measures between 2008 and 2011.[11]

2.4 In 2011, following a referendum, a new devolution settlement came into force, under Part 4 of the Government of Wales Act 2006.[12] Part 4 confers vastly increased legislative powers on the Assembly.

2.5 The position remains dynamic. The Wales Act 2014 conferred tax-raising powers on the National Assembly.[13] It also formally renamed "the Welsh Assembly Government" "the Welsh Government".[14] In the command paper *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* further devolution is now proposed.[15]

2.6 The powers of the Welsh Assembly and the Welsh Government are subject to the overriding sovereignty of the United Kingdom Parliament. Wales remains part of the single jurisdiction of England and Wales. As a result, legislation made by the Welsh Assembly is part of the law of England and Wales and extends throughout the jurisdiction, but applies only to Wales.[16] Neither the current legislation nor the proposals in *Powers for a Purpose* change the structure of the jurisdiction.

2.7 Wales shares a system of courts and tribunals with England and these are administered by Her Majesty's Courts and Tribunals Service, part of the Ministry of Justice. In addition, there are now several Welsh tribunals with responsibilities falling within devolved fields.[17]

2.8 The National Assembly and the Welsh Ministers have already created a substantial body of primary and secondary legislation, resulting in a divergence of the law applicable in England and that applicable in Wales in a number of important areas. Significant changes have already been made in areas such as education, planning and social services, housing and local government and will be made in other areas.[18]

2.9 As a result of these changes, Wales is developing a distinct legal personality. It has become meaningful to speak of Welsh law as a living system of law for the

[11] A complete list of Measures as passed by the Welsh Assembly may be found at www.legislation.gov.uk.

[12] Electoral Commission, Report on the referendum on the law-making powers of the National Assembly for Wales (June 2011).

[13] Wales Act 2014, Part 2.

[14] Wales Act 2014, s 4.

[15] (2015) Cm 9020, referred to in the media as the 'St David's Day Agreement'.

[16] Government of Wales Act 2006, s 108(6)(b).

[17] The devolved tribunals include the Mental Health Review Tribunal for Wales, the Residential Property Tribunal, the Special Educational Needs Tribunal for Wales and the Welsh Language Tribunal.

[18] At the time of writing, some 17 Acts have been passed by the National Assembly for Wales. Examples are discussed in chapter 4 below.

first time since the Act of Union in the mid- sixteenth century.[19]

CHAPTER 3: THE CURRENT LEGISLATIVE PROCESS AND THE WELSH GOVERNMENT

3.1 In this chapter, we look at the structure and operation of the National Assembly for Wales, the appointment of Assembly Members and the processes by which legislation is passed.

The National Assembly for Wales

3.2 Under the Government of Wales Act 2006 the National Assembly gained competence to make primary legislation and its executive and legislative branches were formally separated. The National Assembly remains a unicameral legislature, consisting of one chamber with no upper house. There are 60 Assembly Members, elected by the additional member electoral system. This makes it more likely that there will be no single political party with an overall majority in the National Assembly.

3.3 Committees play an important role of the conduct of National Assembly business and, in particular, in the scrutiny of primary legislation. The Constitutional and Legislative Affairs Committee scrutinises secondary legislation. The Presiding Office carries out similar functions to the Speaker of the House of Commons. The National Assembly is staffed by the Assembly Commission.

The Welsh Government

3.4 The Welsh Government consists of the First Minister, the other Welsh Ministers, and the Counsel General. The Counsel General is a member of the Cabinet, but not a Minister and is the law officer of the Welsh Government. All draft legislation must be approved by the Counsel General as well as the First Minister and Minister holding the relevant portfolio before it is introduced in the National Assembly.

The legislative process

3.5 Assembly Bills must pass through four stages of scrutiny before becoming Assembly Acts: the consideration of general principles by the Assembly or a responsible committee; detailed consideration by committee of the Bill and amendments tabled; consideration of the Bill by the whole Assembly, as amended, followed by a report; finally a motion is moved that the Bill be passed. The third stage may be extended and an additional report stage may be added.[20]

3.6 The Assembly Commission published a report in 2015, entitled *The Future of the Assembly: Ensuring its Capacity to Deliver for Wales*. The report considered the challenges to the National Assembly of effective scrutiny in the future.

[19] T H Jones, "Wales as a jurisdiction" [2004] *Public Law* 80. See Winston Roddick, "Law-making and devolution: the Welsh experience" [2003]; and Sir David Lloyd Jones, "The Machinery of Justice in a Changing Wales" (2010) 14 *Transactions of the Honourable Society of the Cymmrodorion* (New Series) 123.

> The volume and complexity of legislative scrutiny being undertaken by the Assembly is increasing significantly and rapidly. It will reach the highest ever level between now and the end of the Fourth Assembly and we expect it to remain at that level into the Fifth Assembly … The volume of legislation facing the Assembly can be attributed to increase in the amount of Bills, Bills being larger and more complex and the legislative process happening bilingually, for example. The Assembly also has a larger competency base and therefore the scope of legislation is broader.[21]

Consultation Question 3-1: We welcome consultees' views on the current legislative processes.

Special procedures for law reform bills

3.7 In the United Kingdom Parliament and also the Scottish Parliament, special procedures exist for Bills which are not politically controversial.[22] Procedures are available at Westminster for:

(1) Law Commission Bills, which effect substantive reform but are not controversial; and

(2) statute law repeal Bills prepared as a result of a Law Commission and Scottish Law Commission report, to repeal enactments which are no longer of practical utility.

3.8 No such procedures exist in the National Assembly. We talk about consolidation later on in chapter 7, but here we ask whether procedures should be created for these other types of technical Bills.

Consultation question 3-2: Do consultees think that a special procedure for non-controversial Law Commission Bills should exist in the National Assembly?

CHAPTER 4: DRAFTING AND INTERPRETING LEGISLATION

Introduction

4.1 Legislation should convey its intended meaning to all its readers, whether or not they are legally trained. How legislation is written, or drafted, is fundamental to its accessibility. Poor drafting can contribute to the complexity of legislation. Good drafting can aid clarity and accessibility.

[20] Standing Orders of the National Assembly for Wales (March 2015) and Government of Wales Act 2006, s 111.

[21] National Assembly for Wales, Assembly Commission, *The Future of the Assembly: Ensuring its Capacity to Deliver for Wales* (2015).

[22] D Greenberg, *Craies on Legislation* (9th ed 2010) para 5.3.2.

Office of the Legislative Counsel

4.2 Responsibility for the quality of Bills rests with the Counsel General. The drafting of legislation is carried out by professional drafters in the Office of the Legislative Counsel ("OLC"). OLC drafts all Assembly Bills promoted by the Government and all Government amendments including amendments to Bills not promoted by the Government. Secondary legislation is usually drafted by lawyers in the Welsh Government Legal Service, not by OLC, but OLC drafters will then check it before it is laid before the National Assembly and scrutinised by the Constitutional and Legislative Affairs Committee.

4.3 The drafter's role is to produce legislation which is clear, effective and as readable as possible, but it covers more than the drafting of legislation. Their role is to subject policy proposals to

> [a] rigorous intellectual and legal analysis, and to clarify and express legislative propositions. The drafting stage is often the first at which the policy as a whole is subjected to meticulous scrutiny.[23]

4.4 As the Office of Parliamentary Counsel (Westminster's drafting office) explains in its guidance:

> The need to preserve a stable and constitutional relationship between Parliament and the courts means that Counsel will always have an eye on a Bill's long-term consequences for the health of the statute book, and the appropriate distinction between the legislative function of Parliament and the interpretative role of the courts. It is a responsibility of Counsel to protect the integrity of the legislative process, so that the judiciary's settled understanding of the process and this distinction are not disturbed.[24]

Drafting good legislation in Wales

4.5 OLC published *Legislative Drafting Guidelines* in 2012, prescribing best drafting practice with the aim of creating clarity. The Guidelines advise on the use of plain language, including plain words and clear sentences. They also look at the structure and organisation of legislation and how to draft amendments and repeals. If possible, where legislation is being amended, it should be consolidated, but this is not always possible. Where the legislation is not being consolidated, drafters try to express the changes as clearly as possible.

4.6 Amendments may be textual or non textual. A textual amendment changes the words of the earlier legislation, inserting, substituting or omitting text, so that an up to date version of the legislation should include the changes on the face of the statute.[25] A non-textual amendment changes the effect of the legislation without

[23] Office of the Parliamentary Counsel *Research and Analysis: When Laws Become Too Complex* (December 2011) p 15. This report was published as part of the Office's Good Law Project.

[24] Office for the Parliamentary Counsel, *Working with Parliamentary Counsel* (2011) p 12.

[25] See, for example, Education (Wales) Measure 2009, sch 1, para 2 which amends Education Act 1996 s 326(4).

changing its wording.[26] Non-textual amendments can be more convenient to express in simple terms and can be used where it would be difficult to identify, at the time of drafting, all of the pieces of legislation that will be affected.

Consultation question 4-1: Do consultees think that the current practice strikes the right balance between simplicity and precision in legislation passed by the National Assembly?

Consultation question 4-2: Would there be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines?

Consultation question 4-3: Do consultees currently experience difficulty reading amended legislation?

Keeling schedules

4.7 One way of being clear about how legislation has been amended, is to produce a schedule showing the legislation as if it was, with words repealed being printed as struck through and highlighting words added. This is known as a Keeling Schedule, after the Member of Parliament who proposed it. A Keeling Schedule may be an appendix to the final Act, and therefore part of the legislation itself, or may be produced separately.

Consultation question 4-4: Should Keeling schedules be produced alongside Bills, where the Bill amends other pieces of legislation, and be published alongside the Bill in the explanatory notes?

Consultation question 4-5: Should Keeling schedules be formal schedules to an amending Bill that become law when the Bill is enacted?

Consultation question 4-6: What features would consultees like to see in Keeling Schedules, or other documents showing amendments, to make the changes as clear as possible?

Overviews

4.8 Welsh Acts include an overview section at the start of the Act and often an overview at the start of each Part, summarising what is in the legislation. The overviews are intended as signposting for the reader. They do not form part of the law and are not intended to be used to interpret the law.[27]

Consultation question 4-7: Do consultees find overviews helpful in navigating or understanding legislation?

Consultation 4-8: Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?

Aspirational or "purpose" clauses

4.9 These clauses tend to impose a duty or obligation to work towards a goal which

[26] See, for example, Wildlife and Countryside Act 1981 ss 41A and 45, National Assembly for Wales (Transfer of Functions) Order 1999 and the Government of Wales Act 2006 sch 11.

[27] See, for example, Education (Wales) Act 2014, s 1.

is an aspiration, rather than a measurable target for which the duty-holder may be held accountable. They often express the broad purpose of the legislation. For example, section 5 of the Social Services and Well-Being (Wales) Act 2014 imposes a duty to on certain people to promote the well-being of those who need care and support. These purpose clauses express the underlying policy of the legislation, but may be difficult to enforce.

Consultation 4-9: Do consultees find aspirational clauses a helpful addition to legislation?

An Interpretation Act for Wales?

4.10 The Interpretation Act 1978 provides rules on the construction and interpretation of legislation. It provides fixed definitions that may be relied upon when interpreting other legislation, without the need to include those definitions in each piece of legislation. This allows legislation to be drafted more simply without reducing clarity and certainty.

4.11 Acts of the Scottish Parliament and instruments made under Acts of the Scottish Parliament are now subject to the Interpretation and Legislative Reform (Scotland) Act 2010. This remains very similar to the Interpretation Act 1978. The Scottish Law Commission has suggested that while Scotland should make provision for the interpretation of Scottish legislation, wherever possible, standardised interpretations should not differ between Scotland and England.

4.12 The Interpretation Act 1978 currently applies to legislation passed by the National Assembly. The question has been asked whether Wales needs its own Interpretation Act at this stage.

Consultation question 4-10: Do consultees find the Interpretation Act 1978 and its Scottish and Northern Irish equivalents useful?

Consultation question 4-11: Do consultees think that there should be an Interpretation Act for Wales at this stage?

Consultation question 4-12: What do consultees think the benefits of an Interpretation Act for Wales would be? What would an Interpretation Act for Wales need to cover?

CHAPTER 5: THE CONDITION OF LEGISLATION IN WALES: CASE STUDIES

Introduction

5.1 In this chapter, we take a ‘snap shot’ of some aspects of the primary and secondary legislation as it currently stands. We consider five case studies, each of which represents a different devolved area of law and which, taken together, illustrate some of the issues the Welsh Government faces when it comes to carry out reform. They provide evidence of the incentives and disincentives to be considered when drawing up plans for consolidating legislation and developing proposals for a legislative system for the future.

Case study 1: Education

5.2 Education is a policy area in which the law as it applies in Wales and in England is diverging. 'Education and training' was one of the devolved fields set out in Schedule 2 to the Government of Wales Act 1998, and order and regulation-making powers under various Acts of the United Kingdom Parliament were duly transferred to the National Assembly.[28] Primary lawmaking powers relating to education were conferred under Parts 3 and 4 of the Government of Wales Act 2006, and the National Assembly has legislated in the area consistently.[29]

5.3 The United Kingdom Parliament has, meanwhile, continued to pass legislation relating to education in parallel with the National Assembly. This has included, in some recent instances, legislation applicable to Wales, made on the basis of a legislative consent motion. Since the National Assembly has gained primary legislative powers, the presumption is that it should legislate for Wales on devolved matters.[30] However, there are circumstances when it is practicable and convenient to include devolved provisions in Parliamentary legislation. Where, for example, a Bill is in progress in Westminster it may be more convenient and a better use of resources, to include provisions applicable to Wales in that Bill.

5.4 This has left a patchwork of legislation that suffers from all of the usual problems of law in a politically active field which has not recently benefitted from consolidation. To this can be added the further complexity of devolved legislation. Education law in Wales is contained in numerous different pieces of legislation. This includes, depending on how widely 'education' is defined, anything from 17 to as many as 40 Acts of the United Kingdom Parliament, 7 Measures, 5 Acts of the National Assembly, and hundreds of statutory instruments.[31]

5.5 Relevant Acts of the United Kingdom Parliament which apply in both England and Wales contain parallel and increasingly divergent systems applicable in England and Wales which the discerning reader must unpick. A reader interested in the Education Act 1996 in its application to Wales only, for example, faces a

[28] The National Assembly for Wales (Transfer of Functions) Order 1999.

[29] For the legislative programme for the Fourth Assembly, see the First Minister's announcement, National Assembly for Wales, Record of Proceedings, 11 July 2011 and the updated statement by the First Minister on the legislative programme on 16 July 2013.

[30] See chapter 2 for discussion on the convention that exists between the United Kingdom Government and the Welsh Government where a Legislative Consent Motion is laid in the National Assembly if the United Kingdom Parliament wishes to legislate on a devolved subject.

[31] Primary legislation enacted by the United Kingdom Parliament since 1999 which has a significant impact in the field of education in Wales includes: the Care Standards Act 2000; Learning and Skills Act 2000; Special Educational Needs and Disability Act 2001; Education Act 2001; Education Act 2002; Anti-social Behaviour Act 2003; Legal Deposit Libraries Act 2003; Health and Social Care (Community Health and Standards) Act 2003; Children Act 2004; Higher Education Act 2004; Education Act 2005; Childcare Act 2006; Education and Inspections Act 2006; Safeguarding Vulnerable Groups Act 2006; Further Education and Training Act 2007; Tribunals, Courts and Enforcement Act 2007; Children and Young Persons Act 2008; Education and Skills Act 2008; Health and Social Care Act 2008; Apprenticeships, Skills, Children and Learning Act 2009; Academies Act 2010; Children, Schools and Families Act 2010; Equality Act 2010; Education Act 2011; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Children and Families Act 2014 ; Criminal Justice and Courts Act 2015; Counter-Terrorism and Security Act 2015. In addition, there are hundreds of pieces of secondary legislation on education, applicable in Wales.

formidable task. C F Huws' description of the application of Part I of that Act – which makes vital general provision for education - is illuminating.

> Part I of the Education Act 1996 currently contains 28 sections that are currently either in force or due to come into force. Seven of these apply to England only; 14 of the remaining 21 sections contain subsections that apply to one territory only.
>
> …later legislation … has amended the Education Act 1996, and this has meant that some sections have been repealed in relation to England, with amendments inserted, while other sections have been repealed in relation to Wales, with different amendments introduced. Furthermore, a large body of subordinate legislation created pursuant to the Act has resulted in further distinctions emerging between the law in England and the law in Wales. [32]

5.6 The relevant statutes can also be unclear or even misleading on their face, requiring considerable legal expertise to understand their application to Wales.

5.7 An example raising several common problems was provided by Keith Bush QC to the National Assembly's Constitutional and Legislative Affairs Committee's inquiry into Making Laws in the Fourth Assembly.[33]

Example

Section 569 of the Education Act 1996, currently reads as follows:

> (1) Any power of the Secretary of State or the Welsh Ministers to make regulations under this Act shall be exercised by statutory instrument.
>
> (2) A statutory instrument containing regulations under this Act made by the Secretary of State, other than one made under subsection (2A), shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (2A) A statutory instrument which contains (whether alone or with other provision) regulations under section 550ZA or 550ZC may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament."
>
> (2B) A statutory instrument containing regulations under sections 332ZC, 332AA, 332BA, 332BB or 336 made by the Welsh Ministers is subject to annulment in pursuance of a resolution of the National Assembly for Wales.
>
> (2C) Paragraphs 33 to 35 of Schedule 11 to the Government of Wales

[32] C F Huws, "The Language of Education Law in England and/or Wales" (2012) 33 (2) *Statute Law Review* 252.

[33] Evidence submitted to the inquiry may be found at: http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054 (last visited 1 July 2015).

Act 2006 make provision about the National Assembly for Wales procedures that apply to any statutory instrument containing regulations or an order made in exercise of functions conferred upon the Secretary of State or the National Assembly for Wales by this Act that have been transferred to the Welsh Ministers by virtue of paragraph 30 of that Schedule.

(3) (Repealed)

(4) Regulations under this Act may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit or the Welsh Ministers think fit.

(5) Without prejudice to the generality of subsection (4), regulations under this Act may make in relation to Wales provision different from that made in relation to England.

(6) Subsection (5) does not apply to regulations under section 579(4).

On careful consideration it will be seen that, within a single section:

(1) subsections (1), (4), (5) and (6) apply in relation to both England and Wales (although the effect of subsection (6) in relation to Wales is unclear);

(2) subsections (2) and (2A) now apply only in relation to England; and

(3) subsections (2B) and (2C) only apply in relation to Wales.

5.8 Education legislation needs to be understood by local education authorities, but also by head teachers and other providers of education, and a wide range of professionals working with children, as well as by parents and carers. The problem is by no means restricted to non-professionals. Ministers and officials can struggle to get a clear sense of the law and their powers under it, making it challenging to manage both day to day business and to contemplate further reform on a principled basis.

5.9 A rationalisation of the existing law seems desirable, but a very heavy legislative reform programme can make it difficult to find time for consolidation. The existing legislation changes frequently, and that can make it difficult for officials to get the necessary time and perspective to think through the benefits of rationalising the legislation. Officials in the Directorate have, with their colleagues in the Office of the Legislative Counsel, seized such opportunities as have presented themselves. Some consolidation was achieved, for example, in the School Standards and Organisation Act (Wales) 2013.

5.10 In addition, there is a constant stream of new secondary legislation, in which the detailed application of the primary legislation is set out. Some of these contain provisions liable to change from time to time, such as fees; others contain more

detailed policy and procedure that do not warrant primary legislative scrutiny.[34]

Case study 2: Social Care

5.11 The position so far as the law relating to social care in Wales is concerned is different. As with education, this is an area over which the National Assembly has had some form of legislative competence since 1998.[35] Even before the Government of Wales Act 1998, Welsh social care policy was starting to diverge from the position in England. In March 1999, the United Kingdom Government published a white paper, seeking to take "a radical look at the way in which local services are planned and delivered for the people in Wales" and preparing for demographic changes affecting the future of social services in response to an ageing population.[36] The National Assembly for Wales then published *Improving Health in Wales – A Plan for the National Health Service and its Partners,* under which a series of papers were published, planning changes in the organisation and delivery of health and social care in Wales.[37]

5.12 In recent years there has been increasing divergence in social care law between England and Wales.[38] Last year, major Acts were passed in both England and Wales, establishing different legislation governing social care for each country.[39] Exercising its powers under Part 4 of the 2006 Act, the National Assembly has strongly asserted its legislative independence, bringing into force an Act designed to "fully establish - without the need to look elsewhere – the law as it applies in Wales."[40]

5.13 The Welsh Government responded positively to recommendations made by the Law Commission in 2011 in our report on Adult Social Care.[41] The report included recommendations for law reform, together with the consolidation of existing law. The Welsh Government announced its intention to create more sustainable social services and

> for the first time - a coherent Welsh legal framework for social services, based on the principles we hold dear in Wales. It will simplify the web of legislation that currently regulates social care in Wales and will make access to services much easier and more

[34] An example of more detailed procedure may be found in the Education (Induction Arrangements for School Teachers (Wales) Regulations 2015, SI 2015 No 484 (W.41).

[35] Government of Wales Act 1998, sch 2 field 12 and Government of Wales Act 2006 parts 3 and 4.

[36] Building for the Future: A White Paper for Wales (1999) Cm 4051.

[37] National Assembly for Wales, Improving Health in Wales – A plan for the National Health Service and its partners (2001).

[38] For a consideration of the legislative landscape see Adult Social Care (2010) Law Commission Consultation Paper No 192; and J Williams, "A New Law on Adult Social Care: A Challenge for Law Reform in Wales" (2012) 33(2) *Statute Law Review* 304.

[39] The United Kingdom Parliament has enacted the Care Act 2014 in relation to England.

[40] Counsel General Theodore Huckle QC, update on access to legislation delivered to the National Assembly on 19 February 2013 available at http://www.yoursenedd.com/debates/2013-02-19-statement-update-on-access-to-legislation (last visited 1 July 2015).

[41] Adult Social Care (2011) Law Com No 326.

> understandable to those who need them. This Bill will give people a strong voice and real control. It will cover social care services for both children and adults, and will, as far as it is possible and appropriate, integrate the arrangements for both of these groups so that social care services are provided on the basis of need and not of age.[42]

5.14 The Social Services and Well-Being (Wales) Act 2014 was the result. It goes beyond the Law Commission's recommendations (and beyond the Care Act in England). It consolidates the legal framework for children's services as well as those provided to adults. The Act also – like the English Act – takes significant steps towards encouraging greater integration of health and social care services in Wales. It is a large Act and was a large Bill, 151 pages long as introduced into the National Assembly. A very large number of amendments were proposed during its passage.[43] The social care team and policy officials had the challenging task of extricating the Welsh law from the England and Wales legislation whilst consolidating existing Welsh law and introducing wide-ranging reforms. At the same time, the National Assembly struggled to keep up with the sheer number of amendments, some from the Government as policy was refined, and some from Assembly Members in response to the Bill.

5.15 The Act received Royal Assent on 1 May 2014. It is not proposed to bring the Act into force until 2016 to allow time for the drafting of the necessary subordinate legislation and for guidance to be reviewed or written afresh.

5.16 In some areas, the Act consolidates and restates the current legal position. In other areas, the Act provides for changes in law but not in practice, such as with adult safeguarding. In yet other areas, the Act will radically reform social care law by introducing reforms that are new in policy and practice.

5.17 The benefits to the Welsh Government and to all those who will be operating under the new legislation are of course not yet clear, but the Welsh Government predicted that significant savings would result from the reforms.[44] The new Act is comprehensive and presents a fresh start from which policy and practice may develop.

5.18 It has not escaped criticism, however. Professor Luke Clements has suggested that "if the aim was comprehensibility, it fails: it is often opaque and frequently

[42] Gwenda Thomas, Deputy Minister for Children and Social Services, in her introduction to the Welsh Government's Consultation Documents on the Social Services (Wales) Bill (2012).

[43] 120 amendments were proposed. See http://www.senedd.assembly.wales/mgDecisionDetails.aspx?IId=5664&Opt=1 (last visited 1 July 2015).

[44] Social Service and Well-Being (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, Welsh Government (Jan 2013).

reads like a regulation".[45]

5.19 Professor John Williams of Aberystwyth University refers to this Act while discussing the complexity which can result from the substantive law being spread across different pieces of legislation[46] which can make it difficult for practitioners and the public to find out what the law actually is. He goes on to call for codification and consolidation of Welsh law in order to improve accessibility and consistency.

5.20 Producing the Act has been a significant draw on the resources available to the Welsh Government and the National Assembly. It has taken up considerable time in the National Assembly, in addition to the work required of ministers, policy officials, lawyers and legislative counsel.

Case study 3: Waste and the environment

5.21 The National Assembly has competence to legislate in relation to "prevention, reduction, collection, management, treatment and disposal of waste".[47]

5.22 Much of the law relating to waste which applies in Wales and England emanates from the European Union. The relevant legislation therefore frequently does no more than transpose EU Directives.[48] In effect, both legislatures operate within the same system, which limits the freedom of successive governments to pursue separate policy agendas. Moreover, as a matter of practice, the Welsh Government works closely with and benefits from work carried out at the UK-wide Department for Food and Rural Affairs (Defra). Defra is a much larger operation and has resources which it would not be practical for the Welsh Government's Natural Resources Directorate to deploy.

5.23 Some argue that there is, in fact, very little divergence between Welsh and English law in this area, although there are exceptions, particularly in subordinate legislation. There are plausible positive reasons for maintaining the similarity. The waste industry works across both countries and there are no persuasive incentives to create cross-border differences which could increase costs for those operating in the waste industry.

5.24 The legislation is fragmented and the European Union legislation can be complicated and difficult to understand. Provisions are spread across numerous Acts, such as Part 2 of the Environmental Protection Act 1990, the Control of

[45] Professor Clements of Cardiff University has published a commentary of the Social Services and Well-Being Act 2014: The Social Services and Well-Being Act 2014: an overview (1 December 2014) available at:http://www.lukeclements.co.uk/wp-content/uploads/2014/12/SS-Well-being-Act-update-07.pdf (last visited 1 July 2015). In other articles on his website, www.lukeclements.co.uk (last visited 1 July 2015), Professor Clements highlights problems with the legislation and criticises the amount of the detailed law left to be made in subordinate legislation.

[46] Professor John Williams was also legal adviser to the Health and Social Care Committee of the National Assembly during the passage of the Social Services and Well-Being Bill.

[47] Government of Wales Act 2006, part 4 and sch 7 para 6.

[48] Examples include the Waste Framework Directive, Landfill Directive, Mining Waste Directive, Storage of Metallic Mercury Considered as Waste Directive, Packaging Waste Directive, Waste Electrical and Electronic Equipment Directive, Batteries Directive, End of Life Vehicles Directive.

Pollution (Amendment) Act 1989 and the Waste and Emissions Trading Act 2003, with numerous statutory instruments made under those Acts and under the European Communities Act 1972. Statutory instruments include non-textual amendments to the primary legislation.

5.25 We have heard from stakeholders that much of the legislation relating to waste has been in place for years, and is well understood by the industry and regulatory authorities. Consolidation or restatement could cause unnecessary cost and confusion, as it would necessitate retraining staff, the drafting and publication of new guidance, and revising administrative practices where the law is not really changing. Nor is the current law, however complex it may be, necessarily inaccessible to those operating in the industry. Given that much of the complexity springs from European Union law, it would in any event need to be reproduced in any consolidation, and the key players appear to have a good understanding of the legislation as it stands.

5.26 There might, however, be benefit in consolidating and simplifying the whole of the environmental legislation applicable in Wales and reviewing the substantive law at the same time, thereby providing a complete overhaul. It might be that this exercise would avoid some of the difficulties that piecemeal restatement could cause or exacerbate. Equally, the benefits that an exercise on this scale could bring might be enough to offset the disadvantages noted above.

Case study 4: Town and Country Planning

Devolution of town and country planning

5.27 Until the 1990s planning legislation and planning policy was identical in its form and substance for England and Wales.[49] However, a more distinctive approach to the planning system in Wales began to emerge in the early 1990s. This was due to the differences in the organisation of local government in the two countries, and the issue of some planning policy documents by the Welsh Office which applied solely to Wales.

5.28 "Town and Country Planning" has been devolved to some degree since 1999, and is now included in schedule 7 to the Act, giving the National Assembly power to make primary legislation in the area.

5.29 In recent years the Planning Directorate in the Welsh Government has been active in promoting a specific planning system for Wales. Wales has its own national planning policy, *Planning Policy Wales*, which is supplemented by Technical Advice Notes. *Planning Policy Wales* is considerably longer and more detailed than its English equivalent.[50] The Planning Directorate has also commissioned a number of extensive research reports into the planning system in Wales. These reports have made numerous recommendations for changes to

[49] H Williams and M Jarman, "Planning policies and development plans in Wales – change and coexistence" [2007] *Journal of Planning and Environmental Law* 985, 986.

[50] The *National Planning Policy Framework*, which is supplemented by Planning Practice Guidance.

the Welsh planning system, some of which have been taken forward.[51]

5.30 The Planning (Wales) Act 2015 received royal assent on 6 July. It is the first piece of primary legislation on town and country planning made by the Welsh Government.

Source of confusion in town and country planning in Wales

5.31 There are two principal sources of confusion in town and country planning law in Wales.

5.32 First, there is confusion as to whether the law is the same in Wales as it is in England. Throughout the process of devolution, Parliament in Westminster has continued to pass legislation on town and country planning, parts of which apply to Wales and parts of which do not.[52] The Planning (Wales) Act 2015, meanwhile, makes some changes which are the same as changes that have been made in England previously, but also some which introduce entirely new policies.

5.33 Parts of the planning systems in England and Wales are very different. England's system is based on the principle of "localism" and only has local plans (which are prepared by the local authority) and neighbourhood plans (which are prepared by the community).[53] However, the Welsh system is more centralised, and the intention seems to be to continue that trend. The Planning (Wales) Act 2015 introduces a national development framework which is prepared by the Government) and strategic development plans (prepared by strategic planning panels) and local development plans (which are prepared by local authorities).

5.34 The problems are exacerbated by the large numbers of amendments made to primary legislation since 2004, which have not fully been brought into force. Some have commenced in relation to England, but not Wales, others have commenced only in respect of particular types of case. This makes it difficult to find out what the law is, and also difficult to draft subsequent amendments.

5.35 At the same time, parts of the planning systems in England and Wales are almost identical, for example, appeals against planning decisions and enforcement against breaches of planning control.

5.36 The law applying to England and that applying to Wales are both contained in the same pieces of, often much-amended, primary legislation. There is no legislation that separately states planning law as it applies to Wales. It is up to the individual to puzzle out which provisions apply to Wales and which do not. The Planning (Wales) Act 2015 also makes all of its changes in the form of amendments to the Town and Country Planning Act 1990, which means that the new Welsh

[51] See, for example, the Planning (Wales) Bill and Positive Planning consultation, run by the Welsh Government from 4 December 2013 to 26 February 2014. The consultation documents and report may be found at: http://gov.wales/consultations/planning/draft-planning-wales-bill/?lang=en (last visited 1 July 2015).

[52] See, for example: the Planning and Compulsory Purchase Act 2004 and the Localism Act 2011.

provisions will continue to be mixed in with English provisions for some time at least.

5.37 Secondly, the law of town and country planning both in England and in Wales is not consolidated, but is spread across numerous pieces of primary and secondary legislation. Much of the planning legislation since 1990 has amended the Town and Country Planning Act 1990, which was the last consolidation. As a result, the 1990 Act has become unwieldy. There are also various other Acts which deal with land use and planning.[54] It is necessary to look at a number of statutes to determine the law in one area.

The future

5.38 There are good reasons why it might be thought appropriate for Wales to have a different planning system from England. England has a population of 56 million and 340 planning authorities, with a scale of development to match. It may be that different legal structures would be appropriate for a country of 3 million people with 25 planning authorities[55]. The Planning (Wales) Act 2015 is the first stage of creating a more specific planning system for Wales. At the request of the Welsh Government the Law Commission is undertaking a project on "Planning and development management in Wales".[56]

5.39 In 2013, the First Minister announced to the National Assembly that the Welsh Government intended to bring forward a

> further planning consolidation Bill [that] will bring together all existing Acts and further streamline the planning process.[57]

5.40 No timetable has yet been announced for this work.

Case study 5: Local government

5.41 The Welsh Government has advocated joint working between public bodies in general and collaboration between local authorities since the publication of its paper *Making the Connections* in 2004.[58] There are currently 22 local authorities in Wales. Funding pressures contributed to a commitment to changing the structure of local government in Wales to reduce the number of local authorities so as to avoid duplication of services and create economies of scale. This process involves first passing a paving Bill to enable reorganisation to be designed, then legislation to implement the precise reorganisation arrangement.

[53] "Neighbourhood plans" were introduced in England by the Localism Act 2011. These enable local communities to create a development plan which directs development in their area. These operate on a tier below the "local plans" which are created by the local planning authority.

[54] C Mynors, *Simplifying Planning Law: a More Radical Approach* (not published).

[55] 22 local authorities and 3 National Parks.

[56] For more information, see http://lawcom.gov.uk/ (last visited 1 July 2015).

[57] National Assembly for Wales, Record of Proceedings, Plenary: Statement: Progress on Implementing "Energy Wales", 14 May 2013.

[58] The Welsh Assembly Government vision for public services, Making the Connections: Delivering Better Services for Wales (October 2004).

5.42 The most significant legislation in this field has been heavily amended, is old and uses language that is outdated. When trying to restate the meaning of Part 4 of the Local Government Act 1972 in the Local Government (Democracy) Wales Act 2013, drafters struggled to understand what the 1972 Act had intended.[59]

5.43 The language of the 1972 Act is archaic and there has been a substantial amount of amending legislation since then.[60]

Consultation question 5-1: We ask for information concerning consultees' experience of working with these areas of law as they apply to Wales. Does the state of the legislation lead to problems in practice? We would welcome examples of the sorts of problems that arise.

Consultation question 5-2: Do consultees consider that the law as it applies in any of the areas described above would benefit from consolidation? What would the benefits be? Are there any problems or disadvantages in consolidating the relevant law, including costs?

Consultation question 5-3: Are there other areas of devolved law where you have identified problems related to the form and accessibility of the law? Please provide examples. Do you think these areas would benefit from consolidation?

[59] For an example, see Local Government Act 1972, s 55.

[60] This is not an exhaustive list, but amending legislation includes Localism Act 2011, Charities Act 2011, Local Democracy, Economic Development and Construction Act 2009, Local Government and Public Involvement in Health Act 2007, Local Government Act 2000, Local Government and Rating Act 1997, Local Government (Wales) Act 1994, Charities Act 1993, Local Government Act 1992.

PART 2: DEVELOPING SOLUTIONS

CHAPTER 6: PUBLISHING THE LAW: WEBSITES, TEXTBOOKS AND OTHER SOURCES

Introduction

6.1 Ensuring that legislation is available to the public is essential to accessibility. This is best achieved by providing up to date legislation online in an easily navigable way. In addition, accurate secondary materials, such as guidance and textbooks may provide the most useful tools to help citizens to understand the law. In our view, access to law applicable in Wales is currently deficient, though progress is being made. In this chapter, we consider how the situation could be improved.

Publishing statute law

6.2 The United Kingdom Government is responsible for ensuring that United Kingdom statute law is available to the public and the Queen's Printer publishes English and Welsh and also Welsh primary and subordinate legislation. This position was reviewed and reaffirmed during the passage of the Government of Wales Act 2006 in order to ensure that legislation could be found in "a consistent form and from a single location". It is beyond the scope of this project to consider where the ultimate institutional responsibility for the publication of Welsh legislation should lie.

6.3 Legislation available online is not the authoritative version of an Act of Parliament or subordinate legislation.[61] There is no statutory obligation on the Queen's Printer to publish legislation online. In other jurisdictions, such as New Zealand and Australia, the Parliamentary Counsel Office is under a statutory obligation to publish legislation electronically as well as in printed form and, as far as practicable, on a website maintained by or on behalf of the Government, free of charge at the point of access.[62]

Consultation question 6-1: Should the Government's responsibility for the publication of statute law free of charge be the subject of a statutory duty?

Consultation question 6-2: If so, should the duty extend to making legislation available online?

Current online legislation services

6.4 There are several services currently available that provide access to legislation online. Some are free of charge and some are available only by subscription. We discuss the various services available and consider the benefits and disadvantages of them in relation to the requirements of an online service for Wales.

[61] The Queen's Printer's version is the authoritative version of legislation. See Interpretation Act 1978 s19(1)(c).

[62] New Zealand Legislation Act 2012.

Public services

6.5 We look at:

(1) Legislation.gov.uk - The United Kingdom's statute law database maintained by National Archives, which provides a specific Wales area and Welsh legislation search functions, but does not yet publish all legislation in its current up to date form including amendments;

(2) Defralex – The Department for Environment, Food and Rural Affairs' database of legislation and guidance it is responsible for, hosted by legislation.gov.uk where legislation can be searched by subject matter;

(3) Bailii – The British and Irish Legal Information Institute, a charitable trust, providing an online database of caselaw and legislation (as enacted) and other sources;

(4) Wales Legislation Online – A free online database, funded by the Welsh Government and hosted by Cardiff University providing access to Welsh legislation, which was in operation from 1999 until 2012 when it was discontinued;

(5) Law Wales/Cyfraith Cymru – The new Welsh Government database, launching in July 2015, with the aim of providing a guide to the law applicable in Wales, and including overviews of relevant areas of law and links to legislation.gov.uk for legislation.

Commercial services

6.6 Commercial services provide online UK statute law databases and other sources of law, guidance and commentary on a subscription basis. For example, Westlaw UK and LexisNexis provide fully consolidated and annotated legislation. Neither provides Welsh language versions of legislation.

What should a legislation database for Wales look like?

6.7 There is significant demand for access to legislation in an up to date form. We discuss the essential features of an online resource for legislation in Wales. We suggest that the key features might be:

(1) The legislation must be up to date, incorporating amendments;

(2) The database must make clear what legislation applies to Wales;

(3) The legislation should be accessible via a general web search, using a search engine, for example Google;

(4) The legislation should be accessible through the database's internal search engine, including search by subject matter;

(5) Legislation should be organised by subject matter, as seen on Defralex;

(6) It should be possible to view Welsh language legislation alongside English language legislation.

6.8 A challenge facing the creation of a successful online database is ensuring the available resources to complete and maintain it. We ask whether a system of "open source editing" would be helpful. If legal experts from outside the database could update legislation or other materials, in addition to the managers of the database, that might increase the efficiency with which the legislation is edited. The experts could be legal practitioners or academics and their work could be verified by a team of editors. The drawbacks would be an increased risk of inaccuracies, the time taken to check the work and whether there would be sufficient incentives for legal practitioners or academics to want to undertake this work.

6.9 We consider the role of "big data", which refers to large sets of data that can be analysed in order to reveal trends, associations and patterns.[63] We note that a database for Wales should have the capacity to take advantage of opportunities that big data might provide in the future.

Consultation question 6-3: Do consultees think it important that an online legislation database for Wales clearly identifies the legislation of the United Kingdom Parliament, and parts of that legislation, that apply to Wales?

Consultation question 6-4: Do consultees attach importance to legislation being accessible through a general web search?

Consultation question 6-5: Do consultees consider that legislation should be accessible through a database's internal search engine, including being searchable by subject matter?

Consultation question 6-6: Should Welsh language legislation be capable of being viewed alongside English language legislation on legislation.gov.uk?

Consultation question 6-7: Do consultees agree that a database of legislation applicable in Wales should be organised by subject matter, following the *Defralex* model structure, with clear and detailed sub-divisions? Should this be done by way of links from *Cyfraith Cymru/Law Wales* to legislation.gov.uk or in a section of legislation.gov.uk?

Consultation question 6-8: Should legislation available on an online legal database for Wales be editable by volunteer legal experts?

Consultation question 6-9: If so, what safeguards should be put in place?

Accessing secondary materials

6.10 In addition to legislation, we consider how other sources might be improved and also how to improve access to them. We look at the explanatory notes, published alongside Bills and the work being carried out by the Office of Parliamentary Counsel as part of the Good Law Project.

6.11 We also consider guidance, including statutory guidance. If guidance is to be

[63] National Archives announced a "Big Data for Law" project in February 2015. Information can be found on their website at: http://www.legislation.gov.uk/projects/big-data-for-law (last visited 1 July 2015).

published, it must be accurate. There may also be several sources of guidance and it can be difficult to understand which guidance is accurately describing legal obligations and which is stipulating best practice. Defra has undertaken a "smarter guidance" initiative and we consider how best to ensure that the meaning and weight of guidance is clear and that it does not usurp the authority of the primary source of the law, the legislation.

6.12 In addition to guidance, commentary may be provided, in the form of legal journals and online legal databases. There are several recent or current Welsh law journals, including The Welsh Legal History Society Journal; the Cambrian Law Journal; The Wales Law Journal. The Statute Law Review also often publishes articles on Welsh law and published an edition specifically on Welsh legislation in 2012. There is, however, not a substantial range of academic commentary on the law as it applies in Wales.

Consultation question 6-10: Do consultees find explanatory notes helpful? Could they be improved?

Consultation question 6-11: How could explanatory notes best be presented?

Consultation question 6-12: Should guidance and/or commentary be included on an online legislation resource for Wales? If so, how detailed should its coverage be?

Textbooks

6.13 The law is complex and textbooks can be invaluable in making the law accessible, by dissecting and explaining the law. There are currently no comprehensive textbooks that look at the law in Wales only. Textbooks addressing the law in England and Wales do not commonly consider the divergent law in Wales in detail, although there are notable exceptions.[64]

6.14 The University of Wales Press has commissioned a "Public Law of Wales" series, to include textbooks on the Administrative Court in Wales; planning law and practice and legislating for Wales.[65] There are also plans to publish a Welsh language series of law textbooks, by Bangor University Law School with funding from the Coleg Cymraeg Cenedlaethol.

Consultation question 6-13: Have consultees experienced difficulties due to the limited availability of textbooks on the law applicable to Wales?

Consultation question 6-14: What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?

[64] See for example, Liz Davies, Jan Luba QC and Connor Johnston, *Housing Allocation and Homelessness* (4th ed, 2015) which is to include a comprehensive account of the Housing (Wales) Act 2014.

[65] University of Wales website: http://www.uwp.co.uk (last visited 1 July 2015).

CHAPTER 7: CONSOLIDATION OF LEGISLATION

7.1 As we note above, there is a considerable and widespread demand for the consolidation of legislation applicable in Wales.

What is consolidation?

7.2 The process of consolidation is to replace existing statutory provisions, which are to be found in a number of different statutes, with a single Act or a series of related Acts.

> Consolidation is the restatement or re-enactment of the statutory law, the form and not the substance, in a single reorganised form, bringing all the scattered relevant statutory legislation together in one statute, in order "to consolidate and reproduce the law as it stood before the passing of that Act."[66] The long title says it is a consolidating statute. The principal purpose is to facilitate the user. Consolidation may be a prelude to reform; more commonly it is the consequence of reform, or at least change.[67]

7.3 Amending legislation without consolidating it produces a complex result. It can create a convoluted and obscure web of statutes, all of which readers need to get to grips with before they can understand the law which applies. For those who have access to a commercially produced database of legislation, the problem is less severe, because the database provider incorporates the amendments and provides an up to date version of the legislation. However, where legislation has become fragmented over the years, even these resource are unlikely to present a coherent picture of the law.

7.4 Consolidation requires more than pulling together all the provisions which are currently in force. A consolidation exercise is intended to preserve the law as it stands and repeal the various earlier pieces of legislation. 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. In addition, the legislation can be restructured and provisions relating to Wales can be separated from those relating to England.

7.5 In Westminster and Holyrood there are special legislative procedures designed to give consolidation Bills "a fair wind, whilst protecting the system from abuse".[68] The essential feature of the procedure in the United Kingdom Parliament is that Bills are introduced in the House of Lords and, after a second reading, referred to the Joint Committee on Consolidation etc Bills for detailed consideration. For an ordinary Bill second reading is where the principles or policy which inform the Bill are debated, before it is sent to a public Bill committee for line by line scrutiny.[69] If the Joint Committee is content with the Bill, the other parliamentary stages are

[66] *Gilbert v Gilbert* [1927] EWCA cited in A Samuels, "Consolidation: A Plea" (2005) 26(1) *Statute Law Review* 56.

[67] A Samuels, "Consolidation: A Plea" (2005) 26(1) *Statute Law Review* 56..

[68] D Greenberg, *Craies on Legislation* (9th ed 2010) para 5.3.2.

[69] Generally speaking, there is enormous flexibility and consequent variance from the usual within the Westminster system.

largely formal.[70] The Joint Committee has jurisdiction over two types of consolidation Bill:

(1) consolidation Bills, whether public or private, which are limited to re-enacting existing law;

(2) Bills to consolidate any enactments with amendments to give effect to recommendations made by the Law Commission or the Scottish Law Commission or both of them, with any report containing such recommendations. These Law Commission consolidations are by far the most common form of consolidation. They allow some latitude when it comes to changing the law to create a coherent, modern piece of legislation. However, changes which significantly alter the substance or effect of the law are not permitted.[71]

7.6 Consolidation may also be carried out as part of a law reform Bill. However, the consolidating parts of such a Bill will be subject to the full scrutiny of Parliament, so that amendments might be made to parts of the legislation where there is no intention to change the law.

Consolidation in Wales

7.7 The Welsh Government is very much alive to the benefits of consolidating the legislation applicable in Wales. Consolidation would have the added benefit of allowing Welsh legislation to be disentangled from English legislation.[72] However, no special procedures exist for consolidation in the National Assembly for Wales, so any consolidation Bill would have to be subjected to the full procedures and scrutiny of the Assembly.

Developing a model for consolidation

7.8 In order to develop an effective programme of consolidation, it will be necessary to explore different types of consolidation and also appropriate legislative procedures within the National Assembly to support the consolidation process. We ask consultees for evidence from different types of consolidation exercises in order to create a suitable model for Wales. We give two examples: the Tax Law Rewrite project and the project to simplify immigration law. [73]

[70] House of Commons Standing Orders 58; House of Lords Standing Order 51.

[71] The scope of amendments that can be made under this procedure is limited to producing a satisfactory consolidated text and excludes changes of legislative policy, whether or not controversial.

[72] Counsel General, Speech on Access to legislation, given 26 September 2012 to the Association of Welsh District Judges. The First Minister has announced a commitment to consolidation. In his annual statement to the National Assembly on the legislative programme, in 2011 and again in 2013, he announced an intention to consolidate existing legislation to make the planning system more transparent and accessible. See National Assembly for Wales, Record of Proceedings, 12 July 2011.

[73] R Kerridge, "The Income Tax (Earnings and Pensions) Act 2003" [2003] *British Tax Review* 257, as quoted in D Salter, "The tax law rewrite in the United Kingdom: plus ca change plus c'est la meme chose?" [2010] *British Tax Review* 671; Secretary of State for the Home Department, Simplifying Immigration Law, The Draft Bill (November 2009) Cm 7730 p 3.

Lessons from other jurisdictions

7.9 In the consultation paper, we look at models in other jurisdictions. In New Zealand, there is a statutory obligation to consolidate legislation, imposed by the Legislation Act 2012. A three yearly programme of consolidation is published detailing a series of planned revision Bills, which aim to redraft the earlier law, so that it is rationalised, arranged more logically, removes inconsistencies, obsolete and redundant provisions, and modernises expression, style and format.[74]

7.10 We also look at consolidation in New South Wales, Australia, which includes a rolling programme of two "miscellaneous provision" Bills, introduced into Parliament every year to modernise and simplify the statute book.

Discussion

7.11 A rolling programme of consolidation for Wales has significant appeal if supported by procedures and standing orders in the National Assembly so that the time for other legislation is not taken up excessively. However, there are a number of issues to be considered. If the Office of the Legislative Counsel was to take on this task, the resources and other work of the drafters would have to be considered. They already have a very full programme of drafting. Consolidation could be carried out where substantive law reform has already been completed, or where reform is not planned in a particular area.

Consolidation: only a partial solution

7.12 Consolidation is attractive in principle but there are certain shortcomings. Consolidation is a labour-intensive process, requiring the time and attention of highly skilled drafters who have to be able to satisfy themselves and the legislature that their work is exhaustive and has not changed the law, in order to benefit from any procedures for the reduced scrutiny of consolidation Bills.

7.13 It is difficult to measure the costs and benefits of consolidation and to ensure that the benefits outweigh the costs.

7.14 Consolidation can be counter-productive. With no scope to reform the law, any need for law reform, identified during the process, cannot be satisfied.

7.15 Consolidation only brings the law together to date. Without changing the approach to the way the law is made, the problem simply starts again with new legislation being made to amend the consolidating Act.[75]

Consultation question 7-1: Do consultees think there should be procedures in the National Assembly for technical legislative reform, such as consolidation Bills?

[74] Legislation Act 2012, Part 2, sub-part 3, s 31 sets out the powers of a revision Bill.

[75] See, for example, the Powers of Criminal Courts (Sentencing) Act 2000 which consolidated sentencing legislation but was amended within a year and several times within the next three years. For more information, see the Law Commission's project on Criminal Sentencing Law at: www.lawcom.gov .

Consultation question 7-2: Do consultees think that there is a need for consolidation in Wales? If so, do consultees have a view on a particular area of the law in Wales that would benefit from a consolidation exercise?

Consultation question 7-3: We welcome consultees' views on the drawbacks and benefits of a strict consolidation or consolidation combined with law reform.

Consultation question 7-4: We invite consultees to provide examples and evidence of the problems they experience from a lack of consolidation, in terms of time or other costs. In addition, we ask consultees to provide examples and evidence of the costs and benefits they think would result from consolidation.

CHAPTER 8: CODIFICATION

8.1 At the Legal Wales conference in Cardiff in October 2013, the Lord Chief Justice, Lord Thomas of Cwmgiedd, suggested that Wales should look towards a codified form of legislation. He said

> In Wales, there is a huge advantage that Welsh legislation has but a short history. There is no reason, therefore, why it cannot develop its own innovative style… Furthermore, Wales can begin its own sensible organisation of Welsh law into a Code with chapters into which new laws can be inserted and old laws amended, much along the lines of what is done in most states. Westminster is burdened by history. It is therefore a model that does not have to be followed.[76]

8.2 In Chapter 8 of the consultation paper, we examine this proposal. Codification of law has a long history and, in recent times, a close connection with the Law Commission. In what follows, we consider first the different ways in which the concept of a code is used, in an effort to resolve some ambiguities. Secondly we briefly review the history of codification following the establishment of the Law Commission in 1965. We then consider the extent to which the reasons for the (apparent) failure of codification as a project over those years apply to current conditions in Wales. Finally, we ask consultation questions about establishing a system of codified law applicable in Wales.

8.3 When considering codification, it is important to bear in mind that consolidation is an essential element of codification.

What is a code?

8.4 The most fundamental distinction is between common law jurisdictions, like England and Wales[77] and the many jurisdictions worldwide that have sprung from

[76] Lord Thomas of Cwmgiedd, Legal Wales Conference (October 2013).

[77] Within the United Kingdom, Northern Ireland is a common law jurisdiction, while Scotland is described as having a mixed system, with elements of pre-code European law co-existing with common law features. It shares this status with South Africa, whose traditions derive from Dutch law and the law of England and Wales, and also with Quebec and Louisiana (with a legal system derived from France and England and Wales).

it, and jurisdictions based on civil law.[78] The modern European tradition, usually dated to the creation of the Napoleonic French civil code in 1804, is for the law to be stated in codes intending to cover certain areas of law comprehensively, expressed in terms of broad principle.[79] The task of the judges is to apply these principles to the facts of a case, but the system does not rely on the development of a structure of case-law precedents, as in common law countries.

8.5 In common law jurisdictions, such as England and Wales, the starting point is the common law. This is the law made and declared by judges in deciding individual cases. Parliament may then intervene by passing legislation, but it does so on the basis of the accumulated wisdom of the common law. Such legislation, as befits an intervention in the richly detailed flow of the common law, is itself detailed in style and seeks to cover every possible eventuality that occurs to the drafter, unlike the broad principles of the continental codes. And, once Parliament has legislated, judges will make decisions on the legislation, authoritatively explaining and interpreting what Parliament has done.

8.6 We provisionally consider that the most suitable form of codification for Wales would be the bringing together of the statutory law on a single subject into one instrument without substantially changing the boundaries between statute law and case law. Where this is done without any (or any significant) change in the substance of the law, it is consolidation, as discussed in chapter 7 of the Consultation Paper. However, it is important here for two reasons. First, it is associated with substantive law reform. Secondly, it can have implications for the form of the law on a continuing basis.

8.7 Two examples are provided by law reform projects that have been, or are being implemented by legislation in Wales: Adult Social Care, largely implemented by the Social Services and Well-Being (Wales) Act 2014 and Renting Homes, largely implemented by the Renting Home (Wales) Bill, currently before the National Assembly.[80] The result of these projects was wholesale reform, completely recasting the legal structure. But the starting point was the seriously flawed nature of the relevant statute law. The result is effectively codification with reform of the relevant areas of the law.

Codification in other jurisdictions and Law Commission codification

8.8 We look at models from other jurisdictions: the Canadian Criminal Code, the United States of America, Australia and New Zealand.

[78] Both “common law” and “civil law” are potentially ambiguous terms. “Common-law” can refer both to the nature of the jurisdiction, and to judge-made law as opposed to statute law within such a jurisdiction. We use the term “judge-made law” or “case-law” for the latter in the remainder of this discussion. “Civil law”, in addition to describing continental code jurisdictions, can refer to the law that is not criminal law within a common law jurisdiction, but we do not use the term in that sense.

[79] In fact, codes had been established in some of the German states during the second half of the 18th century. The Roman law foundations of modern European law were themselves subject to codification by the Byzantine Emperor Justinian between 529 and 534: B Nichols and E Metzger, *An Introduction to Roman Law* (Oxford University Press 1975) p 38 to 42.

[80] Adult Social Care (2008) Law Commission Scoping Report, p 12. It and our final report Adult Social Care (2011) Law Com No 326. Our report, Renting Homes: the Final Report (2006) Law Com No 297, was followed up by our further report Renting Homes in Wales/Rhentu Cartrefi yng Nghymru (2013) Law Com No 337.

8.9 The Law Commission was established in 1965 with codification as one of its central roles. In the introduction to our Tenth Programme of Law Reform, we reappraised whether projects with codification as their principal outcome were "realistic and whether effort and resources should explicitly be given to achieving that outcome." The Commission took the view that the increasing complexity of the common law, the increased pace and layering of legislation, and the influence of European legislation, made codification ever more difficult but concluded that we would continue to try to codify at the same time as reforming, where possible.[81]

8.10 The problems were, first, that there was inadequate interest within Government departments in codification, or law reform more generally. Secondly, there was limited support outside the Law Commission for at least the grander schemes of codification. Finally, Parliament was ill-equipped to legislate for codes. A large scale codification would involve an unrealistic investment of Parliamentary time.

Codification and Wales

8.11 We consider that there may be a greater appetite for codification in Wales today. The range of law to be considered for codification in Wales will be less than that in England and Wales as a whole, even under a reserved powers model. The National Assembly has not been equally active in all areas. More than half of the 39 Measures and Acts passed by the Assembly are devoted to the three subject areas of education, social welfare and local government. While this is not an indicator of the volume of statute law requiring consideration as part of a codification process, it may be an indicator of priority.

8.12 The seriousness of the problems of inaccessibility of the law has itself propelled the issue up the agenda of policymakers. Dissatisfaction with the form of the law in Wales extends not just to the legal professions and the judges, but also to politicians and policymakers and wider civil society stakeholders. The National Assembly is a new legislature. It has shown itself open to procedural innovation and is more likely to accept some reform of procedure than might be the case at Westminster.

8.13 We consider that the possibility of making legislation in new ways provides a real opportunity to create a novel and more embedded form of common law codification. We discuss below how best to exploit these opportunities. In particular, we consider whether codification might be more successful if the development and maintenance of codes could be seen to be effectively overseen by the National Assembly.

Reform proposals

8.14 Here we set out our consultation questions about a possible codification system for Wales. These include a structure for determining what should be codified, a codification office within the Welsh Assembly, procedural rules for the creation of codes and legislation to allow codes to have a different status from other primary legislation and to allow them to be revised and updated.

[81] Law Commission, Tenth Programme of Law Reform (HC 605, 2008) pp 5 to 6.

Consultation question 8-1: Do consultees agree that the objective of codification in Wales should be to bring the common law into statutory form, and/or reorganise statute law?

Consultation question 8-2: Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?

Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?

Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?

Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?

Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?

Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?

Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?

Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?

Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?

Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?

Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?

Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?

Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to bills to those designed to ensure better codification, rather than alternative substantive provision?

Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?

CHAPTER 9: CONTROL MECHANISMS IN THE GOVERNMENT AND WELSH ASSEMBLY

Introduction

9.1 In chapter 9 of the consultation paper we consider one approach to avenues for reform which could prevent further problems of the sort we have described elsewhere. Here we discuss the possibility of harnessing the machinery of government to ensure that legislation is well designed and accessible from the start.

9.2 We draw in particular on lessons from New Zealand. New Zealand has notable similarities to Wales - it is a small country, in terms of population, with a unicameral legislature and a common law legal system. New Zealand has also tried and tested models which the Welsh Government and legislature can learn from. The New Zealand approach requires new legislation to conform to set standards by inserting controls into the development of policy and drafting processes before a Bill reaches the National Assembly.

9.3 We first set out the existing procedures for the design and control of legislation.

The Welsh Government

9.4 At the commencement of the current National Assembly's term, the First Minister set out a legislative programme covering the whole of the life of an Assembly. The programme was then updated with a legislative statement every year. The annual legislative statement is made in July, again by the First Minister, usually in the last week of the National Assembly term, and gives more details of the Bills that the Welsh Government intends to bring forward in the legislative year starting in the following September. In addition to Government Bills, the legislative programme also aims to allow time for Government consideration of Assembly Members' Bills and other non-Government legislation.[82] The National Assembly passed seven Bills in each of the calendar years 2013 and 2014.

[82] The following account is largely based on Welsh Government Legislation Handbook (3rd ed November 2014) or information supplied by the Welsh Government.

9.5 Internally, the development of the programme is administered by a central unit, the Legislative Programme and Governance Unit. The unit advises the Bill teams assembled in departments to work on Bills, and the lead minister on the Bill (the minister in whose portfolio the Bill falls, or, if more than one portfolio is engaged, one of those ministers appointed by the First Minister). It also advises the First Minister and the Minister responsible for Government Business (currently the Minister for Finance). The Legislative Programme and Governance Unit also provides the secretariat to the Legislative Programme Board, which provides overall strategic management of the legislative programme, as part of the more general Programme for Government.

Existing controls on legislation in Wales

Impact assessments

9.6 The Welsh Government has developed a sophisticated system of impact assessments. These are designed to draw out the implications of all policy developments – not just legislation – and thus to improve the quality of policy making and ultimately legislation. Some of the impact assessments provide a method for judging the effect of a policy development on particular groups of people within Welsh society, or on the environment, the economy and culture.

9.7 The aim is that the impact assessments form a part of the policy process throughout. They are seen by the Welsh Government as important tools designed to influence and support policy-making, and forming a key element of the appraisal of proposals.

The New Zealand approach

9.8 New Zealand's unicameral legislature, the House of Representatives, has twice as many members as the Welsh Assembly and its population, at 4.5 million, is larger than that of Wales, at about 3 million.

The Legislation Advisory Committee

9.9 The Legislation Advisory Committee was established by the then Minister of Justice in February 1986 and has enjoyed a close relationship with the New Zealand Law Commission since that time. The President of the Law Commission chairs the Committee, and the Commission undertakes research work for it.[83]

9.10 It has a twofold role in relation to the quality of legislation. First, it sets standards, set out in guidelines on the process and content of legislation.[84] The Committee's second major function is the monitoring of Government legislation against its guidelines after publication and during the Parliamentary passage of the Bill. In particular, if its review raises issues of inconsistency with the guidelines, it makes

[83] For information on the Legislation Advisory Committee see http://www.justice.govt.nz/publications/legislation/legislation-advisory-committee (last visited 5 June 2015); Sir G Palmer QC, "Improving the Quality of Legislation - the Legislatory Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review*. The Committee had its origins in one of the pre-Law Commission law reform advisory committees, that on public and administrative law.

[84] Legislation Advisory Committee Guidelines, *Guidelines on Process and Content of Legislation* (2014).

a submission to the Parliamentary Select Committee which, in the New Zealand system, will be considering the Bill in detail. The New Zealand Law Commission provides the reports to the Committee that form the basis of its submissions to the Select Committees.[85] The Legislation Advisory Committee thus sets the standards to be used *internally* within Government, but then monitors adherence to those standards *externally* in a way that informs the Parliamentary scrutiny process.

9.11 Sir Geoffrey Palmer QC was the Justice Minister at the time when the Legislation Advisory Committee and the New Zealand Law Commission were created, in 1986. In 2006, he was President of that Law Commission, and accordingly also chair of the Legislation Advisory Committee. That year, he gave a subsequently published speech where he said of the Committee:

> It seems to me to be benign, but peripheral. Indeed the experience of the Committee over 20 years has led to the conclusion that most of the problems with legislation occur early in its design phase. It is often too late to perform major surgery on a Bill after it has been introduced … Remodelling a Bill is difficult. The work needs to go into the original design. In New Zealand, almost all Bills go to Select Committee for public scrutiny and submissions, and the Select Committees alter the details of the legislation extensively in light of the submissions. However, wholesale revisions to the architecture of a Bill, while not unprecedented, are difficult to accomplish.[86]

9.12 It was as a result of this perception that a new approach was adopted with the establishment of the Legislation Design Committee. Again, the chief architect of the Committee was Sir Geoffrey Palmer QC

The Legislation Design Committee

9.13 The Legislation Design Committee was established in 2006. It was also chaired by the President of the Law Commission. The New Zealand Cabinet Manual, dated 2008 describes the Legislation Design Committee as follows:

> a ministerial committee that receives research and advisory support from the Law Commission. The Committee provides high-level, pre-introduction advice on the framework and design of legislation, with the goal of ensuring that policy objectives are achieved and the quality of legislation is improved … Ministers and departments are encouraged to seek formal or informal advice and assistance from the committee at an early stage on projects that are significant in terms of their scope, involve complicated Legislation Design issues, require an innovative approach, or are likely to raise issues about the overall

[85] To browse and search Legislation Advisory Committee submissions made to Select Committees see http://www.lac.org.nz/submissions/ (last visited 5 June 2015).

[86] Sir G Palmer QC, "Improving the Quality of Legislation - the Legislatory Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review.* Sir Geoffrey Palmer QC had previously been Deputy Prime Minister, Attorney-General, Minister of Justice and Minister for the Environment, and from 1989 to 1990 Prime Minister, in addition to a distinguished career as a legal academic in America and New Zealand.

> coherence of the statute book … The Committee may also approach departments to offer assistance on relevant projects.[87]

9.14 The Legislation Design Committee undertook its task as "guide, philosopher and friend to departmental officials generating difficult legislation"[88] on a series of Bills from 2006 to 2011.[89] The Committee was initially a standing advisory body, available to Government departments or agencies if its advice were sought. In late 2007, following a successful evaluation of its contribution, a more formalised procedure was adopted. The Committee still operated on an advisory basis, rather than having a screening role as part of the internal structures for the approval of legislative proposals in New Zealand.[90]

9.15 The Legislation Design Committee has now, however, ceased to function.[91]

A new Legislation Design and Advisory Committee?

9.16 There has been a recent increase in governmental demand for better quality and more efficiently produced legislation. In 2014, the New Zealand Productivity Commission published a report entitled "Regulatory institutions and practices", which outlined some serious problems with legislation. For example, the report observes that legislation quality checks are "under strain", and explains that the New Zealand Law Commission's review of Bills produced in 2013 found that over half of those Bills were deficient in some way.[92] Subsequently, the Attorney General of New Zealand has recommended that the Legislation Design Committee be revived and merged with the Legislation Advisory Committee, to form a Legislation Design and Advisory Committee.

9.17 It is intended that this Committee would operate in a broadly similar way to the Legislation Design Committee, providing advice on Bills in their early development. However, the main difference is that, if the Attorney General's recommendations are adopted, the new Committee would be composed of a smaller number of people, drawn entirely from the public service. The Attorney General envisages that external advisers, such as academics and lawyers, would still play a role, by for example, serving as members of sub-committees set up on an ad hoc basis to assist with editing the guidelines and LAC manual. This re-focusing of attention on improving legislation is to be welcomed.

87 New Zealand Department of the Prime Minister and Cabinet Office, Cabinet Manual (2008), p 92, paras 7.34 to 7.36..

88 Sir G Palmer QC, "Improving the Quality of Legislation - the Legislatory Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review.*

89 Sir G Palmer QC, "Law-Making in New Zealand – is there a better way? The Harkness Henry Lecture 2014" (2014) 22 *Waikato Law Review* 4, 13 to 14.

90 The New Zealand Law Commission, *Briefing for the Minister Responsible for the Law Commission* (2011). Available here: http://www.lawcom.govt.nz/content/corporate-information#item1 (last visited 1 July 2015).

91 The New Zealand Law Commission, *Briefing for the Minister Responsible for the Law Commission* (2011). Available here: http://www.lawcom.govt.nz/content/corporate-information#item1 at 17 (last visited 1 July 2015).

92 New Zealand Productivity Commission, *Regulatory institutions and practices* (16 July 2014).

A Legislation Office for Wales?

9.18 Sir Geoffrey Palmer QC recently presented an alternative hybrid model, a new Legislation Office.[93] It would be located in the National Assembly under the general control of the Counsel General. This change would be accomplished by a Legislative Standards Act, for which the Counsel General would be, in effect, the responsible minister.[94] The First Minister and Cabinet would remain responsible for the policy of the legislation. The Office of the Legislative Counsel would be transplanted to the new Legislation Office, and would form the backbone of its permanent membership. Bill teams for particular pieces of legislation would be assembled by seconding officials from the relevant Welsh Government department for the duration of the drafting and legislative process. This team would produce the information, analysis and a draft Bill to be published with a white paper for pre-legislative consideration by the National Assembly and stakeholders.

9.19 We found this proposal useful in considering how codification might work in Wales.

Reform options

9.20 We consider two options for Wales to create a structure for effective legislative design and oversight.

Using the impact assessment process

9.21 One option would be to use the existing apparatus of impact assessments to include legislation design issues. This is attractive in that it uses existing structures, but there are significant risks. In particular, a "legal impact" approach may not be so well suited to the development of policy as the other impact assessment elements.

A Legislation Design Committee for Wales

9.22 The other option could be to create a Legislation Design Committee based on the New Zealand model.

9.23 In New Zealand, the Committee was chaired by the President of the Law Commission. There is no exact equivalent in the Welsh context, but the Counsel General would seem the obvious choice. That would move away from the New Zealand model, in which all of the members of the Committee were civil servants or, in the case of the chair, a statutory office holder, to include a political figure.

[93] The text of Sir Geoffrey Palmer's speech given on 25 March 2015 in Cardiff as part of the Law Commission's 50th anniversary is available on the Law Commission website at http://lawcommission.justice.gov.uk/leslie-scarman-lectures.htm (last visited 1 July 2015). See Sir G Palmer QC, "Improving the Quality of Legislation - the Legislatory Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review.*

[94] Whether the National Assembly has the power to legislate for such a proposal can be argued both ways. However, that may change as a result of proposals for developing devolution made during 2015: see Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020; and The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014). We deal with questions relating to the role of the National Assembly in determining its own procedures and its legislative process below.

9.24 Such a committee could, however, take on a more significant formal role in Wales at key stages in the development of a legislative proposal, such as early design; the green paper/public engagement stage; the crystallisation of policy during the white paper stage; instructing parliamentary counsel; and the final draft of the Bill before introduction. If it worked, this approach could provide a mechanism for ensuring that considerations of legislative design were more integrated into the process of developing policy. The risk is that any proposal for changing the arrangements for the preparation of legislation amounts to interfering in the domestic business of government.

9.25 In any event, the establishment of a Welsh legislative design committee could amount to a mere bureaucratic reorganisation of the roles of individuals who are already all closely engaged in the development of the legislative programme.

9.26 The one potential role of a Welsh legislative design committee that, arguably, is not covered by existing legal actors is consideration of legislative design at the earliest stages of policy development, including public engagement.

Consultation question 9-1: We ask consultees whether a "legislative impact" assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government?

Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?

Consultation question 9-3: We would also welcome consultees' views on alternative models.

Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models.

PART 3: THE WELSH LANGUAGE

CHAPTER 10: WELSH AS A LEGAL LANGUAGE

10.1 The Welsh language has the status of an official language in Wales, but the English language is currently the dominant language. The 2011 census recorded a population of 3.06 million, with 23.3% of those born in Wales being able to speak Welsh. In 2012-13 it was estimated that 11% of the population of Wales were fluent in Welsh.[95] Welsh is not a community language anywhere apart from Wales (and a small settlement in Patagonia). Trying to treat Welsh no less favourably than English, in the face of the dominance of the English language on the world stage, is no easy matter.

10.2 The Welsh language has official status in Wales today. In particular, legislation provides for the following:

(1) the Welsh and English languages are to be treated on the basis of equality in the conduct of proceedings of the National Assembly for Wales;

(2) equal standing is given to Welsh and English texts of Measures and Acts of the National Assembly and subordinate legislation; and

(3) there is a right to speak the Welsh language in legal proceedings in Wales.[96]

CHAPTER 11: LEGAL TERMINOLOGY AND DRAFTING

Introduction

11.1 The suitability of Welsh as a medium for modern legal communication and debate has been established. The development of modern standardised terminology in Welsh is making good progress. In particular, a body of Welsh language legal terms has already been defined in legislation since the National Assembly started legislating in Welsh in 1999.

Consultation question 11-1: We invite the views of consultees as to how the process of standardising and keeping up to date Welsh legal terminology should be continued and funded. In particular, what manner of body should be responsible for performing this role?

11.2 There is a greater difference between spoken and written Welsh than between spoken and written English. The difficulty of "legal Welsh" may be an impediment to the accessibility of legislation and other documents, and using Welsh in legal proceedings. The National Assembly publishes a glossary (from English to Welsh) of technical and legislative terms with draft Bills.

[95] For this and further statistical information on the Welsh language, see Hywel M Jones, *A statistical overview of the Welsh language* (Welsh Language Board, 2012) chapter 6 and Hywel M Jones, "Pa ddyfodol I'r Gymraeg yn 2012?" ("What future for the Welsh language in 2012?") (BBC Cymru Fyw, 2012) which can be found at: http://bbc.co.uk/cymrufyw/32691390 (last visited 1 July 2015).

[96] Welsh Language (Wales) Measure, s 1.

Consultation question 11-2: Accordingly, we invite the views of consultees as to what, if anything, can be done to make Welsh legal terminology more accessible to legal professionals and to the public.

The form of bilingual legislation and drafting bilingual legislation

11.3 Primary legislation enacted by the National Assembly is produced in facing page format in English and Welsh. Statutory instruments are produced in a two column format with English and Welsh side by side.

Consultation question 11-3: We invite the views of consultees as to whether the form or presentation of bilingual legislation could be improved and, if so, in what ways.

Drafting bilingual legislation

11.4 The use of Welsh as a language of statutory drafting is a very recent development. Prior to the advent of devolution there was no experience in the United Kingdom of making legislation in a bilingual form. The Government of Wales Act 2006 gives equal status to English and Welsh in National Assembly legislation.[97]

11.5 The National Assembly and Welsh Government have been required to develop their approach to preparing legislation in two languages. In doing so, they have sought guidance from other common law jurisdictions, most notably Canada, where co-drafting takes place. We also consider processes adopted in Hong Kong where both English and Chinese are official languages.

11.6 In Canada, full co-drafting is used by the Canadian Federal Government. Drafters work closely together, each preparing drafts in different languages. We consider this procedure in detail in the consultation paper. [98]

11.7 One model used in Canada is known as the "New Brunswick method". A proposal is made by a Government department in English. An English and a French drafting lawyer attend meetings with the instructing department, which are usually held in English. The lead drafter then prepares a draft Bill and shares it with the other lawyer, who comments on it and prepares a draft in French. Each drafter works on his own document. The drafters communicate back and forth between them as they proceed, and the draft is then agreed by both drafters and the instructing department.

The developing practice in drafting bilingual Welsh legislation

11.8 The current system for drafting by the Office of the Legislative Counsel is for initial drafts to be produced in one language and translated into the other. The initial text is usually in English. OLC is responsible for ensuring that the Welsh and English texts are legally equivalent. The Welsh text of a Bill or an amendment is always produced at a stage before both the English and Welsh texts are finally settled. Translators and OLC drafters sometimes identify ways in

[97] Government of Wales Act 2006, s 156.

[98] S Lortie and R C Bergeron, Legislative Drafting and Language in Canada" (2007) 28(2) *Statute Law Review* 83 at 103.

which the English text could be altered to improve the linguistic quality of the Welsh. The production of the Welsh text often highlights problems with the English which would not otherwise have been identified. OLC drafters and the legislative translators then work together to resolve the issues, changing one or both texts in an attempt to produce clearly expressed English and Welsh, which respects the natural idiom of both and achieves the same legal effect. Occasionally, OLC drafters produce text in both languages – usually when late changes are made to Bills or amendments before publication. These are then checked from a linguistic standpoint by the legislative translators. Bilingual drafters will also raise any Welsh terminology issues that occur to them with the legislative translators at any stage in the process.

11.9 Pre-consultation suggested that the fact that policy is first formulated in the English language makes the full co-drafting model difficult if not impossible to employ. Although public consultation is bilingual, responses in Welsh are translated into English, for the benefit of the non-Welsh-speaking officials. The policy instructions are drafted in English, as are the legal instructions. In both cases English is the common working language. In discussions with lawyers and policy officials, English is likely to be the common language once again. The use of Welsh in the pre-drafting stage would either require every internal meeting and document to be bilingual or would require certain Bill projects to be resourced entirely by Welsh speakers. Most of the conceptual work will have taken place in English before it reaches the drafters. If the drafters were to decide to "co-draft", the lead drafter in Welsh would have to translate those concepts into Welsh and do so within the legislative framework of a statute book which is for the most part in English only. Furthermore, many laws made by the National Assembly or the Welsh Government are made in order to be part of a larger legal framework.

Discussion

11.10 In our view the principal objectives of bilingual drafting should be:

(1) fidelity to the intention of the promoters of the Bill;

(2) consistency of meaning between the different language texts of the same provision;

(3) clarity of communication to two audiences;

(4) efficiency in the maintenance of a bilingual legal order; and

(5) achieving effective equality between the two languages;

11.11 However, we also agree with Keith Bush QC who identifies a further objective:

> Our vision of the essence of co-drafting is that it is any technique for drafting in more than one language which seeks to assure to the text in each language sufficient autonomy to protect the natural forms and traditions of that language. The ideal to be achieved is a text in each language which conveys the same meaning as the other but which readers in each language perceive both to be equally natural and familiar use of language. The desirability of striving towards this aim is not based on sentiment alone. Anyone familiar with the way in

> which official documents were, and often still are, translated from English into Welsh will understand that the product, rigidly yoked to the original, may be so unnatural in its mode of expression that it becomes unintelligible to the ordinary reader.[99]

Consultation question 11-4: Do consultees agree with our analysis of the objectives of bilingual drafting?

Consultation question 11-5: Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?

Consultation question 11-6: Does the system presently employed by the Welsh Government satisfactorily achieve the objectives of bilingual drafting?

Consultation question 11-7: Would there be any advantage in the Welsh Government's seeking, as a long term objective, to move from its current model to a system of co-drafting?

Jurilinguists and editors

11.12 In Canada, drafters receive the support of jurilinguists, who are specialists in legal language. They keep up to date with the evolution of the language and seek to ensure that both versions of the legislation convey the same meaning. The Welsh Government also employs jurilinguists as part of the Welsh Government's translation service.

Consultation question 11-8: What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?

Special tools

11.13 The Welsh Government's translation service has produced an English-Welsh legislative vocabulary and legislative translation style guide. The OLC also have comprehensive drafting guidance as discussed in chapter 4 above.

Consultation question 11-9: We invite the views of consultees as to whether any other working tools would be of assistance in the production of bilingual legislation in Wales.

[99] K Bush (now QC), "New Approaches to UK Legislative Drafting: The Welsh Perspective" (2004) 25(2) *Statute Law* Review 144 at 147.

CHAPTER 12: THE INTERPRETATION OF BILINGUAL LEGISLATION

Introduction

12.1 A system in which laws are made in two languages which are to be treated for all purposes as of equal standing has created novel challenges for those required to interpret and apply them.[100] In particular, the question arises as to what are the appropriate means of determining the meaning of texts in different languages.

12.2 In this chapter we address the way in which bilingual and multilingual texts are interpreted in international law, in EU law, in Canada and in Hong Kong before considering possible approaches which may be adopted in Wales.

International law

12.3 We consider the approaches taken in international law to the interpretation of treaties in different languages under the Vienna Convention on the Law of Treaties.[101]

The approach of the courts in this jurisdiction to the interpretation of plurilingual treaties

12.4 Although the bilingual legislation which is produced by the National Assembly and the Welsh Government is the first of its kind to be produced in this jurisdiction, our courts have a long experience of interpreting international instruments.[102] Here, they have shown a willingness to refer to authentic foreign language texts. Thus in *Post Office v. Estuary Radio*, a case concerning the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 as implemented by the Territorial Waters Order in Council, 1964, the Court of Appeal considered, obiter, that where there was an ambiguity in the Order in Council it would be permissible to have recourse to the Convention in its various authentic foreign language texts.[103]

12.5 However, subsequent cases reveal a great variety of judicial opinion as to the approach to be adopted. We consider some of these in the consultation paper.

[100] See, for example the Practice Direction on Devolution Issues. Civil Procedure Rules, Practice Direction 3N, para. 12.1 to 12.3. Available here https://www.justice.gov.uk/courts/procedure-rules/civil/rules/devolution_issues (last visited 1 July 2015). Section 44 of the Constitutional Reform Act 2005 provides that if the Supreme Court thinks it expedient in any proceedings, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisers appointed by it.

[101] Vienna, 23 May 1969, 1155 United Nations Treaty Series 331.

[102] See, generally, E Bjorge, "The Vienna Rules on Treaty Interpretation before Domestic Courts" (2015) 131 *Law Quarterly Review* 78; R Gardiner, "Treaty Interpretation in the English Courts since *Fothergill v. Monarch Airlines* (1980)" (1995) 44(3) *International and Comparative Law Quarterly* 620. In doing so, they do not simply apply the canons of construction or the interpretative principles applicable to domestic legislation. See, for example, *R. v. Governor of Ashford Remand Centre ex parte Postlethwaite* [1988] AC 924 per Lord Bridge at [947]; *Assange v. Swedish Prosecution Authority (Nos. 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471 per Lord Phillips at [15].

[103] *Post Office v. Estuary Radio* [1968] 2 QB 740 at [760]. *Obiter* is a latin word for "by the way". Obiter is words or opinion of the Court that are unnecessary for the decision of the case.

The approach of the Court of Justice of the European Union ("CJEU")

12.6 The European Union currently legislates in 23 languages and all language versions of a piece of legislation are equally authentic. The CJEU adopts a much less literal interpretative approach than is customary in the United Kingdom. The CJEU places provisions of Community law in context, interpreting them in light of provisions of Community law as a whole and with regard to their objectives.[104]

12.7 Where the CJEU has found in favour of a particular language version, there tends to be another factor at play. This might be consistency with a wider purpose of the legislation. Alternatively, it might be some point of superiority of one or more texts over others: in one case, clarity, and in another, self-contradiction or ambiguity.[105]

The interpretation of bilingual legislation in Canada

12.8 In Canada, the French and English versions of bilingual legislation at the federal and provincial levels are enacted as law and both are equally authentic.[106]

12.9 Statutory interpretation of bilingual enactments begins with a search for the meaning shared by the two language versions. A critique by the Counsel General of the Canadian Department of Justice of the "shared meaning rule" concludes that a more reliable approach to interpreting bilingual legislation is to apply the accepted canons of statutory interpretation to both versions of a bilingual statute to arrive at a single meaning most harmonious with the purpose and scheme of the Act. [107]

12.10 In the consultation paper, we also consider the approach taken in Hong Kong.

Discussion

12.11 Section 156(1) of the Government of Wales Act 2006 provides that the Welsh and English versions of the text of laws which are enacted or made in both English and Welsh shall have equal standing. In our view, this requires reference to be made to both versions of the text when interpreting bilingual statutes. Any other reading would undermine the official status of Welsh as declared in the

[104] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 at [20].

[105] See Case 9/79 *Wörsdorfer v Raad van Arbeid* [1979] ECR 2717 above where, as we pointed out, the Court did add that that its interpretation was borne out by the purpose of the provision and the principle of equal treatment of the sexes in matters of social security entitlement.

[106] Constitution Act 1867 (UK), s 133; Official Languages Act, R.S.C., Ch. 31, para. 13 (1985). See *AG (Quebec) v. Blaikie et al,* [1979] 2 SCR 1016 at [1022]. See, generally, M Beaupre, *Interpreting Bilingual Legislation* (2nd ed 1986); P Côté, *The Interpretation of Legislation in Canada* (2000); R Sullivan (ed.), *Driedger on the Construction of Statutes* (3rd ed 1994).

[107] P Salembier, "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule" (2003) 35 *Ottawa Law Review* 75.

Welsh Language (Wales) Measure 2011.[108]

12.12 We consider that the starting point must be that the bilingual texts of Welsh legislation are intended to bear a single meaning. We consider that it will be necessary to develop a body of rules concerning the approach to the identification of that meaning.

12.13 It seems to us that the principal objectives of interpretation of bilingual legislation in English and Welsh should be to ascertain and to give effect to the intention of the legislature and to maintain the equal status of the two languages. However, these two objectives will not always be achievable to the full extent and there will sometimes be a tension between them.[109]

Consultation question 12-1: We welcome the views of consultees on the appropriate approach to the interpretation of bilingual legislation in English and Welsh.

Consultation question 12-2: Do consultees agree that all interpretation of the law enacted bilingually by the National Assembly or made bilingually by the Welsh Government will need to take account of both language versions?

Consultation question 12-3: What approach should be adopted to the interpretation of bilingual legislation where different language texts bear different meanings?

Consultation question 12-4: In particular, should courts in England and Wales apply a shared meaning rule? If so, in what circumstances should it apply?

Consultation 12-5: In interpreting a bilingual text should account be taken of its drafting and legislative history? If so, how is that to be ascertained? In particular, should greater weight be given to the language in which the initial draft was prepared?

Consultation 12-6: Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?

Consultation question 12-7: Consultees are invited to express their views on the future needs for legal education and training to take account of bilingual legislation and how these may best be met.

[108] C F Huws, "The day the Supreme Court was unable to interpret statutes" (2013) 34(3) *Statute Law Review* 221 at 222; C F Huws, "The law of England and Wales: translation in transition" (2015) 22(1) *International Journal of Speech Language and the Law* (forthcoming).

[109] See, in the context of EU law, T Schilling, "Beyond Multilingualism: On Different Approaches to the Handling of Divergent Language Versions of a Community Law" (2010) 16 *European Law Journal* 47 at 51 et seq.; L Solan, "The Interpretation of Multilingual Statutes by the European Court of Justice" (2009) 34 *Brook Journal of International Law* 278 at 279 et seq.

Consultation question 12-8: In particular, should the study of bilingual legislation and its interpretation form a compulsory part of university law degree courses in Wales? If so, for whom should it be compulsory?

Consultation question 12-9: Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?

HOUSE OF LORDS

SELECT COMMITTEE ON THE CONSTITUTION

The Union and Devolution

CALL FOR EVIDENCE

The House of Lords Constitution Committee, chaired by Lord Lang of Monkton, is conducting an inquiry on devolution in the United Kingdom.

The Committee invites interested organisations and individuals to submit written evidence to the inquiry.

The deadline for written evidence submissions is 5pm on Friday 2 October. Public hearings will be held from October 2015. The Committee will report to the House in 2016.

Background

Devolution has radically changed the way in which the United Kingdom is governed. It is now, in effect, a permanent feature of our constitution and marks the latest evolution of the structure of our country.

The UK is a 'union state' formed through the incorporation of Wales in 1536 and the Acts of Union between England and Scotland in 1707 and between Great Britain and Ireland in 1800. Since 1998 the process of devolving power from the centre to the regions and constituent nations of the UK has progressed apace. From the 1998 devolution Acts and the Good Friday Agreement to the current Scotland Bill and proposals for further devolution to Wales, extensive powers have been, and are still being, devolved to Scotland, Wales and Northern Ireland. While devolution has not been implemented wholesale in England, London has a directly-elected mayor and Assembly, and English local authorities are being offered considerable powers if they combine and adopt an elected-mayor model.

We are concerned that this devolution of powers has been the result of ad hoc, piecemeal change, rather than the result of a considered and coherent process that takes into account the needs of the Union as a whole. We warned in our March 2015 report, *Proposals for the devolution of further powers to Scotland*, that the lack of a coherent vision for the Union undermined the notion of an 'enduring' devolution settlement.[1] With Scotland voting in the 2014 referendum to remain part of the UK and little support elsewhere for ending the

[1] See Constitution Committee, *Proposals for the devolution of further powers to Scotland* (10th Report, Session 2014-15, HL Paper 145), paras 22-24.

Union,[2] now is the time to consider how to establish a more stable settlement that will preserve and strengthen the Union as a whole.

Our inquiry will focus on two key themes. First, we are seeking to identify and articulate the principles that should underlie the existence and governance of the Union and the exercise of power, both centrally and by the devolved nations. Secondly, we are considering what practical steps could be taken to stabilise and strengthen the Union in line with those underlying principles.

The Committee welcomes written submissions on any aspect of this topic, and particularly on the following questions:

Principles underlying the Union and devolution

The Union

1. What are the essential characteristics of a nation state? Are these different for a state in which power is devolved and, if so, how?

2. What are the key principles underlying the Union between England, Wales, Scotland and Northern Ireland? Are there principles that are unique to the UK's Union?

Some of the areas from which principles for the Union might be drawn include the economic and social union; the constitution; individual rights and the rule of law; European policy and foreign policy; and security and defence.

Devolution

3. On what principles are the UK's devolution settlements based, or on what principles should they be based? Have principles emerged through the process of devolving power, or as power has been exercised by the devolved nations and regions?

4. Are there applicable examples from other countries with multi-level governance structures?

Principles of devolution might include, for example, subsidiarity (that decisions should be made at the most local level practicable); reciprocity (a duty on all parts of the Union to work for the good of the whole); and representation.

Implementation

5. How might these two sets of principles be embedded in the UK's constitution, or entrenched in the work of governments and legislatures across the UK?

[2] A 2013 Ipsos Mori poll found that 65% of Northern Irish voters supported Northern Ireland remaining in the UK. A 2015 survey by ICM research found that, given a range of options, 6% of respondents in Wales supported independence, compared with 40% supporting further powers for the National Assembly.

Practical steps to strengthen the Union

6. What is the effect on the Union of the asymmetry of the devolution settlement across the UK? What might be the impact of the further proposed devolution of powers to Scotland, Wales, Northern Ireland and English local government? Is the impact of asymmetry an issue that needs to be addressed? If so, how?

7. What might be the effect of devolving powers over taxation and welfare on the economic and social union within the UK? Are there measures that should be adopted to address the effects of the devolution of tax and welfare powers?

8. What other practical steps, both legislative and non-legislative, can be taken to stabilise or reinforce the Union? How should these be implemented?

9. Is the UK's current constitutional and legal structure able to provide a stable foundation for the devolution settlement? What changes might be necessary?

Practical steps might include, for example, mechanisms to encourage legislatures and government to consider the good of the Union as a whole when developing policy; special arrangements for referendums of an existential nature; or measures to ensure thorough representation of all interested parties in policy-making at all levels of government in the UK.

ANNEX: GUIDANCE FOR SUBMISSIONS

Written evidence must be submitted online via the committee's inquiry page www.parliament.uk/union-and-devolution-written-submission-form. Please do not submit PDFs (if you do not have access to Microsoft Word you may submit in another editable electronic form). If you cannot submit evidence online, please contact the committee staff.

The deadline for written evidence is 5pm on Friday 2 October.

Concise submissions are preferred. A submission longer than six pages should include a one-page summary. Paragraphs should be numbered. Submissions should be dated, with a note of the author's name, and of whether the author is making the submission on an individual or a corporate basis. All submissions submitted online will be acknowledged automatically.

Personal contact details supplied to the committee will be removed from submissions before publication but will be retained by the committee staff for specific purposes relating to the committee's work, such as seeking additional information.

Submissions become the property of the committee which will decide whether to accept them as evidence. Evidence may be published by the committee at any stage. It will appear on the committee's website and be deposited in the Parliamentary Archives. Once you have received acknowledgement that your submission has been accepted as evidence you may publicise or publish it yourself, but in doing so you must indicate that it was prepared for the committee. If you publish your evidence separately you should be aware that you will be legally responsible for its content.

You should not comment on individual cases currently before a court of law, or matters in respect of which court proceedings are imminent. If you anticipate such issues arising, you should discuss with the clerk of the committee how this might affect your submission.

Certain individuals and organisations may be invited to appear in person before the committee to give oral evidence. Oral evidence is usually given in public at Westminster and broadcast in audio and online. Persons invited to give oral evidence will be notified separately of the procedure to be followed and the topics likely to be discussed.

Substantive communications to the committee about the inquiry should be addressed through the clerk or the chairman of the committee, whether or not they are intended to constitute formal evidence to the committee.

This is a public call for evidence. Please bring it to the attention of other groups and individuals who may not have received a copy directly.

You may follow the progress of the inquiry at www.parliament.uk/union-and-devolution.

To contact the staff of the committee, please email constitution@parliament.uk.

From: Mike Goodall [mailto:mgoodall@the-tma.org.uk]
Sent: 24 July 2015 10:38
To: Constitutional and Legislative Affairs Committee | Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Subject: Evidence based policy making

Mobile: 07725 262 478

email: mgoodall@the-tma.org.uk

24 July 2015

Dear Mr Williams,

You will be, I'm sure, aware that some aspects of the legislation proposed by the Welsh Government in its outline Public Health Bill have caused a broad range of organisations – including those that represent health and business interests – to publicly voice their concerns about the lack of supporting evidence for the proposals. This has prompted me, as the Regional Manager for Wales of the Tobacco Manufacturers' Association (TMA), to write to you. The TMA is the trade association for tobacco companies that operate in the UK. The TMA's three members are British American Tobacco UK Ltd, Gallaher Ltd (a member of the Japan Tobacco International group) and Imperial Tobacco Ltd.

We recognise that tobacco is a controversial product but we also believe that when dealing with controversial products and issues it is vitally important for all associated legislation to be evidence-based, to be proportionate and to deliver the intended outcomes. That is why we are committed to working openly and transparently with policymakers to facilitate a balanced debate on tobacco manufacture, sale and use.

We offer strategic and operational support for actions that help to tackle important issues such as tobacco-related littering, retail crime, underage smoking and the illicit trade in smuggled and counterfeit tobacco. We are also a respected source of industry statistics, which can inform, and provide the evidence required for, robust policy making. For example:

The Cost of the Illicit tobacco trade in Wales

- 27% of total cigarette consumption in Wales in 2014 was non-UK duty paid.
- 45.2% of total hand rolling tobacco (HRT) consumption in Wales in 2014 was non-UK duty paid.

- The total cost to the Exchequer of non-UK duty paid consumption in Wales in 2014 was approximately £263 million.
- The total cost to shop keepers sales losses associated with non-UK duty paid consumption in Wales in 2014 was in the region of £341 million.
- Non-UK duty paid consumption in Wales cost independent shopkeepers around £150 million in 2014. This equated to an average loss of more than £46,000 per independent shop.

Conversely, legitimate tobacco manufacturers, retailers and supply chain companies continue to make a significant contribution to the socio-economic well-being of Wales.

The Economic Contribution of the Industry in Wales

- The tobacco sector in Wales contributed approximately £440 million to the Exchequer in excise revenue and VAT in 2014.
- Independent research identifies that the tobacco sector supports in the region of 2000 jobs across Wales, in distribution, retail and forward linkages.
- The tobacco sector's forward linkages in Wales are worth in the region of £440 million in Gross Value Added to the UK economy as a whole.
- Tobacco products account for approximately one third of independent retailers' sales revenue. There are 3,219 such shops across Wales.
- The value of tobacco sales in Wales in 2014 was more than £777 million. This amounted to an average sales value more than £106,000 per independent shop.

Clearly, this type of information could help to provide the evidence base for Welsh Government priorities and policies with regards to illicit trade, economic development and enforcement.

To summarise, the recent debate on the Welsh Government's proposals have served to highlight the clear need for evidence-based policymaking. The TMA is ideally placed to help – by providing information, research and data on tobacco-related issues in Wales. We are also keen to identify ways for the industry to do more to combat the trade in illicit tobacco, support hard working independent retailers and to deliver campaigns that help to combat tobacco-related issues such as smuggling, underage smoking and littering.

To these ends, I would welcome the opportunity to meet with you to discuss these matters in more detail and look forward to hearing your views.

Regards,

Mike Goodall
Regional Manager-Wales
Tobacco Manufacturer's Association

Y Fonesig Rosemary Butler AC
Dame Rosemary Butler AM

Llywydd
Presiding Officer

Chair of the Procedure Committee
Rt Hon Charles Walker OBE MP
House of Commons
LONDON
SW1A 0AA

Your ref:
Our ref: PO1080/RB/BA

25 August 2015

Dear Charles

Certification of legislation within devolved competence

Thank you for your invitation to provide evidence to inform your review of the UK Government's proposals for changes to the Standing Orders of the House of Commons to implement English Votes for English Laws.

The proposals require the Speaker to examine each Government Bill and apply two tests - whether the Bill, or parts of it:

- relate exclusively to England and Wales, and
- are within legislative competence of any of the devolved legislatures.

Within the Assembly, I have responsibility for reaching a decision on whether each Assembly Bill, or parts of it, are within legislative competence. The proposals envisage the Speaker performing a similar function. I hope that my evidence will assist your consideration of how the proposals may be applied in the Commons, and provide an understanding of the extent and complexities of the task.

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Proposals to implement English Votes for English Laws – Evidence from Dame Rosemary Butler AM, Presiding Officer of the National Assembly for Wales.

1. Introduction

1.1 The UK Government's proposals to implement English Votes for English Laws (EVEL)[1] require the Speaker to examine each Government Bill and apply two tests. Namely, whether the Bill, or parts of it:

- relate exclusively to England and Wales, and
- fall within devolved competence.

1.2 Essentially this means that the Speaker will decide not only the territorial extent and application of a Bill, or part of a Bill, but also whether it is within the legislative competence of any of the devolved legislatures.

1.3 Within the Assembly, the Presiding Officer is required by law to state, when a Bill is introduced, whether or not in her view it would be within the Assembly's legislative competence. Part 1 of this paper sets out the factual details of the procedure involved in this, including:

- The duties of the Presiding Officer in relation to determining legislative competence of Assembly Bills;
- A detailed description of the procedure followed, legislative tests applied, scale and complexity of the task and resources/expertise required; and
- The potential for dispute or disagreement in relation to determining legislative competence for proposed Bills, and also in relation to Assembly consideration of Legislative Consent Motions.

1.4 Part 2 of the paper highlights some concerns and queries identified in relation to the potential for unintended consequences of the EVEL proposals - in particular the role of the Speaker in determining legislative competence. In order to demonstrate how such issues may arise, a range of illustrative scenarios are included for consideration.

1.5 The procedures, concerns and scenarios presented here, are based upon the **current Welsh settlement**. However, as indicated in Powers for a Purpose,[2] it is likely that the Welsh devolution settlement will change in the coming years, with a move to reserved powers. Powers for a Purpose states that the intention is to bring the Welsh settlement closer to that in Scotland;

[1] Office of the Leader of the House of Commons and Cabinet Office, English Votes for English Laws: revised proposed changes to the Standing Orders of the House of Commons and explanatory memorandum, July 2015

[2] Wales Office, Powers for a purpose: Towards a lasting devolution settlement for Wales, February 2015

however, there are likely to remain significant differences – as there are between the Scottish settlement and that of Northern Ireland.[3]

1.6 Whilst the Assembly's legislative competence is not currently as extensive as that of the Scottish Parliament and Northern Ireland Assembly, the recent Supreme Court judgment on the *Agricultural Sector (Wales) Bill* revealed that the Assembly's competence is capable of extending beyond that of the Scottish Parliament or Northern Ireland Assembly, in some areas. The Supreme Court ruled that the Assembly could legislate in relation to any matters that are not specifically excluded from competence in Wales, provided that the legislation also aims to deal with subjects where competence has been expressly devolved to the Assembly. Therefore, there is currently scope for the Assembly to legislate on matters that are specifically reserved in the Scottish and/or Northern Irish settlements, but which are not specifically excluded from competence in Wales.

Part 1: Procedure followed to enable the Presiding Officer of the National Assembly for Wales to comply with her duties in relation to legislative competence

2. Duties of the Presiding Officer and procedure for determining legislative competence

2.1 The Presiding Officer has two separate duties in relation to the legislative competence of the Assembly: one statutory, and one arising under the Assembly's Standing Orders. It is worth noting that the two duties are slightly different.

2.2 *Statutory duty* - Under section 110(3) of the *Government of Wales Act 2006 (GOWA)*, the Presiding Officer must, on or before introduction of a Bill,

> "*decide whether or not [in his or her view] the provisions of the Bill would be within the Assembly's legislative competence, and state that decision*."

2.3 *Duty under Standing Orders* - Under the Assembly's Standing Order 26.4, the Presiding Officer must make a "statement" on introduction of a Bill. The statement must:

> *"indicate whether or not the provisions of the Bill would be, in his or her opinion, within the legislative competence of the Assembly, and*

[3] Differences between the proposed reservations for Wales in Powers for a Purpose, and the settlements in Scotland and Northern Ireland have been considered as part of a joint project between the Wales Governance Centre and UCL Constitution Unit and are summarised by Alan Trench in a table published as part of his article: A 'reserved powers' model of devolution for Wales: what should be 'reserved'? August 2015

indicate any provisions which, in his or her opinion, would not be within the legislative competence of the Assembly and the reasons for that opinion."

2.4 The duty under the Standing Order, therefore, contains a requirement to give additional details which are not required by GOWA – importantly, to identify any provision that the Presiding Officer considers would not be within legislative competence, and to give the reasons for which she has formed that view. This contrasts with the proposed duty on the Speaker to certify a Bill if certain criteria are met – a duty which expressly excludes the giving of reasons.

3. Tests for legislative competence within the Welsh devolution settlement

3.1 In the Welsh settlement, nine tests are applied to check whether a provision of a Bill is within legislative competence under section 108 of, and Schedule 7 to, the GOWA 2006. These tests are detailed below (slightly simplified).

3.2 ***Subject-matter*** - The provision must relate to a subject in Schedule 7 of GOWA, and must not fall within an exception set out there – unless:

- it is covered by within a carve-out from that exception,
- it is incidental to or consequential on another provision which, itself, relates to a subject, or
- its purpose is to enforce or make effective such another provision).

3.3 The case-law of the Supreme Court has now established that an Assembly Bill will be within competence if it relates to a subject in Schedule 7, notwithstanding the fact that it may also relate to a topic that is neither a subject, nor an exception, in Schedule 7 (see the judgment in the case of *Agricultural Sector (Wales) Bill* [2014]).[4]

3.4 The 2006 Act lays down a specific method for interpreting whether a Bill provision "relates to" a subject or "falls within" an exception. The most important element of the subject-matter test is the purpose of the provision, but the decision-maker must also have regard to its effect "in all the circumstances", as well as to "other things".

3.5 ***Territory (a)*** - The provision must not apply otherwise than in relation to Wales; this means that its practical effect must be in relation to Wales only (unless, again, it is "saved" by one of the caveats set out under test (1) – see the bullet-points in paragraph 3.2 above).

[4] Re Agricultural Sector (Wales) Bill [2013] UKSC 43

3.6 Some questions about the application of this test, and the third test, have been raised, *obiter*, by the Supreme Court in the case of *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015].[5]

3.7 ***Territory (b)*** - The provision must not extend otherwise than to England and Wales (i.e. it must not modify the law outside the legal jurisdiction of England and Wales).

3.8 ***Protected enactments*** - The provision must not repeal or modify the protected enactments set out in Schedule 7 to the GOWA (with some caveats).

3.9 ***Human Rights*** - The provision must not be incompatible with the Convention rights as set out in the Human Rights Act 1998. This is sometimes complex because it requires competing rights to be balanced by the legislature, sometimes because it is not clear whether a particular right applies (e.g. there is considerable case-law on what is a "public authority" for the purposes of the Human Rights Act, and on what constitutes a "possession" for the purposes of the Convention). Further complexity is added by the fact that the Presiding Officer is required to foresee whether a court would regard a Bill provision as Convention-compatible, rather than reaching her own view on this; and case-law shows that the courts apply different standards to different types of legislation. In some cases, they are likely to find any one of a range of legislative solutions compatible, while in others they will consider that the Convention requires the balance to be struck in a particular place.

3.10 It is also noteworthy that the UK Minister in charge of a Parliamentary Bill will, of course, have to make a statement under the Human Rights Act as to the compatibility of the Bill. Thus the Speaker will be required to assess a legal issue that a UK Government Department has already considered. The Speaker would also need to take a view on this matter to assess whether its provisions are within devolved competence or not.

3.11 ***EU law*** - The provision must not be incompatible with EU law. Again, this is often a complex issue and one that is relevant to UK, as well as Assembly, Bills.

3.12 ***Minister of the Crown functions*** - The provision must not modify or remove Minister of the Crown functions that existed before 5 May 2011, unless doing so is incidental or consequential, or the Secretary of State has consented to the change. Nor can a provision impose a new function on a Minister of the Crown unless the Secretary of State consents. In that case, there is no caveat for incidental or consequential functions.

3.13 Numerous Minister of the Crown functions from the period up to 5 May 2011 still subsist in areas of devolved competence. They are not always

[5] Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015]. UKSC 3

obvious, partly due to the manner in which functions have been transferred between UK Ministers and between the UK Government and devolved governments. This is not the case in Scotland, where pre-existing UK Ministerial functions in areas of devolved legislative competence were all transferred to the Scottish Ministers by the Scotland Act 1998.

3.14 ***Welsh Consolidated Fund*** - The provision must not modify a provision of an Act of Parliament which has charged repayments of borrowing by the Welsh Ministers on the Welsh Consolidated Fund (including interest).

3.15 ***Comptroller and Auditor General*** - The provision must not modify functions of the Comptroller & Auditor General, unless the Secretary of State consents.

4. Procedure to comply with duties in relation to legislative competence

Time-table

4.1 The Welsh Government sends a pre-introduction copy of a Bill at least four weeks before the planned date of introduction, in order to enable the Presiding Officer to fulfil her duties under GOWA and Standing Orders.

4.2 Within these four weeks, Assembly lawyers aim to provide the Presiding Officer with advice after around two and a half weeks. This is to allow the Presiding Officer a further week and a half to consider the advice and, if necessary, to take up any issues with the Member in charge of the Bill – for Government legislation a Minister.

Resources and expertise required

4.3 In preparing to make the statement under Standing Order 26.4, the Presiding Officer is principally supported by the Legal Services Directorate of the National Assembly for Wales Commission ("the Commission"). However, other officials, notably clerks and the Private Office, are also involved.

4.4 The formal advice to the Presiding Officer will be completed by one or more Assembly lawyers, depending on the size and complexity of the Bill. For instance, the advice on the Regulation and Inspection of Social Care (Wales) Bill was prepared by three Assembly lawyers, because of the length of the Bill.

4.5 Exceptionally, expert external advice may be sought, on novel and complex issues of Human Rights law or European law.

4.6 In addition, every formal piece of advice on legislative competence to the Presiding Officer is reviewed by the Director of Legal Services. Assembly clerks will then prepare a draft of the statement required by Standing Order 26.4, on the basis of the advice from Assembly lawyers.

4.7 The Presiding Officer will then consider the advice in detail. Normally, if the advice is that any provisions of the Bill are outside competence, or of doubtful competence, the Presiding Officer will wish to discuss in person with the relevant Assembly lawyer and/or the Director of Legal Services.

Scale of the task

4.8 Assembly lawyers consider legislative competence for a Bill section by section (in Westminster terms, clause by clause). For each section, they complete a report in standard template form, designed to show that they have applied all the tests from legislative competence to that section. A copy of the template, with brief annotations, is attached at Annex A.

4.9 As there is one template per section, a 200-section Bill will give rise to a report of some 400 pages. The task is lengthy and detailed but has shown its worth in revealing competence issues that might have been overlooked in a more "broad-brush" approach.

4.10 If Assembly lawyers identify a problem in terms of competence with any section of the Bill, they immediately raise it with Welsh Government lawyers or legislative drafters. It is important that this is done as quickly as possible, as the four-week period for competence scrutiny can be challenging for a long and/or complex Bill.

4.11 If issues were not raised with the Welsh Government until the scrutiny process had been completed, it is likely that a higher number of Bill provisions would be stated to be outside legislative competence, on a precautionary basis, or that the introduction of a number of Bills would be delayed for issues to be resolved.

4.12 When the section-by-section report on the Bill has been completed, and as many issues as possible resolved with Welsh Government lawyers and drafters, Assembly lawyers draw up formal advice to the Presiding Officer on the legislative competence for the Bill. This advice will:

- Set out succinctly Assembly lawyers' grounds for advising the Presiding Officer that particular provisions are within competence;
- Set out, in more detail, the grounds for advising the Presiding Officer that any provisions are of doubtful competence, or are outside competence.

4.13 Formal pieces of advice on competence vary from around 5 pages to around 70 pages, including annexes containing detailed analysis of particular issues.

5. Information considered in preparing the decision/statement on legislative competence

5.1 The following information, as a minimum, is considered in preparation for making the Presiding Officer's statement:

- the pre-introduction draft of the Bill;
- the draft Explanatory Memorandum, prepared by the Member in charge (normally a Minister) relating to the Bill;
- any correspondence to the Presiding Officer from the Member in charge (this is particularly important with regard to whether consents have been sought from UK Secretaries of State for provisions removing, modifying or conferring functions of/on UK Ministers);
- any other legislation amended or repealed by the Bill;
- any relevant case-law on legislative competence (both in the context of the Welsh and Scottish settlements; there has been no relevant case-law on the Northern Irish settlement).

5.2 As set out above, the first test for whether a provision of a Bill is within the Assembly's legislative competence is whether that provision "relates to" one or more subjects set out in Schedule 7 to GOWA. In order to answer this question, section 108(7) GOWA mandates us to look at the "purpose" of the provision. Where there is any doubt as to this purpose, it will be necessary to consider any further documents that can shed light on the purpose. For Government Bills, this will usually include any documents issued by the Welsh Government in the process leading up to the drafting of the Bill, such as:

- previously published consultation drafts of the Bill
- White Papers
- Green Papers
- other consultation documents
- Ministerial statements and press releases.

6. Approach to questions of competence where there is doubt or dispute over the state of the law

6.1 The Welsh devolution settlement is both unique and young. Primary legislative competence on a list of conferred subjects was acquired only in May 2011 (the previous settlement, which lasted for 4 years, being based on piecemeal grants of competence, tailored for specific Bills).

6.2 There is little case-law on how the devolution settlement should operate to guide the Presiding Officer in her decision; only three judgments

in Welsh cases and a handful, relating to the Scottish settlement, that are also relevant to the Welsh situation.

6.3 Moreover, there is frequently uncertainty about the law applying to individual tests for competence: particularly questions of human rights, which often require competing rights to be balanced by the legislator, and as-yet-undecided issues of EU law.

6.4 In view of all these factors, it is not surprising that the Presiding Officer has had to reach a view in a number of cases where there is doubt or dispute as to the state of the law.

6.5 As mentioned above, the Director of Legal Services at the Assembly signs off all formal advice on competence to the Presiding Officer. As also mentioned, exceptionally, expert advice from external lawyers – usually senior Counsel – may first be obtained on novel and complex matters of human rights or EU law.

6.6 Where the arguments on both sides are finely-balanced, the approach of the present Presiding Officer has been to state her decision that the Bill is within competence, so as to allow the Assembly the opportunity to debate the Bill and, if applicable, to scrutinise further the underlying issues relevant to competence (e.g. whether the Bill strikes an acceptable balance between competing human rights).

6.7 In those circumstances, the Presiding Officer also informs the Assembly Committees which will be scrutinising the Bill of the arguments for and against competence that she has considered. Where no Committee will be doing so, as in the case of the *Agricultural Sector (Wales) Bill*, she informs all Members accordingly.[6]

6.8 To date, the Presiding Officer has not expressed the view that any provision of an Assembly Bill was outside competence, other than provisions which required the consent of a Secretary of State and in relation to which that consent had not been received at the date of introduction (for more on this test for competence, see paragraphs 3.12 and 5.1 above). However, as mentioned above, engagement with the Welsh Government before introduction of the Bill provides an opportunity for the Bill to be amended so as to prevent such an outcome.

Part 2: Potential for unintended consequences and queries arising from EVEL proposals

[6] For example: Note to Members from Director of Legal Services in relation to the Recovery of Medical Costs for Asbestos Disease (Wales) Bill, a similar note from the Presiding Officer on Agricultural Sector (Wales) Bill was provided to all Assembly Members and is available on request.

7. Competence decisions in political debate

7.1 From experience within the Assembly, the determination of legislative competence inevitably instigates much political debate. As set out above, the Presiding Officer must make a formal statement to the Assembly on the introduction of each Bill, setting out her view on whether the Bill is within competence.

7.2 There have been instances where Ministers have sought to use the Presiding Officer's statement as a shield later in the Bill process, when Members have raised questions of competence in relation to certain provisions. For example, Ministers have referred to the statement to defend their position in respect of human rights.

7.3 In the Assembly Chamber on 7 July 2015, the Minister for Communities and Tackling Poverty said in relation to the Renting Homes (Wales) Bill:

> "*The Presiding Officer determined the Bill was within the legislative competence of the Assembly and compliance with the [European Convention on Human Rights] is one aspect of competence.*"
>
> "*A very thorough assessment of provisions has been undertaken within the Bill to ensure that they are compatible with human rights and Members will be aware, as I mentioned, that the Presiding Officer has determined that the Bill was within the legislative competence of the Assembly.*"

7.4 The Presiding Officer then wrote to the Minister (and shared the letter with relevant Committees), pointing out that her view on whether a Bill is within competence should not be used by the Welsh Government to constrain detailed scrutiny of the Bill or as justification for a particular position.[7]

7.5 On 13 July 2015, David Melding, the Chair of the Constitutional and Legislative Affairs Committee referred to the Minister's statements:

> "*We had the debate in principle in the Chamber last week, in which the Minister did refer to the human rights issues that are in our report, but in a fairly, sort of, cursory fashion, saying, more or less, that she felt that, as the Presiding Officer had ruled on competence, that was the main factor. It wasn't a terribly reassuring exchange, I thought, but it's on the record now and people will make of it what they will. But, the Presiding Officer, obviously, has felt the need to point out to*

[7] National Assembly for Wales, Constitutional and Legislative Affairs Committee, Letter from the Presiding Officer in relation to the Renting Homes (Wales) Bill

Ministers that the initial ruling on competence in no way prejudices the full scrutiny that the Assembly committees then engage in."[8]

7.6 Legislative competence is also an issue which often arises during Committee proceedings, during which Members have sought to make political use of statements on legislative competence.

8. Potential for disagreement

8.1 An area of particular concern is the potential for perceived conflict between the Speaker and the Presiding Officer – and indeed the Assembly – should there be disagreement as to whether a Bill, clause, schedule or statutory instrument is within legislative competence. There is also the potential for conflict between the opinion of the Speaker and a judgment, or judgments, of the Supreme Court.

8.2 This potential for disagreement was highlighted by Lord Wallace during the recent debate on the proposals in the House of Lords.[9]

8.3 In order to illustrate how such potential disagreements may arise, Annex B provides a range of scenarios outlining some of the practical and legal difficulties which could arise as a consequence of the proposals.

8.4 These scenarios are not fanciful. They are backed by real-life examples which demonstrate the potential difficulties which can arise.

8.5 Possibly the most concerning aspect is how the proposals draw the Speaker into debate about what is devolved across the UK. This has potentially far-reaching consequences and may exacerbate difficulties across what is already an uneven playing field. This point was raised during evidence to the Assembly's Constitutional and Legislative Affairs Committee recently by Professor Thomas Glyn Watkins:

"As far as the devolved legislatures are concerned, where they seek to say that something is devolved, then their decisions are reviewable in the courts, but where the UK Parliament makes a decision that something is not devolved, that's the end of the story because, once it's legislated, that is law and it has the sovereignty of the UK Parliament behind it. That is an extremely un-level playing field, and it's poised to become even less level, because, ***if we move in the UK Parliament to a system of English votes for***

[8] Transcript from Constitutional & Legislative Affairs Committee 13 July 2015, [para 5]

[9] House of Lords Hansard, 21 July 2015 Column 1010

> ***English laws, and a decision as to what is an English matter or what is an England-and-Wales matter is a matter solely to be determined under the standing orders of the House of Commons or by the Speaker, that, in effect, means that, on one side of the boundary, Parliament, protected by parliamentary privilege and sovereignty, decides the issue on a case-by-case basis, whereas, on the other side, it is a matter for judicial determination****. Now that strikes me as being something that can only lead to very serious conflict."*[10] *[emphasis added]*

9. Legislative Consent Motions (LCMs)

9.1 The potential for tension also arises in relation to Legislative Consent Motions (LCM). In circumstances where the UK Government wishes to legislate in relation to a devolved area, there is a constitutional convention[11] to the effect that it would not normally do so without first seeking the consent of the Assembly. This convention should soon be captured in statute via the forthcoming Wales Bill. The procedure by which the Assembly provides or refuses consent is by considering and voting on an LCM in Plenary.

9.2 By providing consent via an LCM, the Assembly in effect agrees that the UK Parliament can legislate in a specific area on its behalf, through a particular Bill. Should the Assembly refuse to consent, the convention requires that the UK Government remove or amend the clauses identified in the LCM and accompanying memorandum from the Bill in question.

9.3 Since 2011, the Assembly has considered 33 LCMs[12]. There have been several occasions where there has been disagreement between the Assembly/Welsh Government and the UK Government as to whether an LCM was necessary, and some where the LCM has been refused. For example:

- *Policing and Social Responsibility Bill* - the Assembly has legislative competence to make law to provide for local authority joint committees to be established for particular purposes, thus an LCM was required relating to the provisions for Police and Crime Panels in Part 1 of the Bill. The Welsh Government, therefore, found itself bringing forward an LCM for a Bill to which it was opposed. The Assembly subsequently rejected the LCM and the UK Government removed the

[10] National Assembly for Wales, Constitutional and Legislative Affairs Committee RoP 22 June 2015 [para129]
[11] This convention is set out in the Memorandum of Understanding and Supplementary Agreements which outlines the principles of co-operation underpinning the relationship between the UK Government and devolved administrations.
[12] LCMs considered by the National Assembly for Wales are listed on the website

impact on devolved matters by removing the proposed Police and Crime Panels from local government structures.

- *Anti-social Behaviour Crime and Policing Bill* - a supplementary LCM was laid by the Welsh Government in relation to the provision to amend the Anti-Social Behaviour Orders exception in Schedule 7 to the GOWA. The view of the UK Government was that this was a consequential amendment which did not require an LCM. The Welsh Government opposed the LCM as it alters the competence of the Assembly by amending Schedule 7. The amendment to widen the definition of anti-social behaviour was defeated in the Lords and was not included in the Bill at Third Reading.
- *Enterprise and Regulatory Reform Bill* – provisions in the Bill abolished the Agricultural Wages Board. The UK Government did not believe this lay within the Assembly's competence and legislative consent was not required. It refused therefore to amend the Bill. The Welsh Government believed it was within competence and subsequently introduced the Agriculture Sector (Wales) Bill. This was passed by the Assembly but was referred to the Supreme Court by the Attorney General. The Supreme Court subsequently found that the Bill was within the competence of the Assembly.
- *Local Audit and Accountability Bill* – The Welsh Government supported an LCM to make audit arrangements for the two Internal Drainage Boards which are partly in England and partly in Wales as a stopgap measure until new arrangements were made. However, the LCM was opposed by other parties within the Assembly and was rejected on the casting vote. The UK Government subsequently agreed to amend the Bill to remove cross-border Boards from the English audit regime.
- *Medical Innovation Bill* (as introduced in the House of Lords on 5 June 2014) – in this case the UK Government view was that the Bill related to modifying the law of tort, a non-devolved matter, and therefore there was no need for an LCM. The Welsh Government disagreed stating that the Bill relates to health, which is devolved. The Welsh Government tabled the LCM, which the Assembly unanimously refused. The Bill was a Private Member's Bill and did not proceed beyond the First Reading in the House of Commons. However, the Bill has been introduced again in the House of Lords; the First Reading was on 8 June 2015.

9.4 The EVEL proposals clearly offer the potential for the Speaker's certifications to be drawn into such disputes over LCMs.

9.5 Clearly, there is also a need for parliamentary procedure to take account of the Assembly's decision on LCMs and to consider how this will interplay with these proposals for England and Wales Bills.

10. Other concerns and queries raised by the proposals

Secondary legislation

10.1 Under the proposals, secondary legislation which is subject to the affirmative procedure - or that is subject to the negative procedure and has been prayed against and scheduled for debate – will also be certified by the Speaker using the same criteria as for Bills. Unlike Bills, statutory instruments are to be considered in their entirety.

10.2 The majority of the executive powers of the Welsh Ministers to make secondary legislation are found under UK Acts – unsurprising as the Assembly has only been passing primary legislation since 2008.

10.3 Thus, there is no direct correlation between the legislative competence of the Assembly and the executive powers of the Welsh Ministers to make secondary legislation. For example, the Welsh Ministers have powers to make regulations relating to speed limits (under the Road Traffic Regulation Act 1984) but this is not within the legislative competence of the Assembly (speed limits are specified as an exception under Schedule 7 to GOWA).

10.4 Accordingly, this will add a further layer of complexity for the Speaker in applying the test for certification to secondary legislation.

Financial implications

10.5 The concern has been raised, during numerous Westminster debates, that the proposals do not take account of the fact that Bills certified as being England-only may have an impact on the block grant for the devolved administrations due to the inherent link within the Barnett formula to spending policy in England (i.e. the Barnett calculation is based on the level of spending in the relevant UK Government department).

10.6 To illustrate this concern, it is possible that a UK Government Bill could impact on funding for the NHS in England (for example by privatising some services, thus reducing the funding provided to the Department of Health). This would likely be certified as an England-only matter, but by the workings of the Barnett formula, would have an impact on the block grants of the devolved administrations.

10.7 The new Standing Orders would not apply to votes on the Estimates, nor to Supply and Appropriation Bills providing statutory authority for the Estimates. However, although it is the case that the block grants are included in the relevant Estimates and Supply and Appropriation Bills, and can be voted on by all Members, the level of detail provided, and the limited opportunity for detailed scrutiny, is unlikely to make clear any impact of England-only legislation on the block grants.

10.8 It is also clear from the revised proposals that, where there are financial implications associated with a Bill, all MPs will be able to vote on the associated money resolution (for spending) or ways and means resolution (for taxation). The Leader of the House has stated that this provides the opportunity for all Members of the House to vote on issues relating to the block grants for the devolved administrations arising from Bills.

10.9 However, at present, money resolutions are not considered by the House, separately from the relevant Bill, as a rule. The Leader of the House has however stated that he is "*open to looking at whether we can find another way to ensure that money resolutions can be debated*",[13] which may provide an opportunity for the financial impact of a Bill on the block grants to be considered, if sufficient detail is provided for scrutiny.

Wales-only Westminster legislation

10.10 The proposals are not clear in their intention towards Wales-only Westminster legislation. Though this is not a matter for the Presiding Officer, the House may wish to satisfy itself that its procedures treat Wales-only Bills equitably with any applying solely to England, Scotland or to Northern Ireland.

11. Conclusion

11.1 This paper illustrates the complexity associated with any comprehensive assessment of Welsh legislative competence. It also highlights how the proposals risk drawing the Speaker into matters of political debate and/or creating the potential for the Speaker and Presiding Officer to be seen as at odds with one another in respect of devolved competence. Given the close and positive relationship that has always existed between the two offices, this would be highly undesirable. A simpler and clearer test for certification would be a territorial test alone.

[13] HoC Deb 15 July 2015: Column 942

Annex A: Bill Section template for determining legislative competence

***Provision*:**	
Does it relate to a Subject? ***(S. 108(7) GOWA plus Agricultural Sector Bill test)***	
Does it fall within an exception? ***(S. 108(7) test)***	
Is it compatible with the Convention Rights?	
Is it compatible with EU law?	
Does it have a prohibited effect on Minister of the Crown functions existing before 5 May 2011? ***(NB Schedule 7 parts 2 and 3)***	
Only <u>applies</u> in relation to Wales?	
Only <u>extends</u> to England and Wales? ***(Consider comments in Asbestos Bill case)***	
Does it modify any protected enactment in a prohibited way? ***(NB Schedule 7 parts 2 and 3)***	
Does it have a prohibited effect on any C & AG function? ***(NB Schedule 7 parts 2 and 3)***	
Does it have a prohibited effect on the Welsh Consolidated Fund? ***(NB Schedule 7 parts 2 and 3)***	
Queen/Duke's Consent ***(Not a competence point as such but can block a Bill from being passed)***	
Wholly within Competence?	**Yes ☐** **No☐**

Annex B: Scenarios highlighting practical and legal difficulties with EVEL proposals

B.1 The following scenarios highlight some of the practical and legal difficulties that could arise under the proposals to implement EVEL. These scenarios are backed up by examples to demonstrate those practical and legal difficulties. The scenarios use the term 'Bill', but the scenarios apply equally to clauses of Bills, Schedules to Bills, and statutory instruments.

B.2 The scenarios focus on the test for legislative competence as it applies in the current devolution settlement for the Assembly. Other legal tests will be relevant in determining whether a Bill, clause, Schedule or statutory instrument is within the legislative competence of the Scottish Parliament and/or the Northern Ireland Assembly.

Scenario 1

B.3 The UK Government introduces a Bill which provides for the listing of care workers who are unsuitable to work with vulnerable adults. The Bill applies to England only and the Speaker decides it is within devolved competence and certifies the Bill. Thus, the House treats it as an England-only Bill.

B.4 The Assembly and Welsh Government agree that the Bill relates to a devolved subject. However, the Bill raises difficult issues under the Human Rights Act 1998, and the Assembly and/or Welsh Government consider that the Bill is not compatible with those rights. Parliament has expressly provided that such a Bill is outside the legislative competence of the Assembly (the same applies to the Scottish and Northern Irish devolution settlements). In this situation, therefore, the Speaker would be forced to reach a view on the compatibility of the Bill with the Human Rights Act, in order to apply the devolution test envisaged by the EVEL proposals. This is an exercise that the Speaker has not previously been called upon to undertake – it has been for Ministers to state, when introducing a Bill, that it is compatible with the 1998 Act. The Speaker could be in a difficult position if he or she was asked to agree either with that Minister or with the view of the devolved authorities. In either case the public airing of the disagreement would make it more likely that the resulting UK Act would be challenged in the courts on human rights grounds by those affected.

B.5 The fact that this is a realistic scenario is illustrated by the number of pieces of UK legislation which have breached human rights, including several in areas devolved to the Assembly:

- The listing of care workers as unsuitable to work with vulnerable adults under the Care Standards Act 2000 was held by the House of Lords to breach human rights.[14]
- Remedial orders were used to remedy human rights breaches in several sections of the Mental Health Act 1983.[15]
- The Court of Appeal held that sections of the Housing Act 1996 breached human rights.[16] New legislation was introduced in order to address those breaches.[17]
- The blanket ban on prisoner voting under section 3 of the Representation of the People Act 1983 is another example, albeit not in the context of an area currently devolved to the Assembly. However, the UK Government have committed to devolving competence relating to Assembly and local government elections, as set out in Powers for a Purpose.[18]

B.6 The same principles would apply if Parliament introduced legislation which breached EU law. Legislation would be outside the legislative competence of the Assembly if it breached EU law.[19]

Scenario 2

B.7 A Bill is introduced to specify the limits of fines for certain smoking-related offences. The Bill applies in England only and the Speaker decides its subject-matter is within devolved legislative competence and so certifies the Bill. The House treats the Bill as England-only.

B.8 The Assembly and Welsh Government agree the Bill relates to a devolved subject, but consider the Bill modifies significant functions vested in a Minister of the Crown prior to 5 May 2011. Parliament has expressly stated that the Assembly does not have legislative competence to modify such functions without Secretary of State consent. Thus, although the Bill may relate to a devolved subject, it is outside Assembly competence. In order for it to be within competence, there would need to be an assumption that the UK Minister would provide consent were it to be a provision in a Bill proposed by the Assembly.

B.9 For example, Part 1 of the Health Act 2006 gives powers to the Secretary of State to set the maximum limit of fines for certain smoking-related offences. These powers were given to the Secretary of State before 5

[14] R (Wright) v Secretary of State for Health [2009] UKHL 3
[15] For example, see the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712)
[16] R (Morris) v Westminster City Council and First Secretary of State [2005] EWCA Civ 1184.
[17] New measures were introduced in Schedule 15 to the Housing and Regeneration Act 2008
[18] Wales Office, Powers for a purpose: Towards a lasting devolution settlement for Wales, February 2015
[19] If required, examples of infringement cases instigated by the European Commission against the UK under Article 258 of the Treaty of the Functioning of the EU can be provided.

May 2011, therefore their subject matter is not within the legislative competence of the Assembly.

Scenario 3

B.10 A Bill is introduced to create a social care wages board in England and Wales. The Bill applies in England and Wales but the Speaker does not consider it to be within devolved legislative competence, and so does not certify the Bill.

B.11 The Assembly raises concerns, on the basis the Bill relates to an area devolved to the Assembly (applying the test set out by the Supreme Court in the Agricultural Sector (Wales) Bill case).[20] An LCM is considered by the Assembly, and subsequently rejected. Thus, the decision of the Speaker is called into question in political debate in the Assembly and any related debate in Westminster as the Bill progresses.

B.12 On the basis that the Welsh Government and Presiding Officer consider this is within competence, a corresponding Welsh Bill is introduced and passed by the Assembly, but is referred to the Supreme Court for a definitive answer on competence. The Supreme Court decides that the Assembly legislation is within competence – thus generating a conflict between the Speaker's opinion and Supreme Court judgment.

B.13 This scenario reflects many of the events that led to the Supreme Court judgment in the Agricultural Sector (Wales) Bill case. [21]

- An amendment to the Enterprise and Regulatory Reform Bill was tabled in the House of Lords on 19 December 2012. The amendment sought to abolish the Agricultural Wages Board for England and Wales.
- The UK Government did not believe that the subject of the amendment was devolved.
- The Welsh Government believed that the subject of the amendment was devolved, and it tabled an LCM before the Assembly.
- The Assembly rejected the LCM, but the Enterprise and Regulatory Reform Bill went ahead and abolished the Agricultural Wages Board for both England and Wales.
- The Assembly then decided to make its own primary legislation, the Agricultural Sector (Wales) Bill, to reinstate a regime for the regulation of agricultural wages in Wales (by establishing an Agricultural Advisory Panel for Wales).
- The UK Government believed that the Agricultural Sector (Wales) Bill was outside the legislative competence of the Assembly, and referred it to the Supreme Court.

[20] Agricultural Sector (Wales) Bill [2014] UKSC 43
[21] Agricultural Sector (Wales) Bill [2014] UKSC 43

- The Supreme Court unanimously decided that the Agricultural Sector (Wales) Bill was within the legislative competence of the Assembly.

B.14 Under the current proposals the Speaker would be required to consider the amendment to the Enterprise and Regulatory Reform Bill to determine whether it should be certified.

B.15 Had the Speaker been of the opinion that the amendment was not within the legislative competence of the Assembly, the Speaker and the Supreme Court would have reached different conclusions on whether the matter was within the legislative competence of the Assembly.

B.16 A similar issue arose under the Medical Innovation Bill (considered further in Scenarios 4 and 4A). The UK Government considered that the Bill was about the law of tort and was not within the legislative competence of the Assembly. The Assembly and the Welsh Government (applying the Supreme Court test for legislative competence) considered that the Bill related to health and was within the legislative competence of the Assembly. An LCM was considered by the Assembly. The Assembly rejected the LCM by 54 votes to 0.

Scenario 4

B.17 The UK Government introduce a Bill seeking to encourage innovative medical treatment by doctors. The Bill applies in England and Wales only, but the Speaker does not consider the Bill is within devolved legislative competence, and so does not certify the Bill.

B.18 Similar issues arise as outlined in Scenario 3, leading to an LCM being rejected by the Assembly. The Assembly and Welsh Government make representations to the UK Government that the Bill relates to a devolved subject, setting out the Supreme Court test. The UK Government reviews its decision, anticipating a reference to the Supreme Court were the Assembly to decide to legislate on it and accepts that the Bill is within the legislative competence of the Assembly.

B.19 This means that the Speaker's opinion is now in disagreement with the UK Government's, and the Bill should have been certified. The Bill is subsequently amended to apply in England only. The Speaker considers the amendment and decides the Bill should be certified. It should be noted that inter-governmental discussions proceed in parallel to the Bill's passage through Parliament and such amendments can of course be made at the final stages. The reverse scenario may also arise, where a Bill may be certified at the outset and later as a result of amendments, it is de-certified.

B

Scenario 4A

B.21 As Scenario 4, but the Speaker initially decides that the Bill is within devolved legislative competence and certifies the Bill. The Assembly and Welsh Government agree with the Speaker that the Bill is within the legislative competence of the Assembly (applying the Supreme Court test).

B.22 The UK Government considers the Bill relates to the law of tort and not to a devolved subject, and thus the Speaker and UK Government are in disagreement.

B.23 These scenarios set out the real differences of opinion that arose during the passage of the Medical Innovation Bill. While the Bill would not have been within the scope of Standing Order 83J(1), the UK Government's legal position was clear – the Bill was about the law of tort, and did not relate to a devolved subject.

The Assembly's legislative competence is not as extensive as that of the Scottish Parliament and Northern Ireland Assembly. Therefore I recognise that an assessment of the Assembly's legislative competence will rarely be the starting point for the Speaker. However, the recent Supreme Court judgment on the Agricultural Sector (Wales) Bill revealed that the Assembly's competence is capable of extending beyond that of the Scottish Parliament or Northern Ireland Assembly, in some areas. This is due to the difference between our conferred powers model and the reserved powers model used in Scotland and Northern Ireland.

The UK Government is committed to moving the Welsh devolution settlement to a reserved powers model via the forthcoming Wales Bill as announced in the Queen's Speech in May 2015. The intention is to bring the Welsh settlement closer to that in Scotland; however, there are likely to remain significant differences – as there are between the Scottish settlement and that of Northern Ireland. I hope that this change of model will make the determination of competence simpler and clearer. However, as I highlighted in my recent evidence to the Assembly's Constitutional and Legislative Affairs Committee, this is far from guaranteed[1]. I also expect it not to roll back the breadth of the Assembly's legislative powers as interpreted by the Supreme Court.

Part 1 of the attached paper provides factual information on the procedures and processes involved in conducting my duties in relation to determining legislative competence. It sets out the legislative tests required, but also an indication of the scale and complexity of the process, as well as the resources and expertise required.

Part 2 brings to your attention certain scenarios which may bring the Speaker's decisions into political contention, based on our experience at the National Assembly for Wales. I consider that the benefits of including devolved competence within the certification process, rather than using territorial application alone, are not clear and are likely to be outweighed by the significant complexities and constitutional uncertainties created.

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[1] National Assembly for Wales, Constitutional and Legislative Affairs Committee, Evidence from the Presiding Officer in relation to UK Government's Proposals for Further Devolution to Wales, June 2015

Llywydd
Presiding Officer

In respect of the process for Assembly consent to UK Bills (Legislative Consent Motions), once this has attained a statutory footing as expected in the forthcoming Wales Bill, I hope that this will be reflected in your Standing Orders.

I am also writing to the Speaker separately to bring these matters to his attention, and have shared the attached evidence paper with him.

My officials and I would be pleased to discuss these matters further with you.

Yours sincerely

Rosemary Butler

Dame Rosemary Butler AM
Presiding Officer

Enc

cc: Speaker of the House of Commons, Rt Hon John Bercow MP
First Minister of Wales, Rt Hon Carwyn Jones AM
Secretary of State for Wales, Rt Hon Stephen Crabb MP
Chair of the Welsh Affairs Committee, David TC Davies MP
Chair of the Constitutional and Legislative Affairs Committee, David Melding AM

Y Fonesig Rosemary Butler AC
Dame Rosemary Butler AM

Llywydd
Presiding Officer

Chair of the Public Administration and Constitutional Affairs Committee
Rt Hon Bernard Jenkin MP
House of Commons
LONDON
SW1A 0AA

Your ref:
Our ref: PO/RB/BA

7 September 2015

Dear Bernard

The Constitutional implications of the UK Government's proposal to establish a system of 'English Votes for English Laws'

As part of its review of the UK Government's proposals to implement English Votes for English Laws, the Chair of the Commons Procedure Committee has requested details of procedures followed in the National Assembly for Wales to determine whether legislation is within competence. I have submitted the attached paper to that Committee. I believe that the same evidence will be of interest to your Committee in helping to inform its review of the broader constitutional implications of the proposals.

The proposals for implementing English Votes for English Laws give rise, in my view, to a number of concerns relating to the role of the Speaker and the relationship between the National Assembly and House of Commons. The paper brings to your attention certain scenarios which, based on the experience of the Assembly, may bring the Speaker's decisions into political contention and raise important issues for the House. The benefits of basing certification on devolved competence, rather than solely on territorial application, are not clear to me and seem likely to be outweighed by the significant complexities and constitutional uncertainties created. By way of illustration:

- The proposals create considerable **potential for disagreement** between the Speaker and the Presiding Officer - and indeed the Assembly - as well as the potential for conflict between the opinion of the Speaker and judgments of the Supreme Court;

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Proposals to implement English Votes for English Laws – Evidence from Dame Rosemary Butler AM, Presiding Officer of the National Assembly for Wales.

1. Introduction

1.1 The UK Government's proposals to implement English Votes for English Laws (EVEL)[1] require the Speaker to examine each Government Bill and apply two tests. Namely, whether the Bill, or parts of it:

- relate exclusively to England and Wales, and
- fall within devolved competence.

1.2 Essentially this means that the Speaker will decide not only the territorial extent and application of a Bill, or part of a Bill, but also whether it is within the legislative competence of any of the devolved legislatures.

1.3 Within the Assembly, the Presiding Officer is required by law to state, when a Bill is introduced, whether or not in her view it would be within the Assembly's legislative competence. Part 1 of this paper sets out the factual details of the procedure involved in this, including:

- The duties of the Presiding Officer in relation to determining legislative competence of Assembly Bills;
- A detailed description of the procedure followed, legislative tests applied, scale and complexity of the task and resources/expertise required; and
- The potential for dispute or disagreement in relation to determining legislative competence for proposed Bills, and also in relation to Assembly consideration of Legislative Consent Motions.

1.4 Part 2 of the paper highlights some concerns and queries identified in relation to the potential for unintended consequences of the EVEL proposals - in particular the role of the Speaker in determining legislative competence. In order to demonstrate how such issues may arise, a range of illustrative scenarios are included for consideration.

1.5 The procedures, concerns and scenarios presented here, are based upon the **current Welsh settlement**. However, as indicated in Powers for a Purpose,[2] it is likely that the Welsh devolution settlement will change in the coming years, with a move to reserved powers. Powers for a Purpose states that the intention is to bring the Welsh settlement closer to that in Scotland;

[1] Office of the Leader of the House of Commons and Cabinet Office, English Votes for English Laws: revised proposed changes to the Standing Orders of the House of Commons and explanatory memorandum, July 2015

[2] Wales Office, Powers for a purpose: Towards a lasting devolution settlement for Wales, February 2015

however, there are likely to remain significant differences – as there are between the Scottish settlement and that of Northern Ireland.[3]

1.6 Whilst the Assembly's legislative competence is not currently as extensive as that of the Scottish Parliament and Northern Ireland Assembly, the recent Supreme Court judgment on the *Agricultural Sector (Wales) Bill* revealed that the Assembly's competence is capable of extending beyond that of the Scottish Parliament or Northern Ireland Assembly, in some areas. The Supreme Court ruled that the Assembly could legislate in relation to any matters that are not specifically excluded from competence in Wales, provided that the legislation also aims to deal with subjects where competence has been expressly devolved to the Assembly. Therefore, there is currently scope for the Assembly to legislate on matters that are specifically reserved in the Scottish and/or Northern Irish settlements, but which are not specifically excluded from competence in Wales.

Part 1: Procedure followed to enable the Presiding Officer of the National Assembly for Wales to comply with her duties in relation to legislative competence

2. Duties of the Presiding Officer and procedure for determining legislative competence

2.1 The Presiding Officer has two separate duties in relation to the legislative competence of the Assembly: one statutory, and one arising under the Assembly's Standing Orders. It is worth noting that the two duties are slightly different.

2.2 *Statutory duty* - Under section 110(3) of the *Government of Wales Act 2006 (GOWA)*, the Presiding Officer must, on or before introduction of a Bill,

> "*decide whether or not [in his or her view] the provisions of the Bill would be within the Assembly's legislative competence, and state that decision*."

2.3 *Duty under Standing Orders* - Under the Assembly's Standing Order 26.4, the Presiding Officer must make a "statement" on introduction of a Bill. The statement must:

> *"indicate whether or not the provisions of the Bill would be, in his or her opinion, within the legislative competence of the Assembly, and*

[3] Differences between the proposed reservations for Wales in Powers for a Purpose, and the settlements in Scotland and Northern Ireland have been considered as part of a joint project between the Wales Governance Centre and UCL Constitution Unit and are summarised by Alan Trench in a table published as part of his article: A 'reserved powers' model of devolution for Wales: what should be 'reserved'? August 2015

indicate any provisions which, in his or her opinion, would not be within the legislative competence of the Assembly and the reasons for that opinion."

2.4 The duty under the Standing Order, therefore, contains a requirement to give additional details which are not required by GOWA – importantly, to identify any provision that the Presiding Officer considers would not be within legislative competence, and to give the reasons for which she has formed that view. This contrasts with the proposed duty on the Speaker to certify a Bill if certain criteria are met – a duty which expressly excludes the giving of reasons.

3. Tests for legislative competence within the Welsh devolution settlement

3.1 In the Welsh settlement, nine tests are applied to check whether a provision of a Bill is within legislative competence under section 108 of, and Schedule 7 to, the GOWA 2006. These tests are detailed below (slightly simplified).

3.2 ***Subject-matter*** - The provision must relate to a subject in Schedule 7 of GOWA, and must not fall within an exception set out there – unless:

- it is covered by within a carve-out from that exception,
- it is incidental to or consequential on another provision which, itself, relates to a subject, or
- its purpose is to enforce or make effective such another provision).

3.3 The case-law of the Supreme Court has now established that an Assembly Bill will be within competence if it relates to a subject in Schedule 7, notwithstanding the fact that it may also relate to a topic that is neither a subject, nor an exception, in Schedule 7 (see the judgment in the case of *Agricultural Sector (Wales) Bill* [2014]).[4]

3.4 The 2006 Act lays down a specific method for interpreting whether a Bill provision "relates to" a subject or "falls within" an exception. The most important element of the subject-matter test is the purpose of the provision, but the decision-maker must also have regard to its effect "in all the circumstances", as well as to "other things".

3.5 ***Territory (a)*** - The provision must not apply otherwise than in relation to Wales; this means that its practical effect must be in relation to Wales only (unless, again, it is "saved" by one of the caveats set out under test (1) – see the bullet-points in paragraph 3.2 above).

[4] Re Agricultural Sector (Wales) Bill [2013] UKSC 43

3.6 Some questions about the application of this test, and the third test, have been raised, *obiter*, by the Supreme Court in the case of *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015].[5]

3.7 ***Territory (b)*** - The provision must not extend otherwise than to England and Wales (i.e. it must not modify the law outside the legal jurisdiction of England and Wales).

3.8 ***Protected enactments*** - The provision must not repeal or modify the protected enactments set out in Schedule 7 to the GOWA (with some caveats).

3.9 ***Human Rights*** - The provision must not be incompatible with the Convention rights as set out in the Human Rights Act 1998. This is sometimes complex because it requires competing rights to be balanced by the legislature, sometimes because it is not clear whether a particular right applies (e.g. there is considerable case-law on what is a "public authority" for the purposes of the Human Rights Act, and on what constitutes a "possession" for the purposes of the Convention). Further complexity is added by the fact that the Presiding Officer is required to foresee whether a court would regard a Bill provision as Convention-compatible, rather than reaching her own view on this; and case-law shows that the courts apply different standards to different types of legislation. In some cases, they are likely to find any one of a range of legislative solutions compatible, while in others they will consider that the Convention requires the balance to be struck in a particular place.

3.10 It is also noteworthy that the UK Minister in charge of a Parliamentary Bill will, of course, have to make a statement under the Human Rights Act as to the compatibility of the Bill. Thus the Speaker will be required to assess a legal issue that a UK Government Department has already considered. The Speaker would also need to take a view on this matter to assess whether its provisions are within devolved competence or not.

3.11 ***EU law*** - The provision must not be incompatible with EU law. Again, this is often a complex issue and one that is relevant to UK, as well as Assembly, Bills.

3.12 ***Minister of the Crown functions*** - The provision must not modify or remove Minister of the Crown functions that existed before 5 May 2011, unless doing so is incidental or consequential, or the Secretary of State has consented to the change. Nor can a provision impose a new function on a Minister of the Crown unless the Secretary of State consents. In that case, there is no caveat for incidental or consequential functions.

3.13 Numerous Minister of the Crown functions from the period up to 5 May 2011 still subsist in areas of devolved competence. They are not always

[5] Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015]. UKSC 3

obvious, partly due to the manner in which functions have been transferred between UK Ministers and between the UK Government and devolved governments. This is not the case in Scotland, where pre-existing UK Ministerial functions in areas of devolved legislative competence were all transferred to the Scottish Ministers by the Scotland Act 1998.

3.14 ***Welsh Consolidated Fund*** - The provision must not modify a provision of an Act of Parliament which has charged repayments of borrowing by the Welsh Ministers on the Welsh Consolidated Fund (including interest).

3.15 ***Comptroller and Auditor General*** - The provision must not modify functions of the Comptroller & Auditor General, unless the Secretary of State consents.

4. Procedure to comply with duties in relation to legislative competence

Time-table

4.1 The Welsh Government sends a pre-introduction copy of a Bill at least four weeks before the planned date of introduction, in order to enable the Presiding Officer to fulfil her duties under GOWA and Standing Orders.

4.2 Within these four weeks, Assembly lawyers aim to provide the Presiding Officer with advice after around two and a half weeks. This is to allow the Presiding Officer a further week and a half to consider the advice and, if necessary, to take up any issues with the Member in charge of the Bill – for Government legislation a Minister.

Resources and expertise required

4.3 In preparing to make the statement under Standing Order 26.4, the Presiding Officer is principally supported by the Legal Services Directorate of the National Assembly for Wales Commission ("the Commission"). However, other officials, notably clerks and the Private Office, are also involved.

4.4 The formal advice to the Presiding Officer will be completed by one or more Assembly lawyers, depending on the size and complexity of the Bill. For instance, the advice on the Regulation and Inspection of Social Care (Wales) Bill was prepared by three Assembly lawyers, because of the length of the Bill.

4.5 Exceptionally, expert external advice may be sought, on novel and complex issues of Human Rights law or European law.

4.6 In addition, every formal piece of advice on legislative competence to the Presiding Officer is reviewed by the Director of Legal Services. Assembly clerks will then prepare a draft of the statement required by Standing Order 26.4, on the basis of the advice from Assembly lawyers.

4.7 The Presiding Officer will then consider the advice in detail. Normally, if the advice is that any provisions of the Bill are outside competence, or of doubtful competence, the Presiding Officer will wish to discuss in person with the relevant Assembly lawyer and/or the Director of Legal Services.

Scale of the task

4.8 Assembly lawyers consider legislative competence for a Bill section by section (in Westminster terms, clause by clause). For each section, they complete a report in standard template form, designed to show that they have applied all the tests from legislative competence to that section. A copy of the template, with brief annotations, is attached at Annex A.

4.9 As there is one template per section, a 200-section Bill will give rise to a report of some 400 pages. The task is lengthy and detailed but has shown its worth in revealing competence issues that might have been overlooked in a more "broad-brush" approach.

4.10 If Assembly lawyers identify a problem in terms of competence with any section of the Bill, they immediately raise it with Welsh Government lawyers or legislative drafters. It is important that this is done as quickly as possible, as the four-week period for competence scrutiny can be challenging for a long and/or complex Bill.

4.11 If issues were not raised with the Welsh Government until the scrutiny process had been completed, it is likely that a higher number of Bill provisions would be stated to be outside legislative competence, on a precautionary basis, or that the introduction of a number of Bills would be delayed for issues to be resolved.

4.12 When the section-by-section report on the Bill has been completed, and as many issues as possible resolved with Welsh Government lawyers and drafters, Assembly lawyers draw up formal advice to the Presiding Officer on the legislative competence for the Bill. This advice will:

- Set out succinctly Assembly lawyers' grounds for advising the Presiding Officer that particular provisions are within competence;
- Set out, in more detail, the grounds for advising the Presiding Officer that any provisions are of doubtful competence, or are outside competence.

4.13 Formal pieces of advice on competence vary from around 5 pages to around 70 pages, including annexes containing detailed analysis of particular issues.

5. Information considered in preparing the decision/statement on legislative competence

5.1 The following information, as a minimum, is considered in preparation for making the Presiding Officer's statement:

- the pre-introduction draft of the Bill;
- the draft Explanatory Memorandum, prepared by the Member in charge (normally a Minister) relating to the Bill;
- any correspondence to the Presiding Officer from the Member in charge (this is particularly important with regard to whether consents have been sought from UK Secretaries of State for provisions removing, modifying or conferring functions of/on UK Ministers);
- any other legislation amended or repealed by the Bill;
- any relevant case-law on legislative competence (both in the context of the Welsh and Scottish settlements; there has been no relevant case-law on the Northern Irish settlement).

5.2 As set out above, the first test for whether a provision of a Bill is within the Assembly's legislative competence is whether that provision "relates to" one or more subjects set out in Schedule 7 to GOWA. In order to answer this question, section 108(7) GOWA mandates us to look at the "purpose" of the provision. Where there is any doubt as to this purpose, it will be necessary to consider any further documents that can shed light on the purpose. For Government Bills, this will usually include any documents issued by the Welsh Government in the process leading up to the drafting of the Bill, such as:

- previously published consultation drafts of the Bill
- White Papers
- Green Papers
- other consultation documents
- Ministerial statements and press releases.

6. Approach to questions of competence where there is doubt or dispute over the state of the law

6.1 The Welsh devolution settlement is both unique and young. Primary legislative competence on a list of conferred subjects was acquired only in May 2011 (the previous settlement, which lasted for 4 years, being based on piecemeal grants of competence, tailored for specific Bills).

6.2 There is little case-law on how the devolution settlement should operate to guide the Presiding Officer in her decision; only three judgments

in Welsh cases and a handful, relating to the Scottish settlement, that are also relevant to the Welsh situation.

6.3 Moreover, there is frequently uncertainty about the law applying to individual tests for competence: particularly questions of human rights, which often require competing rights to be balanced by the legislator, and as-yet-undecided issues of EU law.

6.4 In view of all these factors, it is not surprising that the Presiding Officer has had to reach a view in a number of cases where there is doubt or dispute as to the state of the law.

6.5 As mentioned above, the Director of Legal Services at the Assembly signs off all formal advice on competence to the Presiding Officer. As also mentioned, exceptionally, expert advice from external lawyers – usually senior Counsel – may first be obtained on novel and complex matters of human rights or EU law.

6.6 Where the arguments on both sides are finely-balanced, the approach of the present Presiding Officer has been to state her decision that the Bill is within competence, so as to allow the Assembly the opportunity to debate the Bill and, if applicable, to scrutinise further the underlying issues relevant to competence (e.g. whether the Bill strikes an acceptable balance between competing human rights).

6.7 In those circumstances, the Presiding Officer also informs the Assembly Committees which will be scrutinising the Bill of the arguments for and against competence that she has considered. Where no Committee will be doing so, as in the case of the *Agricultural Sector (Wales) Bill*, she informs all Members accordingly.[6]

6.8 To date, the Presiding Officer has not expressed the view that any provision of an Assembly Bill was outside competence, other than provisions which required the consent of a Secretary of State and in relation to which that consent had not been received at the date of introduction (for more on this test for competence, see paragraphs 3.12 and 5.1 above). However, as mentioned above, engagement with the Welsh Government before introduction of the Bill provides an opportunity for the Bill to be amended so as to prevent such an outcome.

Part 2: Potential for unintended consequences and queries arising from EVEL proposals

[6] For example: Note to Members from Director of Legal Services in relation to the Recovery of Medical Costs for Asbestos Disease (Wales) Bill, a similar note from the Presiding Officer on Agricultural Sector (Wales) Bill was provided to all Assembly Members and is available on request.

7. Competence decisions in political debate

7.1 From experience within the Assembly, the determination of legislative competence inevitably instigates much political debate. As set out above, the Presiding Officer must make a formal statement to the Assembly on the introduction of each Bill, setting out her view on whether the Bill is within competence.

7.2 There have been instances where Ministers have sought to use the Presiding Officer's statement as a shield later in the Bill process, when Members have raised questions of competence in relation to certain provisions. For example, Ministers have referred to the statement to defend their position in respect of human rights.

7.3 In the Assembly Chamber on 7 July 2015, the Minister for Communities and Tackling Poverty said in relation to the Renting Homes (Wales) Bill:

> "*The Presiding Officer determined the Bill was within the legislative competence of the Assembly and compliance with the [European Convention on Human Rights] is one aspect of competence.*"
>
> "*A very thorough assessment of provisions has been undertaken within the Bill to ensure that they are compatible with human rights and Members will be aware, as I mentioned, that the Presiding Officer has determined that the Bill was within the legislative competence of the Assembly.*"

7.4 The Presiding Officer then wrote to the Minister (and shared the letter with relevant Committees), pointing out that her view on whether a Bill is within competence should not be used by the Welsh Government to constrain detailed scrutiny of the Bill or as justification for a particular position.[7]

7.5 On 13 July 2015, David Melding, the Chair of the Constitutional and Legislative Affairs Committee referred to the Minister's statements:

> "*We had the debate in principle in the Chamber last week, in which the Minister did refer to the human rights issues that are in our report, but in a fairly, sort of, cursory fashion, saying, more or less, that she felt that, as the Presiding Officer had ruled on competence, that was the main factor. It wasn't a terribly reassuring exchange, I thought, but it's on the record now and people will make of it what they will. But, the Presiding Officer, obviously, has felt the need to point out to*

[7] National Assembly for Wales, Constitutional and Legislative Affairs Committee, Letter from the Presiding Officer in relation to the Renting Homes (Wales) Bill

Ministers that the initial ruling on competence in no way prejudices the full scrutiny that the Assembly committees then engage in."[8]

7.6 Legislative competence is also an issue which often arises during Committee proceedings, during which Members have sought to make political use of statements on legislative competence.

8. Potential for disagreement

8.1 An area of particular concern is the potential for perceived conflict between the Speaker and the Presiding Officer – and indeed the Assembly – should there be disagreement as to whether a Bill, clause, schedule or statutory instrument is within legislative competence. There is also the potential for conflict between the opinion of the Speaker and a judgment, or judgments, of the Supreme Court.

8.2 This potential for disagreement was highlighted by Lord Wallace during the recent debate on the proposals in the House of Lords.[9]

8.3 In order to illustrate how such potential disagreements may arise, Annex B provides a range of scenarios outlining some of the practical and legal difficulties which could arise as a consequence of the proposals.

8.4 These scenarios are not fanciful. They are backed by real-life examples which demonstrate the potential difficulties which can arise.

8.5 Possibly the most concerning aspect is how the proposals draw the Speaker into debate about what is devolved across the UK. This has potentially far-reaching consequences and may exacerbate difficulties across what is already an uneven playing field. This point was raised during evidence to the Assembly's Constitutional and Legislative Affairs Committee recently by Professor Thomas Glyn Watkins:

"As far as the devolved legislatures are concerned, where they seek to say that something is devolved, then their decisions are reviewable in the courts, but where the UK Parliament makes a decision that something is not devolved, that's the end of the story because, once it's legislated, that is law and it has the sovereignty of the UK Parliament behind it. That is an extremely un-level playing field, and it's poised to become even less level, because, ***if we move in the UK Parliament to a system of English votes for***

[8] Transcript from Constitutional & Legislative Affairs Committee 13 July 2015, [para 5]

[9] House of Lords Hansard, 21 July 2015 Column 1010

> ***English laws, and a decision as to what is an English matter or what is an England-and-Wales matter is a matter solely to be determined under the standing orders of the House of Commons or by the Speaker, that, in effect, means that, on one side of the boundary, Parliament, protected by parliamentary privilege and sovereignty, decides the issue on a case-by-case basis, whereas, on the other side, it is a matter for judicial determination****. Now that strikes me as being something that can only lead to very serious conflict."*[10] *[emphasis added]*

9. Legislative Consent Motions (LCMs)

9.1 The potential for tension also arises in relation to Legislative Consent Motions (LCM). In circumstances where the UK Government wishes to legislate in relation to a devolved area, there is a constitutional convention[11] to the effect that it would not normally do so without first seeking the consent of the Assembly. This convention should soon be captured in statute via the forthcoming Wales Bill. The procedure by which the Assembly provides or refuses consent is by considering and voting on an LCM in Plenary.

9.2 By providing consent via an LCM, the Assembly in effect agrees that the UK Parliament can legislate in a specific area on its behalf, through a particular Bill. Should the Assembly refuse to consent, the convention requires that the UK Government remove or amend the clauses identified in the LCM and accompanying memorandum from the Bill in question.

9.3 Since 2011, the Assembly has considered 33 LCMs[12]. There have been several occasions where there has been disagreement between the Assembly/Welsh Government and the UK Government as to whether an LCM was necessary, and some where the LCM has been refused. For example:

- *Policing and Social Responsibility Bill* - the Assembly has legislative competence to make law to provide for local authority joint committees to be established for particular purposes, thus an LCM was required relating to the provisions for Police and Crime Panels in Part 1 of the Bill. The Welsh Government, therefore, found itself bringing forward an LCM for a Bill to which it was opposed. The Assembly subsequently rejected the LCM and the UK Government removed the

[10] National Assembly for Wales, Constitutional and Legislative Affairs Committee RoP 22 June 2015 [para129]
[11] This convention is set out in the Memorandum of Understanding and Supplementary Agreements which outlines the principles of co-operation underpinning the relationship between the UK Government and devolved administrations.
[12] LCMs considered by the National Assembly for Wales are listed on the website

impact on devolved matters by removing the proposed Police and Crime Panels from local government structures.

- *Anti-social Behaviour Crime and Policing Bill* - a supplementary LCM was laid by the Welsh Government in relation to the provision to amend the Anti-Social Behaviour Orders exception in Schedule 7 to the GOWA. The view of the UK Government was that this was a consequential amendment which did not require an LCM. The Welsh Government opposed the LCM as it alters the competence of the Assembly by amending Schedule 7. The amendment to widen the definition of anti-social behaviour was defeated in the Lords and was not included in the Bill at Third Reading.
- *Enterprise and Regulatory Reform Bill* – provisions in the Bill abolished the Agricultural Wages Board. The UK Government did not believe this lay within the Assembly's competence and legislative consent was not required. It refused therefore to amend the Bill. The Welsh Government believed it was within competence and subsequently introduced the Agriculture Sector (Wales) Bill. This was passed by the Assembly but was referred to the Supreme Court by the Attorney General. The Supreme Court subsequently found that the Bill was within the competence of the Assembly.
- *Local Audit and Accountability Bill* – The Welsh Government supported an LCM to make audit arrangements for the two Internal Drainage Boards which are partly in England and partly in Wales as a stopgap measure until new arrangements were made. However, the LCM was opposed by other parties within the Assembly and was rejected on the casting vote. The UK Government subsequently agreed to amend the Bill to remove cross-border Boards from the English audit regime.
- *Medical Innovation Bill* (as introduced in the House of Lords on 5 June 2014) – in this case the UK Government view was that the Bill related to modifying the law of tort, a non-devolved matter, and therefore there was no need for an LCM. The Welsh Government disagreed stating that the Bill relates to health, which is devolved. The Welsh Government tabled the LCM, which the Assembly unanimously refused. The Bill was a Private Member's Bill and did not proceed beyond the First Reading in the House of Commons. However, the Bill has been introduced again in the House of Lords; the First Reading was on 8 June 2015.

9.4 The EVEL proposals clearly offer the potential for the Speaker's certifications to be drawn into such disputes over LCMs.

9.5 Clearly, there is also a need for parliamentary procedure to take account of the Assembly's decision on LCMs and to consider how this will interplay with these proposals for England and Wales Bills.

10. Other concerns and queries raised by the proposals

Secondary legislation

10.1 Under the proposals, secondary legislation which is subject to the affirmative procedure - or that is subject to the negative procedure and has been prayed against and scheduled for debate – will also be certified by the Speaker using the same criteria as for Bills. Unlike Bills, statutory instruments are to be considered in their entirety.

10.2 The majority of the executive powers of the Welsh Ministers to make secondary legislation are found under UK Acts – unsurprising as the Assembly has only been passing primary legislation since 2008.

10.3 Thus, there is no direct correlation between the legislative competence of the Assembly and the executive powers of the Welsh Ministers to make secondary legislation. For example, the Welsh Ministers have powers to make regulations relating to speed limits (under the Road Traffic Regulation Act 1984) but this is not within the legislative competence of the Assembly (speed limits are specified as an exception under Schedule 7 to GOWA).

10.4 Accordingly, this will add a further layer of complexity for the Speaker in applying the test for certification to secondary legislation.

Financial implications

10.5 The concern has been raised, during numerous Westminster debates, that the proposals do not take account of the fact that Bills certified as being England-only may have an impact on the block grant for the devolved administrations due to the inherent link within the Barnett formula to spending policy in England (i.e. the Barnett calculation is based on the level of spending in the relevant UK Government department).

10.6 To illustrate this concern, it is possible that a UK Government Bill could impact on funding for the NHS in England (for example by privatising some services, thus reducing the funding provided to the Department of Health). This would likely be certified as an England-only matter, but by the workings of the Barnett formula, would have an impact on the block grants of the devolved administrations.

10.7 The new Standing Orders would not apply to votes on the Estimates, nor to Supply and Appropriation Bills providing statutory authority for the Estimates. However, although it is the case that the block grants are included in the relevant Estimates and Supply and Appropriation Bills, and can be voted on by all Members, the level of detail provided, and the limited opportunity for detailed scrutiny, is unlikely to make clear any impact of England-only legislation on the block grants.

10.8 It is also clear from the revised proposals that, where there are financial implications associated with a Bill, all MPs will be able to vote on the associated money resolution (for spending) or ways and means resolution (for taxation). The Leader of the House has stated that this provides the opportunity for all Members of the House to vote on issues relating to the block grants for the devolved administrations arising from Bills.

10.9 However, at present, money resolutions are not considered by the House, separately from the relevant Bill, as a rule. The Leader of the House has however stated that he is "*open to looking at whether we can find another way to ensure that money resolutions can be debated*",[13] which may provide an opportunity for the financial impact of a Bill on the block grants to be considered, if sufficient detail is provided for scrutiny.

Wales-only Westminster legislation

10.10 The proposals are not clear in their intention towards Wales-only Westminster legislation. Though this is not a matter for the Presiding Officer, the House may wish to satisfy itself that its procedures treat Wales-only Bills equitably with any applying solely to England, Scotland or to Northern Ireland.

11. Conclusion

11.1 This paper illustrates the complexity associated with any comprehensive assessment of Welsh legislative competence. It also highlights how the proposals risk drawing the Speaker into matters of political debate and/or creating the potential for the Speaker and Presiding Officer to be seen as at odds with one another in respect of devolved competence. Given the close and positive relationship that has always existed between the two offices, this would be highly undesirable. A simpler and clearer test for certification would be a territorial test alone.

[13] HoC Deb 15 July 2015: Column 942

Annex A: Bill Section template for determining legislative competence

***Provision*:**	
Does it relate to a Subject? ***(S. 108(7) GOWA plus Agricultural Sector Bill test)***	
Does it fall within an exception? ***(S. 108(7) test)***	
Is it compatible with the Convention Rights?	
Is it compatible with EU law?	
Does it have a prohibited effect on Minister of the Crown functions existing before 5 May 2011? ***(NB Schedule 7 parts 2 and 3)***	
Only <u>applies</u> in relation to Wales?	
Only <u>extends</u> to England and Wales? ***(Consider comments in Asbestos Bill case)***	
Does it modify any protected enactment in a prohibited way? ***(NB Schedule 7 parts 2 and 3)***	
Does it have a prohibited effect on any C & AG function? ***(NB Schedule 7 parts 2 and 3)***	
Does it have a prohibited effect on the Welsh Consolidated Fund? ***(NB Schedule 7 parts 2 and 3)***	
Queen/Duke's Consent ***(Not a competence point as such but can block a Bill from being passed)***	
Wholly within Competence?	**Yes ☐** **No☐**

Annex B: Scenarios highlighting practical and legal difficulties with EVEL proposals

B.1 The following scenarios highlight some of the practical and legal difficulties that could arise under the proposals to implement EVEL. These scenarios are backed up by examples to demonstrate those practical and legal difficulties. The scenarios use the term 'Bill', but the scenarios apply equally to clauses of Bills, Schedules to Bills, and statutory instruments.

B.2 The scenarios focus on the test for legislative competence as it applies in the current devolution settlement for the Assembly. Other legal tests will be relevant in determining whether a Bill, clause, Schedule or statutory instrument is within the legislative competence of the Scottish Parliament and/or the Northern Ireland Assembly.

Scenario 1

B.3 The UK Government introduces a Bill which provides for the listing of care workers who are unsuitable to work with vulnerable adults. The Bill applies to England only and the Speaker decides it is within devolved competence and certifies the Bill. Thus, the House treats it as an England-only Bill.

B.4 The Assembly and Welsh Government agree that the Bill relates to a devolved subject. However, the Bill raises difficult issues under the Human Rights Act 1998, and the Assembly and/or Welsh Government consider that the Bill is not compatible with those rights. Parliament has expressly provided that such a Bill is outside the legislative competence of the Assembly (the same applies to the Scottish and Northern Irish devolution settlements). In this situation, therefore, the Speaker would be forced to reach a view on the compatibility of the Bill with the Human Rights Act, in order to apply the devolution test envisaged by the EVEL proposals. This is an exercise that the Speaker has not previously been called upon to undertake – it has been for Ministers to state, when introducing a Bill, that it is compatible with the 1998 Act. The Speaker could be in a difficult position if he or she was asked to agree either with that Minister or with the view of the devolved authorities. In either case the public airing of the disagreement would make it more likely that the resulting UK Act would be challenged in the courts on human rights grounds by those affected.

B.5 The fact that this is a realistic scenario is illustrated by the number of pieces of UK legislation which have breached human rights, including several in areas devolved to the Assembly:

- The listing of care workers as unsuitable to work with vulnerable adults under the Care Standards Act 2000 was held by the House of Lords to breach human rights.[14]
- Remedial orders were used to remedy human rights breaches in several sections of the Mental Health Act 1983.[15]
- The Court of Appeal held that sections of the Housing Act 1996 breached human rights.[16] New legislation was introduced in order to address those breaches.[17]
- The blanket ban on prisoner voting under section 3 of the Representation of the People Act 1983 is another example, albeit not in the context of an area currently devolved to the Assembly. However, the UK Government have committed to devolving competence relating to Assembly and local government elections, as set out in Powers for a Purpose.[18]

B.6 The same principles would apply if Parliament introduced legislation which breached EU law. Legislation would be outside the legislative competence of the Assembly if it breached EU law.[19]

Scenario 2

B.7 A Bill is introduced to specify the limits of fines for certain smoking-related offences. The Bill applies in England only and the Speaker decides its subject-matter is within devolved legislative competence and so certifies the Bill. The House treats the Bill as England-only.

B.8 The Assembly and Welsh Government agree the Bill relates to a devolved subject, but consider the Bill modifies significant functions vested in a Minister of the Crown prior to 5 May 2011. Parliament has expressly stated that the Assembly does not have legislative competence to modify such functions without Secretary of State consent. Thus, although the Bill may relate to a devolved subject, it is outside Assembly competence. In order for it to be within competence, there would need to be an assumption that the UK Minister would provide consent were it to be a provision in a Bill proposed by the Assembly.

B.9 For example, Part 1 of the Health Act 2006 gives powers to the Secretary of State to set the maximum limit of fines for certain smoking-related offences. These powers were given to the Secretary of State before 5

[14] R (Wright) v Secretary of State for Health [2009] UKHL 3
[15] For example, see the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712)
[16] R (Morris) v Westminster City Council and First Secretary of State [2005] EWCA Civ 1184.
[17] New measures were introduced in Schedule 15 to the Housing and Regeneration Act 2008
[18] Wales Office, Powers for a purpose: Towards a lasting devolution settlement for Wales, February 2015
[19] If required, examples of infringement cases instigated by the European Commission against the UK under Article 258 of the Treaty of the Functioning of the EU can be provided.

May 2011, therefore their subject matter is not within the legislative competence of the Assembly.

Scenario 3

B.10 A Bill is introduced to create a social care wages board in England and Wales. The Bill applies in England and Wales but the Speaker does not consider it to be within devolved legislative competence, and so does not certify the Bill.

B.11 The Assembly raises concerns, on the basis the Bill relates to an area devolved to the Assembly (applying the test set out by the Supreme Court in the Agricultural Sector (Wales) Bill case).[20] An LCM is considered by the Assembly, and subsequently rejected. Thus, the decision of the Speaker is called into question in political debate in the Assembly and any related debate in Westminster as the Bill progresses.

B.12 On the basis that the Welsh Government and Presiding Officer consider this is within competence, a corresponding Welsh Bill is introduced and passed by the Assembly, but is referred to the Supreme Court for a definitive answer on competence. The Supreme Court decides that the Assembly legislation is within competence – thus generating a conflict between the Speaker's opinion and Supreme Court judgment.

B.13 This scenario reflects many of the events that led to the Supreme Court judgment in the Agricultural Sector (Wales) Bill case. [21]

- An amendment to the Enterprise and Regulatory Reform Bill was tabled in the House of Lords on 19 December 2012. The amendment sought to abolish the Agricultural Wages Board for England and Wales.
- The UK Government did not believe that the subject of the amendment was devolved.
- The Welsh Government believed that the subject of the amendment was devolved, and it tabled an LCM before the Assembly.
- The Assembly rejected the LCM, but the Enterprise and Regulatory Reform Bill went ahead and abolished the Agricultural Wages Board for both England and Wales.
- The Assembly then decided to make its own primary legislation, the Agricultural Sector (Wales) Bill, to reinstate a regime for the regulation of agricultural wages in Wales (by establishing an Agricultural Advisory Panel for Wales).
- The UK Government believed that the Agricultural Sector (Wales) Bill was outside the legislative competence of the Assembly, and referred it to the Supreme Court.

[20] Agricultural Sector (Wales) Bill [2014] UKSC 43
[21] Agricultural Sector (Wales) Bill [2014] UKSC 43

- The Supreme Court unanimously decided that the Agricultural Sector (Wales) Bill was within the legislative competence of the Assembly.

B.14 Under the current proposals the Speaker would be required to consider the amendment to the Enterprise and Regulatory Reform Bill to determine whether it should be certified.

B.15 Had the Speaker been of the opinion that the amendment was not within the legislative competence of the Assembly, the Speaker and the Supreme Court would have reached different conclusions on whether the matter was within the legislative competence of the Assembly.

B.16 A similar issue arose under the Medical Innovation Bill (considered further in Scenarios 4 and 4A). The UK Government considered that the Bill was about the law of tort and was not within the legislative competence of the Assembly. The Assembly and the Welsh Government (applying the Supreme Court test for legislative competence) considered that the Bill related to health and was within the legislative competence of the Assembly. An LCM was considered by the Assembly. The Assembly rejected the LCM by 54 votes to 0.

Scenario 4

B.17 The UK Government introduce a Bill seeking to encourage innovative medical treatment by doctors. The Bill applies in England and Wales only, but the Speaker does not consider the Bill is within devolved legislative competence, and so does not certify the Bill.

B.18 Similar issues arise as outlined in Scenario 3, leading to an LCM being rejected by the Assembly. The Assembly and Welsh Government make representations to the UK Government that the Bill relates to a devolved subject, setting out the Supreme Court test. The UK Government reviews its decision, anticipating a reference to the Supreme Court were the Assembly to decide to legislate on it and accepts that the Bill is within the legislative competence of the Assembly.

B.19 This means that the Speaker's opinion is now in disagreement with the UK Government's, and the Bill should have been certified. The Bill is subsequently amended to apply in England only. The Speaker considers the amendment and decides the Bill should be certified. It should be noted that inter-governmental discussions proceed in parallel to the Bill's passage through Parliament and such amendments can of course be made at the final stages. The reverse scenario may also arise, where a Bill may be certified at the outset and later as a result of amendments, it is de-certified.

B

Scenario 4A

B.21 As Scenario 4, but the Speaker initially decides that the Bill is within devolved legislative competence and certifies the Bill. The Assembly and Welsh Government agree with the Speaker that the Bill is within the legislative competence of the Assembly (applying the Supreme Court test).

B.22 The UK Government considers the Bill relates to the law of tort and not to a devolved subject, and thus the Speaker and UK Government are in disagreement.

B.23 These scenarios set out the real differences of opinion that arose during the passage of the Medical Innovation Bill. While the Bill would not have been within the scope of Standing Order 83J(1), the UK Government's legal position was clear – the Bill was about the law of tort, and did not relate to a devolved subject.

- There are potentially significant **financial implications** for Wales arising from some England-only legislation and I am unconvinced that Welsh interests will be sufficiently protected by these proposals;

  The proposals do not appear to take account of the **Legislative Consent Motion (LCM) convention**; in particular, it is unclear how the Assembly's decision on granting, or not granting, consent for the UK Parliament to legislate on a devolved matter will interact with the proposed procedure.

In respect of the other part of your inquiry and the future of the Union, I have significant concerns about the piecemeal fashion in which our constitution is developing. The existing devolution settlements for Northern Ireland, Scotland and Wales are very different, and it is not easy to see a rational basis for all of those differences. New devolution and constitutional arrangements for Scotland and England are being implemented at a remarkable pace yet with none of the obstacles and resistance that seem to characterise further devolution to Wales.

This is not a satisfactory way of proceeding. The provisions in the Scotland Bill currently going through Parliament will set a precedent for Wales, yet the Assembly has not been consulted on them and was not involved in developing them. A coherent pan-UK approach is required based on the principle of subsidiarity - the centre should reserve to itself only what cannot be done effectively at devolved level. We must aim, therefore, for genuine joint discussion, to which all four Nations contribute on an equal footing, if we are to reach a settlement that works for all parts of the UK.

I have written previously to the Speaker to bring these matters to his attention and am copying this letter to him. I trust that this information will be helpful and I, or my officials, would be pleased to discuss any aspect further.

Yours sincerely

Rosemary Butler

Dame Rosemary Butler AM
Presiding Officer

Enc

cc: Speaker of the House of Commons, Rt Hon John Bercow MP
First Minister of Wales, Rt Hon Carwyn Jones AM
Secretary of State for Wales, Rt Hon Stephen Crabb MP
Chair of the Welsh Affairs Committee, David TC Davies MP
Chair of the Constitutional & Legislative Affairs Committee, David Melding AM

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Andrew Scallan
Director Electoral Administration
Electoral Commission

16 June 2015

Dear Andrew

European Union Referendum Bill – referendum question assessment

We considered your email dated 1 June 2015 at our recent meeting on 15 June 2015.

We believe that both of the questions referred to in your email, and which the Electoral Commission suggested following the 2013 Private Members' Bill, are acceptable in both English and Welsh.

Nevertheless, differing views were expressed. Some Members felt the question included in the European Union Referendum Bill (Should the United Kingdom remain a member of the European Union?) is the clearer of the two questions.

However, some saw merit in avoiding a yes / no question, and as a result, that there could be further consideration of the alternative question (Should the United Kingdom remain a member of the European Union or leave the European Union?).

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We would also welcome clarification on whether there is likely to be any further consultation on other issues surrounding the referendum. In particular, we would welcome the opportunity to comment on the proposed election date and electoral cohort.

Yours sincerely

David Melding AM
Chair
Constitutional and Legislative Affairs Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.
We welcome correspondence in Welsh or English.

Referendum on membership of the European Union

Assessment of the Electoral Commission on the proposed referendum question

September 2015

Translations and other formats

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Email: publications@electoralcommission.org.uk

We are an independent body set up by the UK Parliament. Our aim is integrity and public confidence in the democratic process. We regulate party and election finance and set standards for well-run elections.

Contents

Summary of our assessment

The European Union Referendum Bill as introduced into parliament sets out the proposed referendum question:

> Should the United Kingdom remain a member of the European Union?
>
> A ddylai'r Deyrnas Unedig ddal i fod yn aelod o'r Undeb Ewropeaidd?

The Political Parties, Referendums and Elections Act 2000 (PPERA) requires the Commission to consider the wording of this referendum question and publish a statement of our views as to its intelligibility.

To inform our assessment we carried out research with members of the public to see how well the proposed question meets our guidelines for intelligible questions, and whether it is easy for voters to use and understand. We also wrote to interested groups and organisations including political parties and would-be campaigners, to seek their views on the proposed question. We took account of views expressed by other individuals and groups who contacted us.

Our guidelines say that a question should be clear and simple, that is, easy to understand; to the point; and not ambiguous. It should also be neutral, which means it should not encourage voters to consider one response more favourably than another or mislead voters.

We found that the question is written in plain language and is easy for people to understand and answer. However, we have concerns, based on our assessment, about the proposed question. This is because of what we heard through the consultation and research about the perception that the question encourages voters to consider one response more favourably than the other. These views raise concerns about the potential legitimacy, in the eyes of those campaigning to leave and some members of the public, of the referendum result – particularly if there was a vote to remain a member of the European Union.

We have previously recommended the possibility of either a yes/no or a non-yes/no question for use at a referendum on European Union membership. However, in this assessment we have heard clearer views, particularly from potential campaigners to leave the European Union, about their concerns regarding the proposed yes/no question.

In addition, we have not as part of this assessment heard significant concerns from campaigners about campaigning on a non-yes/no question.

Our assessment suggests that it is possible to ask a question which would not cause concerns about neutrality, whilst also being easily understood.

Our recommendation

The referendum result should be one that all voters and referendum campaigners can accept and have confidence in. For that reason, we recommend changing the way the question is asked, so that it is more neutral. We recommend the following wording:

> Should the United Kingdom remain a member of the European Union or leave the European Union?
>
> Remain a member of the European Union
>
> Leave the European Union

Our recommended Welsh version of this question would be:

> A ddylai'r Deyrnas Unedig aros yn aelod o'r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?
>
> Aros yn aelod o'r Undeb Ewropeaidd
>
> Gadael yr Undeb Ewropeaidd

1 Background

Our role

1.1 The Electoral Commission is an independent body which reports directly to the UK Parliament. We regulate party and election finance and set standards for well-run elections and referendums. We put voters first by working to support a healthy democracy, where elections and referendums are based on our principles of trust, participation, and no undue influence.

1.2 On 28 May 2015, the UK Government introduced the European Union Referendum Bill to Parliament. The Bill makes provision for a referendum by the end of 2017 on the United Kingdom's membership of the European Union. The Bill contains the following referendum question:

> Should the United Kingdom remain a member of the European Union?
>
> Yes
>
> No

1.3 In the referendum, we are responsible for:

- giving our views on the referendum question
- registering campaigners who want to spend significant amounts in the referendum
- where appropriate, appointing lead campaign groups for each outcome
- providing lead campaign groups with grants that we determine within statutory limits
- monitoring and reporting on campaign spending
- reporting on the administration of the referendum

1.4 The Chair of the Commission will be Chief Counting Officer for the referendum on the UK's membership of the European Union.

Legal framework

1.5 Where a referendum question is set out in a Bill providing for a referendum, as in the case of the European Union (Referendum) Bill, the Political Parties, Referendums and Elections Act 2000 (PPERA)[1] requires the Commission to consider the wording of the referendum question and publish a statement of our views as to its intelligibility:

- as soon as is reasonably practical after the Bill is introduced and
- in such manner as the Commission may determine.

[1] Section 104(1) and (2).

1.6 The introduction of the European Union (Referendum) Bill triggered our duty to consider the intelligibility of the referendum question.

Publication of our views

1.7 As the independent body charged with giving our views on the referendum question, we want to ensure that our approach is open and transparent. We are publishing this report of our views on the referendum question as soon as concluding our question assessment process.

Question assessment process

1.8 Our responsibility is to consider the intelligibility of the referendum question. We want to make sure that the question is one that voters can understand, so that they know what they are voting on.

1.9 When referring to 'referendum question' in this report, we mean the question and the choice of responses on the ballot paper. Where we have comments particular to the question or the responses, we make this clear.

1.10 We published our preferred approach to assessing referendum questions and our revised question assessment guidelines in November 2009. These are at Appendices 2 and 3 to this report. These guidelines, and our current assessment methodology, have been used to inform seven previous question assessments we have undertaken, including for our earlier assessment of a possible European Union referendum question in 2013.

1.11 We know that our assessments identify important issues in relation to proposed referendum questions and our advice is usually accepted. In some cases it has not been accepted in its entirety. For example, in the case of the question for council tax referendums, our recommended question wording was not fully implemented.[2] The first referendum using this question in 2015 subsequently encountered many of the issues we raised in our assessment report.

1.12 We developed our guidelines to:

- Help us assess how intelligible a proposed question is
- Help people draft intelligible referendum questions

1.13 We have followed our published preferred approach to assessing referendum questions by:

[2] http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/145327/GfK-NOP-Council-Tax-Referendum-Report_Final.pdf

- Carrying out qualitative public opinion research with people from different backgrounds and demographics across the UK, through focus groups and one-to-one in-depth interviews
- Asking for advice from experts on accessibility and plain language
- Writing to interested parties including political parties and would-be campaigners, to seek their views and to offer meetings to hear from them
- Receiving views and comments from individual people or organisations who contacted us, having seen from our website or otherwise heard that we were undertaking the question assessment

1.14 A report of the findings of our public opinion research, including the methodology adopted, is available on our website.[3]

1.15 A list of respondents who gave us their views through correspondence or in meetings held for the purpose of contributing to the question assessment is available on our website. The views we have received from these respondents are addressed where relevant in this report. We much appreciate the time taken by individuals and organisations in giving their views to us.

1.16 We have previously reported on a question included in a previous Private Member's Bill for a European Union referendum.[4] Where relevant we reference findings from that previous research throughout this report.

Scope of our advice on 'intelligibility'

1.17 We interpret the scope of our responsibility to give advice on 'intelligibility' as going further than simply looking at whether people understand the language used in the referendum question. Where we have a statutory duty to give views on referendums in the UK,[5] we have powers to suggest alternative drafting or to offer suggestions as to how a particular question might be reframed. We advised on the wording and intelligibility of the independence referendum question in Scotland in the same way.

1.18 We have confined our suggestions to changes in the language or structure and framing of the question, again reflecting our statutory duty in other referendums. This does not extend to suggesting alterations that would change the substance of the question or introduce new factors which might alter the nature of the debate.

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[3] http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/eu-referendum-question-assessment

[4] Referendum on the United Kingdom's membership of the European Union - Advice of the Electoral Commission on the referendum question included in the European Union (Referendum) Bill: http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/163282/EU-referendum-question-assessment-report.pdf

[5] Section 104 PPERA

This report

1.19 Chapter 2 of this report sets out the referendum question in context, including the background to previous research.

1.20 Chapter 3 sets out the findings from the public opinion research we conducted to support this assessment.

1.21 Chapter 4 presents the views of those who responded to our consultation. This includes would-be campaigners, accessibility and language experts and members of the public.

1.22 In chapter 5 we present our assessment of the proposed question against our question assessment criteria. We make our recommendation for the question to be used at a referendum on the United Kingdom's membership of the European Union, as well as our views on the information that should be made available to voters.

2 The referendum question in context

2.1 This chapter outlines the context for our question assessment. It sets out the findings from the testing of a previous proposal for a European Union referendum question and the recommendations that resulted from that.

Previous testing and recommendations

2.2 The Commission has previously assessed the wording of a question for a referendum on the United Kingdom's membership of the European Union,[6] which was included in a Private Members' Bill introduced in 2013 by James Wharton MP.[7] That question was:

> Do you think that the United Kingdom should be a member of the European Union?
>
> Yes
>
> No

2.3 Our research and consultation found that, although the question used brief and straightforward language, the phrase 'be a member of the European Union' to describe the referendum choice was not sufficiently clear to ensure a full understanding of the referendum as a whole. This was because some participants in our research did not know that the United Kingdom is currently a member of the European Union while others who did know thought the question suggested the United Kingdom was not a member.

2.4 We recommended, in October 2013, that the proposed question wording should be amended to reduce the risk of misunderstanding or ambiguity about the current membership status of the United Kingdom within the European Union. We also recommended making the question more to the point by removing 'Do you think…'.

2.5 We recommended amending the question to:

> Should the United Kingdom remain a member of the European Union
>
> Yes
>
> No

[6] http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/eu-referendum-question-assessment

[7] We also tested Welsh versions of the question.

2.6 However, it was clear from our research that some people will perceive either positive or negative associations with the phrase 'remain a member of the European Union', although there was no evidence to suggest that this wording resulted in participants changing their voting preference in any way. Our testing suggested that, in the context of a referendum on the UK's membership of the EU, question wordings using 'Yes' and 'No' as response options may not be able to fully resolve these complex issues.

2.7 We therefore provided a second recommended question wording which included both options (to remain and leave the EU) to reduce the risk of bias for either outcome. We indicated that this highlighted an important decision for Parliament about retaining or moving away from the UK's recent experience of referendum questions using 'Yes' and 'No' as response options. This second question was considered the most neutral of all those we tested and asked:

> Should the United Kingdom remain a member of the European Union or leave the European Union?
>
> Remain a member of the European Union
>
> Leave the European Union

2.8 However, we also highlighted in October 2013 that we had not been able to fully test the second of these two alternative question wordings in the time available to us before we reported. We therefore made clear that, if Parliament amended the question in the Bill to include this wording, the Commission would undertake further work to check whether this wording raised any new issues of intelligibility.

2.9 The question wording included in the Private Members' Bill was then amended in Parliament to "Should the United Kingdom remain a member of the European Union or leave the European Union?", and we therefore carried out this further research in early 2014. Taking into account the results of that research, we were satisfied that the amended question wording (using "Remain a member of the European Union" and "Leave the European Union" as response options) was not only clear and straightforward for voters but was, at that time, also thought to be the most neutral wording from the range of options we had considered and tested.

2.10 At that time we also sought evidence from potential referendum campaigners about the impact of this question wording for them. Unfortunately, at that stage, we received no responses to our request. Therefore, while we were satisfied that the question wording would be clear and straightforward for voters, we recognised that the absence of evidence about the potential implications for referendum campaigners represented a gap in our ability to assess the intelligibility of question in the widest possible sense. This new assessment has sought to address that gap as well as providing further, updated evidence of public views on the question.

Membership of the European Union

2.11 At the time of undertaking our question assessment, we know that the Government has committed to a process of negotiation on the United Kingdom's membership of the European Union. That process is not yet complete. There is therefore a level of uncertainty about some of the specific issues which will frame the vote and what impact or otherwise these may have on how people approach the question.

2.12 There is also uncertainty about the precise steps that will be taken immediately following a referendum. There would be likely to be discussions following the referendum on how any change would be implemented.

2.13 In some other referendums in the UK, such as that on the voting system for the UK Parliament held in May 2011 and on the law-making powers of the National Assembly for Wales held in March 2011, the referendums were linked to legislation made by the UK Parliament that was ready to be implemented in the event of a 'Yes' vote.[8]

2.14 This referendum is therefore more similar to the referendum on independence for Scotland, in terms of outcomes, than to those held in 2011.

Informing people

2.15 There are therefore different views about what continued membership of the European Union or leaving the European Union would mean for the United Kingdom.

2.16 At this referendum, campaigners will promote their views about what membership of the European Union means, what rejection of it would mean, and what they believe will happen after the referendum, depending on the result.

2.17 Referendum campaigners have a key role to play in informing people what the issues are in a referendum. The campaigns are the main source for highlighting to potential voters the implications of each potential outcome, encouraging people to vote and influencing how they vote. In addition, others will be discussing and debating the issue and putting forward opinions including commentators, constitutional experts and the media.

2.18 Although referendum campaigners and others will promote their views and highlight the issues, this may not necessarily lead to greater clarity for potential voters ahead of the referendum. There may be claims and counter-claims, information and misinformation.

[8] In the case of the referendum on the alternative vote, the legislation would have been implemented, following a 'yes' vote, depending on a separate vote to approve proposed boundary changes.

2.19 There can be a place in referendums for public information from a trusted source separate from the referendum campaigns. However, beyond the provision of factual information related to voting processes, for example how to cast a vote, the Electoral Commission will not be providing additional independent information on the arguments for and against membership of the European Union.

2.20 The significance of public information can vary depending on the nature of the referendum and the extent to which complex issues might need to be explained. The Venice Commission Code of Practice for referendums says that 'the authorities must provide objective information' in advance of voting.[9]

2.21 For example, in the referendum on the voting system for the UK Parliament held in May 2011, factual information was available about the voting systems that people were being asked to decide on, as the rules of each voting system were set out in legislation already on the statute books. This meant it was possible to provide voters with neutral, factual information about what would happen after each referendum, which the Commission included as part of its public awareness campaign.

2.22 In Scotland, where the arguments about the impact of a yes or no vote were significantly more complicated than in other recent referendums, we recommended that the UK and Scottish Governments should clarify what process will follow the referendum in sufficient detail to inform people what will happen if most voters vote 'Yes' and what will happen if most voters vote 'No'.

2.23 Specifically, we recommended that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. This was because the alternative - two different explanations – could have caused confusion for voters rather than make things clearer. This joint statement was agreed and included in the booklet the Commission produced to be sent to all households ahead of the referendum. The booklet also contained information about how to register to vote and how to vote.

2.24 Chapter 4 sets out the information that participants in our public opinion research reported as being important to them when deciding how to vote in this referendum. This was not the main focus of the research we carried out but when discussing the question participants naturally expressed opinions on what sort of information they would expect and would find helpful. We then make specific recommendations in chapter 5 about what type of public information could usefully be provided.

[9] European Commission for Democracy Through Law (Venice Commission) 'Code of Good Practice on Referendums' (2006)

3 Research findings

3.1 We appointed the independent research agency GfK to carry out a qualitative research exercise to see how people reacted to and understood the proposed question. This has given us an evidence base for our conclusions and the revised question wording we are proposing. GfK also conducted our two previous research projects focused on European Union referendum questions.[10]

3.2 The research helped us find out people's understanding of the proposed question and the reasons for this. The research also helped us explore whether and how the question could be made more intelligible. It focused on the question itself and how it is written, rather than on how people would vote if a referendum were to take place.

3.3 This research also provides an update to the previous research findings from 2013 and early 2014.

3.4 The full report from GfK is available on our website.[11] The report describes who took part in the research and where. The research included participants from a wide range of backgrounds, of different ages, across the United Kingdom. It also specifically included participants who may have more difficulty voting including those with a lower level of literacy, learning difficulties, English as a second language and visual impairments.

Key areas considered in our public opinion research

- **Completion**: participants were asked to answer a proposed question as if for real and identify any words or phrases they found clear, or more difficult to understand.
- **Understanding**: participants discussed what they thought the question was asking and any difficulties they had with the question, and the reasons for this.
- **Neutrality**: participants were asked to consider whether they felt the question was encouraging people to vote in a particular way, and if so, why they felt that.
- **Improvements**: participants considered what improvements they would make to the question wording and discussed their suggestions.
- **Comparing alternatives**: participants were shown alternative question wording and asked to compare it to the original, and consider whether or not the changes improved the question.

[10] http://www.electoralcommission.org.uk/our-work/our-research/referendum-question-testing
[11] Ibid

The research methodology and approach

3.5 This research approach has also been used for the seven previous question assessments we have undertaken using this methodology, including for our earlier assessment of a possible EU referendum question in 2013. Full details of the research approach and methodology are contained in the research report. The research used a combination of one-to-one in-depth interviews and focus groups to test the question.

3.6 A qualitative approach was chosen for this research because its purpose was to identify any problems with the question, explore the reasons for those problems and explore ways in which they might be solved, so that we had evidence for any changes we might want to recommend.

3.7 This was not therefore a quantitative exercise and we were not attempting to estimate the proportion of voters who may, for example, give a particular response, interpret the question a certain way or misunderstand particular wording. We were also not attempting to measure the neutrality of the question in a numerical or absolute sense. Rather, we explored people's perceptions of the neutrality of the proposed question.

3.8 A quantitative approach would not have provided the necessary depth of understanding of the key issues. It might have told us what people thought of particular issues but not why, and it would not have enabled us to find out how any problems they raised might be addressed.

3.9 It should be noted that whilst qualitative research can identify participant reported views regarding neutrality of question wording based on participant perceptions, the approach does not capture any unconscious impact of question wording and structure. It is thus possible that questions might influence participants to answer in a particular way without them being aware of it.

3.10 As set out elsewhere in this report, the research was designed to build on the previous research carried out on a proposed European Union referendum question, particularly to check if anything had changed in public perceptions and views since that work was conducted.

Testing alternative question wording

3.11 We have previous experience of assessing referendum questions, including carrying out research with voters. In the past we have found that research participants may find it difficult to suggest specifically how questions could be re-worded to address problems that they have identified. We therefore developed some alternative versions of the question with revised wording and where participants had concerns about the question, we were able to probe on these alternative words and questions.

3.12 The purpose of developing alternative wording was to allow us to test potential changes to the wording and see whether or not they improved the question, in terms of making it easier for people to understand and answer and its neutrality. This would provide an evidence base for any recommendations for change we may want to make. The main aim of this element of the research was not therefore for the research participants to choose one of the versions they were shown as 'the best'. Instead, providing different versions that could be compared and contrasted during fieldwork was intended to help participants to identify what factors improve or worsen a question's wording and intelligibility for them.

3.13 Across the three research projects a total of 11 versions of the question have been tested.

3.14 The following questions were tested in the 2015 public research:[12]

	Question wording	Previously tested?
1	Should the United Kingdom remain a member of the European Union? Yes/No	Also tested in 2013 research
2	Should the United Kingdom remain a member of the European Union or leave the European Union? Remain a member of the European Union / Leave the European Union	Also tested in 2013 and 2014 research
3	Should the United Kingdom stay a member of the European Union or leave the European Union? Stay a member of the European Union/ Leave the European Union	New version for 2015
4	Should the United Kingdom remain a member of the European Union or leave the European Union? Remain in the European Union/ Leave the European Union	New version for 2015

[12] Other questions were tested during the fieldwork through use of prompts and stimulus materials. For example, "Should the United Kingdom be a member of the European Union". Although these questions were not given out on mocked up ballot papers for voting the wording etc was explored with participants.

3.15 These questions were tested in either the 2013 and/or 2014 public research:

	Question wording	Tested in
5	Do you think the United Kingdom should be a member of the European Union? Yes/No	2013 research
6	Should the United Kingdom continue to be a member of the European Union? Yes/No	2013 research
7	The United Kingdom is a member of the European Union. Do you think the United Kingdom should be a member of the European Union? Yes/No	2013 research
8	Should the United Kingdom leave the European Union? Yes/No	2013 research
9	Should the United Kingdom stay a member of the European Union or get out of the European Union? Stay in the European Union / Get out of the European Union	2014 research
10	Should the United Kingdom remain a member of the European Union (EU) or leave the EU? Remain a member of the European Union / Leave the European Union	2014 research
11	Should the United Kingdom remain a member of the European Union or leave the European Union? Remain / Leave	2014 research

3.16 In each interview or focus group, one question was used as the main 'test' question (that is, participants were given this question at the beginning of the interview and asked to mark their vote), with other versions used as comparators to help elicit participant's views on the main version being tested.

3.17 In this report we focus primarily on the findings from the most recent research, noting previous findings as appropriate.

What we have previously concluded about the proposed question

3.18 Overall the proposed question in the 2015 Bill was regarded as easy to understand, to the point and unambiguous. In particular, the question clarifies the current status of the UK within the EU which is necessary to help voters better understand the choice of actions proposed, and to reduce the risk of ambiguity about the consequences of the referendum. Participants in the research were able to vote according to their intentions when presented with this question.

3.19 However, we found that some participants perceived either positive or negative associations with the phrase ‘remain a member of the European Union’ and this could potentially introduce some risk of perceived bias. With this in mind, overall, participants preferred a question that paired both options of ‘remain’ and ‘leave’, since this resulted in a balanced and more neutral question that treated both voting options equally. However, there was no evidence to suggest that the wording changes resulted in participants in the research changing their voting preference in any way.

3.20 We recommended that Parliament should consider very carefully whether it wishes to retain the approach of a referendum question which uses ‘Yes’ and ‘No’ as response options, taking into account the risk of a perception of bias which might be associated with the question wording.

What we found in this assessment

3.21 As set out above, we began with testing the question in the European Union Referendum Bill (2015) as the main question (referred to as the proposed question). Alongside this we used alternatives, as set out above, to draw out participants views. As particular issues emerged during fieldwork, we also developed alternatives as solutions to these. We then tested these alternatives fully as well, to ensure that other problems were not identified when participants viewed them as the first question in the research.

3.22 The analysis below focuses on responses to a ‘yes’/’no’ question and a question with non-yes/no answer options (centred around remain/stay or leave).

Contextual understanding of the European Union

3.23 As we found in previous research, contextual knowledge of the EU varied across participants. The vast majority were aware that the UK is currently a member of the European Union, with only a small number of participants querying this. These participants reported very low levels of engagement in politics and political issues and noted that they tended not to read newspapers or keep up with current affairs.

3.24 However, it was clear from this testing that our previous finding, that the question needs to clarify current membership status, is still valid (see paragraphs 3.51-3.53 for full details). This is not just because of the few who do not know whether the UK is a member or not but also because a question which is not clear (e.g. “Should the United Kingdom be a member…?”) risks confusing some who know the UK is a member of the European Union but feel the question is misleading because it does not clarify this membership status.

3.25 Whilst overall awareness of the UK’s membership of the EU was found to be relatively high, many reported that more contextual information would be required regarding the voting outcomes. Particular queries included what a vote to remain a member would mean in terms of membership status: continuation of current terms of membership or something different? A small number of participants thought that a majority vote to stay would result in the UK becoming a member of the Eurozone.

3.26 There were similar queries about what a vote to leave would mean in terms of membership status: completely leaving the EU or some other form of membership?

3.27 Those who were undecided about how to vote were particularly likely to report a lack of contextual information enabling them to make an informed vote. They reported a lack of clarity regarding what each voting outcome would mean in practice. This is considered in more detail later in this chapter.

Understanding of the Government’s proposed question

3.28 Overall, we did not hear concerns from participants in relation to their understanding of the proposed ‘yes’ or ‘no’ question. Participants felt that the question used clear and straightforward language and was easy to understand. This mirrors the findings from previous research on the same question. Participants also noted that the question was short and concise.

3.29 Some participants liked the ‘yes’ and ‘no’ answer options as they were regarded as simple and succinct: ‘That one is giving you the question and a simple yes or no…it’s more simple.’ (mini-depth, Stirling, 45-59 years).

3.30 However, others felt that the question lacked contextual information as it does not state both leave and remain options. There was also a view that the

yes/ no answer options were vague when compared to the fuller answer options (e.g. remain / stay or leave):

> On the yes/no for someone who doesn't really know what the European Union is you wouldn't really know what you're saying yes to or no to. However leave the European Union – a box for that and then stay in the European Union, you know exactly what you're voting for and you'll be confident filling it [ballot paper] out. (Mini-depth, Norwich, 17-24 years).

Neutrality of the proposed question

3.31 Some participants felt that this question lacked neutrality. They believed that it could be seen to favour 'remain' by only including this option in the question, '…it's not making you think about either side it's only making you think about remaining cos it doesn't say anything about leaving.' (Mini-depth, Norwich, 17-24 years)

3.32 There was a view amongst some that using the word 'remain' could suggest maintaining the status quo which could be perceived in a positive or negative light and therefore potentially influence voter decision. This was particularly a concern for the proposed question which does not include the other possible outcome (leaving the European Union) in the question. However, as with the previous findings, there was no evidence to suggest that the wording changes resulted in participants in the research changing their voting preference in any way.[13]

3.33 One option that was highlighted in the consultation responses was to use 'leave' instead of 'remain' (for example, 'should the UK leave the EU'). However, previous research strongly indicated that the word 'leave' was not preferred by participants in the context of a yes/no question.[14] Some noted that not mentioning the word 'leave' was a positive element of the proposed question, as they felt that 'leave' was a strong word with potentially negative connotations and therefore including this word (instead of remain) could influence the voter decision (in favour of remaining).

[13] Although as noted earlier in this chapter qualitative research can identify participant's reported views regarding neutrality of question wording based on perceptions but it cannot capture the unconscious impact of question wording and structure. It is thus possible that questions might influence participants to answer in a particular way without them being aware of it.

[14] The question 'Should the United Kingdom leave the European Union?' was tested previously. See page 43-44 of the Electoral Commission's report on this: http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/163282/EU-referendum-question-assessment-report.pdf

Understanding of non-yes/no questions

3.34 Our previous preference when reporting on the EU referendum question was: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' with answer options of: 'Remain a member of the European Union' and 'Leave the European Union'.

3.35 In previous research this question had been regarded as straightforward and clear as well as neutral and balanced, although some had also regarded it as overly wordy.[15]

3.36 This recent wave of public opinion research began by testing the question in the Bill as the first question presented to participants. Once it was clear there were continuing concerns about its neutrality, we introduced the remain/leave question into the research for full testing (i.e. in rotation with the proposed Bill question).

3.37 As we had found previously, the remain/leave question was considered straightforward and easy to understand. Participants noted that it was particularly clear as it shows the two voting options, and thereby avoids any potential confusion in the answer options:

> It gives you the effect of what you're doing rather than just saying yes or no. If you cross this box you are leaving, if you cross this box you would like to stay, so I think that's a really good point. (Mini-group, Sunderland, 25-44 years)

3.38 This is reflected in the preference for this question by some participants with English as a second language, low literacy and learning disability participants. They regarded the question as simpler and more easy to understand than the 'yes' or 'no' question above.

3.39 The length of the question (when compared to the 'yes' or 'no' question) was seen by some participants as, 'overdoing it…it's telling you what exactly you're voting for but again, you'd probably know before you come [to vote].' (Mini-group, Sunderland, 25-44 years). However, in previous research this emerged as more of an issue when the non-yes/no question was directly compared to shorter questions rather than when it was seen in isolation. Also, in this and previous research even those who preferred a more concise question did not feel that the length of this question affected their ability to mark their ballot paper as intended.

[15] Some participants in our 2013 research had regarded this question as wordy when considered in context of a yes/no option. When reviewed in isolation in our 2014 research, this view did not feature in the research findings. (Page 6) http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/166613/Referendum-on-the-membership-of-the-European-Union-Further-question-testing-April-2014.pdf

Neutrality of non-yes/no questions

3.40 Participants felt that this question format ('remain'/'stay' or 'leave') was more balanced and neutral than the proposed 'yes' or 'no' question as it provided both options within the question and the answer. The question was not seen to be biased towards any specific voting option: 'It's not like it's biased towards any side, it's just saying stay a member or leave.' (Mini-depth, Norwich, male, 60+ years)

3.41 While participants were positive about including both options, a few noted that the word 'leave' had potentially negative connotations. Some felt that this could encourage people to vote for the UK to remain a member of the EU, especially if they feared the unknown or changing the status quo. However, this was found to be a mild concern.

3.42 Some others felt that the phrase 'member of the European Union' could convey positive feelings of inclusivity and therefore that the phrase was not neutral (this was also noted in discussions about the 'yes' or 'no' question). Issues identified with this wording are discussed in full in paragraphs 3.54-3.60.

3.43 In contrast, a couple of participants suggested that 'leave' as the last part of the question could result in a 'recency' effect, encouraging people to vote for the UK to leave the EU.

3.44 Overall, however, these were minor concerns and this question format was felt this to be a more balanced question than the 'yes' or 'no' one.

Other issues

The word 'remain' or 'stay'

3.45 During the first stage of this 2015 research, some participants spontaneously suggested changing 'remain' to 'stay'. We then tested the 'remain' or 'leave' question, replacing the word 'stay' for 'remain': 'Should the United Kingdom stay a member of the European Union or leave the European Union?' The corresponding answer option was: 'Stay a member of the European Union'.

3.46 There was no clear preference for using 'remain' or 'stay' in the question. Some participants noted that it did not matter which was used as they both mean the same thing. Overall, however, there was a slightly stronger preference for the word 'remain'.

3.47 Those who preferred 'remain' felt that it was more formal or professional, and therefore more suited to a referendum question. A couple of those who preferred 'remain' suggested that 'stay' felt like a 'command' word – feeling it was strong and directive. However, participants who expressed a preference for 'remain' also noted that using the word 'stay' would not affect their understanding of the question or their own voting behaviour.

3.48 Those who preferred ‘stay’ felt it was more everyday language and an easier word to understand. A couple of participants felt that the word ‘remain’ was too formal and therefore sounded too ‘harsh’. However, they also noted that using the word ‘remain’ would not affect their understanding of the question or voting behaviour.

3.49 The research also found no clear preference for ‘remain’ or ‘stay’ amongst those with English as a second language, low literacy or participants with learning difficulties.

3.50 It appeared from the research, therefore, that the reason some people preferred ‘stay’ (less formal, more everyday language) was the same reason that others preferred ‘remain’ (more formal, more suitable for a referendum question). Overall, participants agreed that whether the word was ‘remain’ or ‘stay’, it was important to include one of these options in the question in order to clarify current UK membership of the EU.

‘be a member’

3.51 We used stimulus to explore the following variation of the ‘yes’ or ‘no’ question: ‘Should the United Kingdom be a member of the European Union?’ Although this was the preference of a significant proportion of those who responded to our consultation, this question option was not favoured by participants in the research reflecting the findings of the previous research.

3.52 Inclusion of the word ‘remain’ was seen to clarify that the UK is currently a member of the EU. Participants felt that this is an important fact to convey in the question. Without the word ‘remain’, participants felt that the question lacked clarity. Those who were unaware of current UK membership felt that the question suggested that the UK is not currently a member, and therefore thought the question was asking whether the UK should join the EU. Even those aware of the UK’s membership of the EU felt that the question was confusing as it did not clarify this fact.

3.53 Although some participants regarded this question as more neutral than the ‘yes’ or ‘no’ question proposed in the Bill, due to the absence of a word such as remain or stay which created a perception of bias, it was strongly agreed overall that the question should convey current membership status in order to avoid misleading voters.

‘Member’

3.54 At the start of the research, some participants noted that the word ‘member’ was a positive word, conveying a sense of inclusivity and belonging. A few participants noted that, in the remain/leave question, this word was only attached to the ‘remain’ option, which could encourage people to vote for remaining a member of the EU. Although none felt that this would influence their own personal voting behaviour.

3.55 Based on this feedback, we also tested (through prompting on wording changes and with a new question) the ‘yes’ or ‘no’ question without the word member: ‘Should the United Kingdom remain in the European Union’ and a version of the ‘remain’ or ‘leave’ question that similarly did not include the

word ‘member’: Should the United Kingdom remain in the European Union or leave the European Union?’. The answer option was: ‘Remain in the European Union’. We did likewise for the version of this question that included ‘stay’ rather than ‘remain’.

3.56 We also tested a version of the ‘remain’ or ‘leave’ version which included ‘member’ in the wording of the question but not in the answer option (see table on pages 13-14 above).

3.57 Overall, therefore, we did fully explore how participants responded to versions of the questions that did not include the word ‘member’.

3.58 Those who preferred the word ‘member’ to be included felt that it added clarity to the question by making it clear that the UK is currently a member of the EU. These participants felt that ‘in the European Union’ was too vague. This was particularly the case for the ‘yes’ or ‘no’ question: “There’s just a bit more substance to it with the word member in it rather than just ‘in’”. (Mini-group, Sunderland, 25-44 years, C2DE)

3.59 Those who preferred not to include the word ‘member’ felt it was unnecessary and added a superfluous word, ‘The member bit, I didn’t see that as needed… I think that people who would be voting would know’ (Mini-depth, Norwich, female, 25-44 years, C2DE).

3.60 Participants generally agreed that there should be consistency in terms of including or excluding the word ‘member’ from the first part of the question and the associated answer option (e.g. so ‘remain a member of the European Union or leave…’ in the question and ‘Remain a member of the European Union’ as the answer option).

European Union or EU

3.61 The abbreviation ‘EU’ had been included in previous EU referendum question research. While many participants had not felt strongly about the inclusion of the abbreviation (in addition to, not instead of, ‘European Union’), some felt that other may be it could add clarity to the question for those unaware that ‘EU’ stood for ‘European Union’. Similarly, some low literacy and English as a second language participants had felt that the abbreviation was more easily recognised and clarifies that EU is the European Union.

3.62 For this research, none of the participants who saw the abbreviation felt it would be personally useful. Overall, participants reflected that the abbreviation ‘EU’ could be useful for those who are more familiar with this abbreviation than the full term ‘European Union’. However, some participants – including those with low literacy, learning difficulties and English as a second language – noted that including the abbreviation could be confusing. This difference to the previous findings may suggest that overall there may be greater recognition of the term ‘European Union’, meaning that the inclusion of ‘EU’ is not necessary.

Welsh language version of the question and responses

3.63 We also tested Welsh versions of these questions during fieldwork. Below we note any issues which specifically arose in relation to the Welsh versions. Unless otherwise noted, other feedback on these questions, eg on neutrality, was the same as for the English variants.

3.64 We tested the Welsh language version of the proposed question: 'A ddylai'r Deyrnas Unedig ddal i fod yn aelod o'r Undeb Ewropeaidd?' with corresponding answer options of 'Dylai' and 'Na Ddylai'.

3.65 We then tested the Welsh language version of the 'remain' or 'leave' question: 'A ddylai'r Deyrnas Unedig bara i fod yn aelod o'r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?' With corresponding answer options of 'Para i fod yn aelod o'r Undeb Ewropeaidd' and 'Gadeal yr Undeb Ewropeaidd'.

3.66 The research found that overall participants did not like the word 'para' (which sounded like other words such as parachute) or the mutated version 'bara' (which is the Welsh word for bread). They also did not like the alternative word 'barhau'/'parhau'.

3.67 We also tested a version of the 'remain' or 'leave' question that replaced 'remain' with 'stay': 'A ddylai'r Deyrnas Unedig aros yn aelod o'r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?' With corresponding answer options of, 'Aros yn yr Undeb Ewropeaidd' and 'Gadael yr Undeb Ewropeaidd'.[16]

3.68 Some participants preferred the word 'aros', as used in this version of the question. This reflected consultation responses (see chapter 4) that also suggested the word 'aros' in place of 'bara i fod'. The preference for 'aros' tended to be determined by personal preference. Some others preferred 'ddal i fod', again driven by personal preference.

3.69 While a couple of participants raised neutrality concerns around the words 'para'/'parhau', 'bara'/'barhau', 'aros' or 'ddal i fod', most did not cite any issues regarding neutrality of these words.

3.70 Most participants noted that either 'aros' or 'ddal i fod' could be used in the referendum question. Both options are considered to work well alongside the English options of 'remain' or 'stay' as they are both synonyms for both English words.

[16] A Welsh version of the remain/leave question which removed 'a member' from the answer options was also tested (as it was in English). There were no additional Welsh specific issues related to this question

Information preferences

3.71 Participants expected to be provided with information around the time of the referendum that would enable them to gain a greater understanding of the implications of voting to remain a member of the European Union or to leave the European Union. Moreover, the majority agreed that greater contextual information about the outcomes of a referendum would be needed to help them make an informed voting decision. Set out below are the key areas that participants identified as wanting answers to.

What will the outcome of a vote be either way?

3.72 Participants were not clear about what the terms of membership would be for the United Kingdom if there was a majority 'yes' or a majority 'no' vote. As one person put it: 'If you're not a member of the European Union, what would you be then?' (mini-depth, Norwich, female, 25-44 years)

3.73 Participants wanted to know whether a majority vote to remain a member of the European Union would mean: continuation of current terms of membership; continued membership with different terms of membership; or continued membership and adoption of the Euro.

3.74 Similarly, participants wanted to know whether a majority vote to leave the European Union would mean: entire separation from the European Union; renegotiated terms of membership; some kind of partial membership; or a relationship with European Union with trade agreements similar to other European countries that are not part of the European Union.

3.75 Participants indicated they wanted answers to the following questions:

- Will a majority 'yes/ remain/ stay' vote mean:
    - Continuation of current terms of membership?
    - Continued membership with different terms of membership?
- Will a majority 'no/ leave' vote mean:
    - Entire separation from the European Union?
    - Renegotiated terms of membership?
    - 'What's the consequences of saying no? What's the next option if you say no? Is it partial membership?' (Mini-group, London, 45-59 years, BC1)
    - A relationship with the European Union with trade agreements similar to other European countries that are not part of the European Union?

The benefits of remaining a member or leaving the European Union

3.76 Across the research, participants felt information on the benefits and drawbacks of continued membership or ceasing membership would be essential for informing how they cast their vote.

3.77 This information was sought at a UK-wide level as well as a local level. For example, in Wales, participants wanted information on the impact for Wales, Welsh businesses and agriculture. In Northern Ireland – particularly Derry/Londonderry – participants wanted information regarding the impact or cultural and trade relationships between Northern Ireland and the Republic of Ireland.

3.78 Participants also wanted to understand the impact of the decision on individuals and what the result would mean for the typical person or family.

Key issues identified

3.79 Across the research, participants were keen to know what the consequence of the referendum would mean for a range of issues that were important to them or their local area, as well as key issues that they had heard about in the media. These were similar to issues that had been cited in the earlier research. This interest in the implications of the vote is also similar to what we found when assessing the question for the referendum on Scottish independence.

3.80 These areas of interest covered: finances (such as the cost of being a member); trade and the economy (such as the impact on trade agreements); immigration, travel and border control (including the impact on immigration numbers and the ability to work or travel in countries in the European Union); laws (such as which laws will be impacted); impact on jobs, working directives and housing; impact on public services (for example, the NHS, police and education) and the impact on the European Union (for example, on remaining members).

Information delivery

3.81 Participants were asked to consider how they would expect to receive or obtain this information. Some expected that the majority of information would come from campaigners in a similar format to information provided during a general election. These participants had the view that, whilst some factual information should be provided, most would probably be opinion-based. They also recognised that full details regarding the terms of membership may not be decided prior to the referendum itself.

3.82 Others struggled with the notion that there would be limited factual information and found it difficult to envisage making a voting decision without a clear understanding of what a majority vote either way would mean in

practice. In addition to information from campaigners, these participants also wanted to receive information from an independent organisation.

3.83 It was agreed generally that information from a broad spectrum would be valuable. This covered – government; campaigners; an independent organisation; independent experts (for example, economists and academics); and members of the public without a strong affiliation to a campaigning party.

3.84 Televised and local debates were often cited as an appropriate and engaging method for providing information, as well as news coverage. Others expected they would come across information when searching online.

3.85 Views were more mixed about pamphlets and leaflets, as some thought they would not read them. An easy read format was suggested by a participant with a learning disability, and others with low literacy said that written information would be useful as they struggled to follow debates. Some suggested any pamphlet or leaflet should be short and concise, detailing key facts and with links for where to find out more.

4 Respondents' views

4.1 We wrote to people, including the main political parties across the United Kingdom and would-be campaigners, to seek their views and to offer meetings to hear from them. This follows the standard approach we have used for our question assessments since 2009. A copy of the letter we issued is included at Appendix 4.

4.2 In addition, we received views and comments from individuals and groups who contacted us, having seen from our website or otherwise heard that we were undertaking the question assessment. We have also been aware of points raised by others in the media.

4.3 Respondents were broadly asked to provide views to help us to ensure we had identified all the main issues with the questions, and any alternatives, and to establish if there was any implication for the conduct of the campaign from the wording of the question.

4.4 A list of all those who responded to our consultation is available on our website. In total, we received almost 1,600 responses, the vast majority of which were from members of the public. We received 29 responses from elected representatives and accessibility or language experts, many of whom we had written to as part of our consultation.

4.5 We received official responses from several political parties: Democratic Unionist Party (DUP), Liberal Democrats, Plaid Cymru, Scottish National Party (SNP), UKIP and the Ulster Unionist Party (UUP). Therefore, from the parties represented at Westminster, we did not receive official party responses from the Conservative Party, Green Party, Labour Party, Sinn Fein or the Social and Democratic Labour Party (SDLP).

4.6 Some of these responses were on behalf of many others. For example, we heard representations from various political parties, as well as from Conservatives for Britain (who represent a number of Conservative MPs). We heard from a coalition of campaigning organisations (the Equality and Diversity Forum), as well as the charity Mencap.

4.7 We received a small number of responses in relation to the Welsh language version of the question, including from the Welsh Language Commissioner.

4.8 We received many submissions from members of the public which we believe were in response to the official UKIP submission. In some cases the public submissions stated that the person was a UKIP supporter and/or member, in others they used the same or similar text to that submitted by UKIP. While in many other cases submissions largely or partly reflected the sentiment of the official response we received from UKIP. We also received a significant number of these responses in the one to two days immediately following UKIP's submission. We have taken all of these responses into

account but it is important to be clear that public responses to the consultation are not necessarily representative of the views of the public as a whole.

4.9 In this chapter, unless otherwise specified, we use the term 'respondents' (or similar terms such as 'people who responded'; 'response') generally to refer both to those people or organisations whose views we sought, and other people or organisations who chose to contact us to give us their views on the question.

4.10 Below we summarise the key themes raised by respondents.

The Government's proposed question

Support for the Government's question

4.11 We asked political parties and would-be campaigners about the question set out in the legislation:

> Should the United Kingdom remain a member of the European Union?
>
> Yes
>
> No

4.12 A small number of MPs contacted us to set out their support for the current wording. In favour of the proposed question were the following: Caroline Flint MP (Labour); Dominic Grieve MP (Conservative) and Tommy Sheppard MP (SNP). We also heard support for the government's question from the Liberal Democrats (via Lord Tyler); Plaid Cymru (via Rhuanedd Richards), the SNP (via Peter Murrell) and the Ulster Unionist Party (via Mike Nesbitt).

4.13 Dominic Grieve MP viewed the question as formulated by the Government to be an 'appropriate one'. Similarly, Tommy Sheppard MP told us, 'I have no issue with the question, and am certain of its intelligibility.'

4.14 Lord Tyler, responding on behalf of the Liberal Democrats, told us:

> We strongly believe the first of the two options proposed is the strongest and simplest – the question must have a simple 'yes' or 'no' response. The alternative proposed, with long responses, really would be unnecessarily complex.

4.15 We wrote to a number of organisations who work with or represent particular groups of people. One of these, the Equality and Diversity Forum, a network of national organisations committed to equal opportunities, social justice and good community relations, told us that they considered the wording of the referendum question included in the Bill to be clear and easily understandable. They support its use in the forthcoming EU referendum.

4.16 These views were not, however, representative of the vast majority of responses we received. Most of those who contacted us had concerns about

the question in the Bill. Almost 1,400 respondents told us that the Government's question should be changed, compared to fewer than 100 who wanted to retain the question without changes. The majority of these were from members of the public who had heard the proposed Government question and wanted to raise their concerns with us although change was also suggested by others including the Democratic Unionist Party (DUP), UKIP and Conservatives for Britain.

Neutrality

4.17 The key reason for respondents choosing to recommend changes to the question in the Bill was their concern about its neutrality. Indeed, more than 1,000 respondents told us that they thought the current question is not neutral, with approximately 50 respondents supporting its use at the referendum (please note the points on overall representativeness raised in paragraph 4.8 above).

4.18 Many of the respondents were concerned about the neutrality of the question because of the word 'remain' rather than 'be', and this is considered in the section below. Other respondents were concerned that yes/no answer options are inherently biased – and this is also examined in more detail below.

4.19 Another key factor that explained concerns about this was the use of 'no' to represent a change. Professor Thom Brooks of Durham University was concerned about the lack of consistency when compared to previous referendum questions:

> There is a convention that the answer "no" should be reserved for a verdict of no change – and "yes" for a verdict of change. The problem with the current question is that a "yes" vote is a verdict for no change. This is inconsistent with referendums on AV nationally and on independence in Scotland.

4.20 The Democratic Unionist Party expressed even stronger concerns about the potential bias of this:

> It risks being seen as a clear attempt to give the pro-EU campaign the stronger positive basis for the referendum campaign…In a single question scenario, we note that it has been the much more common practice in referendums held within the United Kingdom for the non-status quo position to be the 'Yes' answer.

4.21 We also heard this sentiment from members of the public, one of whom told us:

> The existing question gives a Yes vote to the status quo and does not reflect on any negotiated changes. Given that referenda tend to support the status quo anyway, this represents conscious bias in favour of the EU.

4.22 Another member of the public told us that she was, ‘not at all happy with the way the question has been put.’ She argued that: ‘The balance of the question at present leans towards asking for a yes vote.’

4.23 This was a concern we heard from many members of the public who wrote to us. There was clearly a strong perception that the proposed question in the Bill is not neutral and would not lead to a fair outcome. This also led some respondents to warn that the legitimacy of the outcome would come under doubt :

> If the question’s neutrality cannot be agreed by *all sides* prior to the vote, then its outcome and legitimacy will forever be question. This will further increase the feelings of disconnection and disillusionment to politics that many voters feel.

4.24 The concern about the neutrality of the question and the consequences of this was reflected in the response we received from the Plain Language Commission.

> It may be argued that putting ‘Yes’ first invites people to think this is the answer the questioner wants to hear and thus introduces a bias towards ‘yes’. The Government is likely to recommend a ‘yes’ vote, so any assumed bias towards ‘yes’ may skew the results in the Government’s favoured direction….There is also the question of possible bias in that ‘yes’ will probably be the positive or status quo response, which will allow the ‘yes’ campaign to paint itself as the positive or conservative option…

‘Be’ rather than ‘remain’

4.25 A significant proportion of responses expressed a preference for replacing the word ‘remain’ in the Government’s question with ‘be’:

> ‘Should the United Kingdom be in the European Union?’

4.26 Almost 1,000 responses expressly mentioned either a preference for ‘remain’ or a preference for ‘be’. The clear majority of these – more than 850 responses - preferred the latter. One of these responses was from Professor Matthew Turner of Warwick University, who told us:

> By explicitly including language that only refers to the possibility of remaining (and not withdrawing) from the EU the question obviously breaks a conceptual symmetry and is almost certain to have a clear behavioural bias. I am sure that you are aware of this fact, which will be confirmed by any practicing behavioural psychologist.

4.27 Professor Turner preferred the question to include ‘be’, rather than ‘remain’. This was the view of some of the elected politicians we heard from, including Kate Hoey, Labour MP, who wrote the ‘…question should be ‘be’ in the European Union rather than ‘remain’ in the European Union. Much more even-handed.’

4.28 Henry Smith, Conservative MP for Crawley, agreed: ‘In my opinion the UK EU membership referendum wording should read: “Should the United Kingdom be a member of the European Union?”’

4.29 We also heard this view from Conservatives for Britain. Co-chaired by Steve Baker MP and David Campbell-Bannerman MEP, Conservatives for Britain has the support of a number of Conservative MPs. They were concerned that the use of the word remain suffers from acquiescence bias:

> The tendency to affirm is more instinctive than the tendency to reject and we observe that bias in related ICM polling. In our view, if the question is to require a yes/no answer, then it should be the question provided in the Bill introduced by James Wharton MP: “Do you think the United Kingdom should be a member of the European Union?” This question has been considered and approved twice by the House of Commons.

4.30 However, as with many of those who expressed a preference for ‘be’ rather than ‘remain’, Conservatives for Britain also expressed their support for a question that does not have yes/no answer options. This is considered in more detail in the section below.

4.31 We also heard from UKIP that, in their view, ‘be’ was a more neutral word than ‘remain’. Their chairman, Steve Crowther, told us:

> Asking "Should the United Kingdom remain a member of the European Union?" gives a bias towards the status quo by using the question to emphasise the current position. The neutral formulation is **"Should the United Kingdom be a member of the European Union?"**. UKIP considers that this is the correct and fair referendum question to ask if a 'Yes' or 'No' answer is required.

4.32 This is clearly a subject that many UKIP members feel strongly about, and we received hundreds of responses from them that expressed similar concerns about the use of the word ‘be’. However, a significant proportion of these also expressed support for a question which has the answer options based on ‘leave’ and ‘remain’ rather than yes or no. This is examined further below.

A question without yes/no answer options

4.33 We heard many views about the remain or leave question that we have previously recommended:

> Should the United Kingdom remain a member of the European Union or leave the European Union?”
>
> Remain a member of the European Union
>
> Leave the European Union

4.34 Almost 450 of the responses we received set out a preference for the leave/remain option, with fewer than 300 respondents expressing a specific preference for yes/no. The remainder of responses did not specifically address this issue. As noted in the section above, while many of these responses where from members of the public there was also support for this type of question from Conservatives for Britain and UKIP.

4.35 Preference for this question was often because it was seen to be more balanced. In the words of one respondent, ‘equal prominence should be given to leaving the EU.’

4.36 Indeed, many of the respondents felt strongly about this issue:

> The proposed question is manifestly unfair and biased in favours of a Yes vote because it leads the voter to choose the status quo. Also the Yes case in any referendum has an inbuilt advantage because respondents like to be positive and say Yes rather than No. Why isn't the proposed question "Should the UK leave the EU?" To avoid this inbuilt bias, the question should ask "Remain or Leave".

4.37 Another told us that it would remove any confusion about the will of the electorate, as well as being a more neutral question:

> "Should the United Kingdom remain a member of the European Union or leave the European Union?" is a far clearer alternative…having to answer “Leave the EU” or “Remain a member” it removes all possibility of confusion as to the will of the elector, and all bias that would be associated with a yes/no answer would thus be removed.

4.38 Indeed, many members of the public were not convinced of the need for yes/no on the ballot paper or for campaigns:

> In my opinion the options should be made crystal clear, and the question should be "Should the United Kingdom remain a member of the European Union or leave the European Union?", and the options should be "Remain a member of the EU" or "Leave the EU". Why would it have to be a YES or NO answer?

4.39 However, there were others who preferred to keep a yes / no question. This was the view of Caroline Flint, Labour MP:

> I have a strong preference for a question that can be answered by ticking YES or NO. This is far simpler for the electorate and for the rival campaigns in the Referendum than to have “remain” or “leave” as alternative propositions.

4.40 There was also the view among a number of respondents that, ‘A yes/no question is preferable, as it leaves much less room for ambiguity.’

Intelligibility

4.41 While most of the preferences for the remain/leave question were based on the perception that it is more neutral, we also heard from Mencap that this was a preferable question amongst those people with learning difficulties that they consulted with.

4.42 Mencap told us that they consulted with a small number of their staff with a learning disability to find out their opinions and thoughts on the question in the Bill and the remain/leave question.

4.43 Most of those asked preferred the answers 'Remain a member of the European Union' and 'Leave the European Union' rather than a simple yes or no choice. Mencap suggested that these answer options were, in contrast to yes/no, seen to make the question 'fully accessible'.

4.44 We also heard this concern from a small number of other respondents, with one person telling us, 'A simple Yes/No answer can cause confusion, particularly with the old, partially literate and people that struggle with English as a first language.'

Other questions or changes

4.45 While the majority of those who contacted us did not recommend any specific alternatives to the question variations outlined above, a significant number (more than 250) did make further suggestions.

4.46 Some of these respondents were relatively satisfied with one of the versions already considered, but had additional ideas about how the question could be improved. While others believed none of the above questions to be suitable.

4.47 Moreover, while some respondents suggested a change to a word or two, for others it was important that a different structure or approach should be taken for the wording of the question.

4.48 Examples of the various alternatives are set out below.

Should the UK leave the European Union?

4.49 For some members of the public who felt that the 'yes' response should not be used to show support for the status quo option, the preferred alternative was to ask whether the UK should leave the EU. This is illustrated in the following response from a member of the public:

> In my view I think it should be like the Scottish referendum. The ones who want to leave should be on the yes campaign, the ones who want to stay the no campaign. In conclusion I think the question should be along these lines – 'Should the UK leave the European Union?'

4.50 Similarly, another member of the public was of the view that:

> ... the question should be able to illicit [sic] an instant answer to the question, without the need for any undue analysis of the wording. To that end a yes or no answer is the best option. There is an argument for saying that as we are already in the union the question should be **'Should the United Kingdom leave the European Union'.** That after all is the driving force behind the original argument.

4.51 This question was therefore preferred among those who wanted a yes/no question but who had concerns about the 'yes' option reflecting the status quo. There was a perception amongst these respondents that the status quo should be represented by the 'no' campaign.

4.52 The Democratic Unionist Party told us that "in a single question scenario the question should be "Do you agree that the United Kingdom should leave the European Union?" However, that was not their preferred wording (see paragraph 4.68 below).

Take out 'member'

4.53 To make the Government's question simpler and shorter still, Lord Tyler, responding on behalf of the Liberal Democrats, suggested that taking out the word 'member' from the question in the Bill would be a modest improvement: 'The campaigns are likely to be characterised as 'in' and 'out', so this shorter wording would make the question even more intelligible to the voter.'

4.54 Whilst taking out the word 'member' but keeping the question otherwise the same was not a common theme in the responses we received, many people did make proposals for a version of the question that did not include the word 'member'. These included: 'Should Britain be in or out of the European Union?', 'Should the UK remain in the EU?' and 'Should the United Kingdom remain in the EU or leave the EU?'

'Stay' rather than 'remain'

4.55 Many people suggested alternative questions that included the word 'remain' or said they were satisfied with previously proposed questions that included 'remain'. However, others used the word 'stay' in their responses.

4.56 Whilst sometimes it was clear that they were proposing this as an alternative to the use of 'remain' in the question, for some responses the word 'stay' was part of a more substantive change. It was not always clear in these instances the extent to which 'stay' was preferred over remain.

4.57 For some respondents, 'stay' was a word used more in everyday language, and it was for this reason, in the words of one respondent, that , '"stay in" is preferable to "remain".'

4.58 Some respondents mentioned this in relation to the question with 'remain' or 'leave' answer options. For example, Kate Hoey MP said she would, 'much prefer a question to have the opportunity to say either leave or stay rather than yes or no, which can become quite confusing.'

4.59 Similarly, we heard from local Tamworth Councillor Chris Cooke that: ‘The options should not be “Yes” or “No”. They should be “STAY IN” or “LEAVE”. I am sure a perfectly sensible question can be drafted around that.’

4.60 We also received feedback from Mencap, who ran a small feedback session with some of their staff to ask them about the question. The people they asked felt that the word ‘remain’ was not accessible and would prefer the word ‘stay’. ‘Stay’ was regarded as an easier word to understand and used in everyday language and conversation.

In/Out

4.61 We heard from several respondents about their preference for the words ‘in’ and ‘out’. This was seen to be a clear, easily understood alternative that would mirror how the issue is discussed outside of the polling booth. As one member of the public explained:

> I believe an 'in or 'out' answer question such as "Do you wish for the United Kingdom to be 'in or 'out' of the European Union" more straight forward. This format is completely unbiased and has total clarity. When the referendum is debated in the media, the option is always put as 'in' or 'out' not as 'yes' or 'no' and I see no reason why it should be different at the ballot box.

4.62 Another respondent noted that when the public had been, ‘promised an in/out referendum, instead we’ve got a yes/no referendum’. He proposed a question worded along the lines of:

> What position should the Government adopt regarding membership of the EU
>
> IN
>
> OUT

4.63 An ‘in’ or ‘out’ response was therefore seen by some to be direct and to reflect the essence of the referendum.

Two opposing statements

4.64 We received various suggestions for a question based on two separate statements. One person told us that to make the question fair, it should be:

\- ONE BOX ONLY TO BE MARKED -

Should Britain be an independent sovereign country?

OR

Should Britain be a Member of the European Union?

4.65 Another respondent concurred with this approach, explaining that there should be, ‘NO question to the electorate – just alternative statements set out on the ballot paper’. He added:

> The ballot paper should I suggest have two statements, set out in two boxes equally placed on the ballot paper. Those statements should read: “I want the UK to accept (or remain) in membership of the European Union”, AND “I want the UK to form a free trading self governing relationship with the European Union”.

4.66 He regarded this question to be a much fairer and more balanced referendum option, presenting the electorate with a positive and clear alternative to remaining in the EU.

4.67 ‘Two clear choices’ was how another member of the public described the question he advocated:

> TICK One BOX
>
> I want the United Kingdom to remain in the EU.
>
> I want the United Kingdom to leave the EU.

4.68 The Democratic Unionist Party told us that their preference is for a ballot paper that uses a ‘two option model’:

> Do you agree the United Kingdom should remain a member of the European Union?
>
> or
>
> Do you agree the United Kingdom should leave the European Union?

4.69 We received a range of alternative proposals based on such ‘either/or’ options. As these examples illustrate, opinions differed somewhat on what these options should be. Overall, however, those who submitted these suggestions believed that the question needed to present a range of options in order to provide a, ‘truly unbiased choice’.

Abbreviation ‘EU’

4.70 We also heard from some respondents that the question should include the abbreviation ‘EU’ as well as European Union. As one person explained, ‘I believe the initials EU should be included in the question, perhaps as (EU), as this is how the entity is most presented to the public.’

4.71 Another respondent reworded the question to - 'Do you wish to remain in the European Union (EU)'. With yes / no answer options. He told us, ‘I have put EU after the full title as these days most organisations are referenced to in these terms.’

4.72 A number of other proposals included the abbreviation ‘EU’ but did not specifically draw attention to this. It was not always clear, therefore, whether or not they were specifically advocating for this change or were using it as a short-hand.

Additional information on the ballot paper

4.73 Only a handful of the many responses we received mentioned adding additional information on to the ballot paper to explain the referendum. The consensus for a straightforward question is illustrated by the response of Conservatives for Britain: ‘We welcome the absence of unnecessary preamble from the ballot paper, in contrast to the 1975 referendum.’

4.74 One of the few exceptions to this was received from Professor Patrick Dunleavy, responding on behalf of the Democratic Audit. Their view is that the Electoral Commission should consider how far the referendum question itself should spell out the consequences of the decision that voters are being asked to make:

> At present all UK citizens are also European citizens with many attendant rights, which are of considerable economic and social value… In our view any remotely fair eventual EU referendum question must make plain to all those voting, at the point in the ballot box where the decision has to be made, that a UK decision to leave the EU will strip away those rights.

4.75 Overall, therefore, there was a broad consensus that the referendum question should be, ‘simple and balanced’. Adding additional information about the referendum or views on what the consequences of a ‘remain’ or ‘leave’ vote would be was not asked for by respondents.

Welsh language question

4.76 The consultation asked respondents to comment on the Welsh language version of the question included in the Bill:

> A ddylai’r Deyrnas Unedig ddal i fod yn aelod o’r Undeb Ewropeaidd?

4.77 The consultation also included the Welsh language version of the leave or remain question that the Commission had previously recommended:

> A ddylai'r Deyrnas Unedig bara i fod yn aelod o'r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?

4.78 A small number of respondents contacted us with their views on the Welsh language question, with a couple of issues being raised for consideration.

4.79 We heard from the Vale of Glamorgan Council that ‘aros’ should be used for the word ‘remain’, to use the word ‘ynteu’ for ‘or’ and to substitute the word ‘ymadael’ for ‘adael’:

In English “Should the United Kingdom remain a member of the European Union?” and in Welsh: “A ddylai’r Deyrnas Unedig aros yn aelod o’r Undeb Ewropeaidd?”

The responses in English would be “Yes” and “No”, and in Welsh “Dylai” and “Na ddylai”

In English “Should the United Kingdom remain a member of the European Union or leave the European Union?” and in Welsh “A ddylai'r Deyrnas Unedig aros yn aelod o'r Undeb Ewropeaidd ynteu ymadael â’r Undeb Ewropeaidd?”

The responses in English would be “Remain a member of the European Union”a “Leave the European Union” and in Welsh “Aros yn aelod o’r Undeb Ewropeaidd” and “Ymadael â’r Undeb Ewropeaidd”

4.80 The Welsh Language Commissioner was also concerned about the suitability of ‘neu’ (for ‘or’), with ‘ynteu’ also mentioned as a possible alternative.

4.81 The Welsh Language Commissioner also commented that while 'dal i fod' and 'para i fod' are grammatically correct, it should be noted that some people would consider that they would be better suited for oral or informal use.

5 Our assessment

5.1 We have considered the question proposed by the UK Government against our guidelines for assessing referendum questions that we published in November 2009.

5.2 Our guidelines say that a referendum question should present the options clearly, simply and neutrally. So it should:

- Be easy to understand
- Be to the point
- Be unambiguous
- Avoid encouraging voters to consider one response more favourably than another
- Avoid misleading voters

5.3 In arriving at our assessment, we have taken account of the context for the referendum question and all the evidence we have received.

Our conclusions

5.4 Set out below is our assessment of the referendum question in the Bill (Should the United Kingdom remain a member of the European Union?):

Is the question easy to understand?

5.5 We mostly heard that the question 'Should the United Kingdom remain a member of the European Union' was easy to understand. The majority of our consultation responses did not have concerns about comprehension and this was also the case for those who participated in the research.

5.6 However, our research did find that some participants with English as a second language, lower literacy and learning difficulties found the non-yes/no questions easier to understand. Through our consultation we also heard this, in relation to those with learning disabilities, from Mencap who told us the answer options which did not use yes and no were more accessible.

5.7 Consequently, whilst we regard the question as generally easy to understand, we are concerned that there may be some people who struggle to answer it as they intend.

Is the question to the point?

5.8 The question was regarded as to the point. Research participants noted that it was short and concise and we did not receive any other evidence to the contrary. We have no concerns about this.

Is the question unambiguous?

5.9 The words used in the question were not found to be ambiguous and we feel that the question itself is therefore sufficiently unambiguous.

5.10 However, it is clear that the consequences of the question remain unclear. This means that any ambiguity relating to the question was generally part of a wider ambiguity relating to the consequences of the referendum, rather than anything that can be addressed in the question itself.

5.11 We also heard from some respondents to our consultation/research that the proposed 'yes/no' question was less clear about the consequences of the referendum than a question based on 'either/or' answer options.

Does the question avoid encouraging voters to consider one response more favourably than another?

5.12 There were no participants in our research who felt that the wording of this question affected their own personal voting intention. However, some felt that the question lacked neutrality. As noted previously this research can identify participant's reported views regarding neutrality of question wording but it cannot capture any unconscious impact of wording and structure. It is thus possible that questions might influence participants to answer in a particular way without them being aware of it. Many respondents to our consultation also perceived the question in the Bill to be biased.

5.13 There were two main reasons why consultation respondents and research participants viewed the question as biased – it only sets out the 'remain' option in the question, and the 'yes' response is for the status quo.

5.14 Consequently, while the question is not significantly leading, we have concerns about the perception that this question will encourage voters to consider one response more favourably than another. Importantly, some respondents to our consultation, particularly those likely to campaign or vote to leave the European Union, believed this perception could undermine the legitimacy of the referendum result in the event of a 'yes' vote. While we cannot know if this is a concern that would be shared by the general public as a whole we are concerned about the risk of using a question at this referendum which is not accepted as valid by one side of the debate.

Does the question avoid misleading voters?

5.15 The question is clear that the United Kingdom is currently a member of the European Union and we do not have concerns that it would mislead voters.

Our recommendation

5.16 We have concerns, based on our assessment, about the proposed 'yes/no' question. This is because of what we heard through the consultation and research about the perception that the question encourages voters to consider one response more favourably than the other. These views raise concerns about the potential legitimacy, in the eyes of those campaigning to leave and some members of the public, of the referendum result – particularly if there was a vote to remain a member of the European Union.

5.17 Our assessment suggests that it is possible to ask a question which would not cause comparable concerns about neutrality, whilst also being easily understood.

5.18 We have previously recommended both a yes/no and a non-yes/no question for use at a referendum on European Union membership. However, in this assessment we have heard clearer views, particularly from potential campaigners to leave the European Union, about their concerns regarding the proposed yes/no question.

5.19 In addition, we have not as part of this assessment heard significant concerns from campaigners about campaigning on a non-yes/no question.

5.20 We also found, through the research and consultation, concerns that some people, such as those with lower levels of literacy, may find it easier to answer a non-yes/no question.

5.21 Our proposed question retains the word 'member' because the research found views to be mixed about the advantages and disadvantages of asking about membership or staying/remaining 'in' the European Union. On balance we think it is preferable for the question to be specific about what voters are being asked to give their views on.

5.22 We recommend that the following question be used at the referendum on the United Kingdom's membership of the European Union:

> **Should the United Kingdom remain a member of the European Union or leave the European Union?**
>
> **Remain a member of the European Union**
>
> **Leave the European Union**

5.23 We have assessed this recommended question against our referendum guidelines.

Is the question easy to understand?

5.24 The question is easy to understand. Research participants indicated that the question was clear, simple and easy to understand. Whilst some felt that

this question was longer when compared to the ‘yes/no’ question, none felt that this would impact on their understanding of it. Many participants noted that the ‘yes / no’ answer options are vague when compared to the fuller answer options used in this question. A small number of stakeholders who responded to the consultation made the case for the ‘yes/no’ question being simpler.

5.25 Both this and our previous assessment found that both of the words ‘remain’ and ‘stay’ were easy to understand and plain English. There was also no significant distinction between them in terms of the Welsh version of the question. It is therefore a fine judgment which would be better for use in the referendum question. The research did find that, while easy to understand, ‘remain’ is a more formal word than ‘stay’ and therefore some participants considered it more suited to use in a referendum question. Separately, we heard via our consultation that some people such as those with learning disabilities may find ‘stay’ a more accessible word than ‘remain’, although this was not found in our research and the advice we received from the Plain Language Commission said that ‘the crucial word ‘remain’ is shown in vocabulary lists as being familiar to the average nine-year-old. Apart from people with exceptionally low levels of literacy, the electorate should have little difficulty…’. On balance, based on the evidence available, the Commission concluded that ‘remain’ was preferable for the question.

Is the question to the point?

5.26 This is a longer question and answer than the ‘yes/no’ option. This was noticed in the research when compared directly with the ‘yes/no’ question. When participants considered this question in isolation, the research did not find concerns about the length of this question.

5.27 A small number of stakeholders also noted, through the consultation, that this was a longer question than the proposed ‘yes/no’ one. However, no-one in the research felt the length of the question would influence their voting behaviour or understanding and we believe the question is sufficiently to the point.

Is the question unambiguous?

5.28 The question was not regarded as ambiguous. Ambiguity was not a notable concern in either the consultation or the research.

Does the question avoid encouraging voters to consider one response more favourably than another?

5.29 We did not hear from respondents to the consultation that this question encouraged one response to be viewed more favourably than another. Participants in the research also considered this formulation of question to be more balanced.

5.30 We are therefore confident that this question avoids encouraging voters to consider one response more favourably than another. We did not hear any substantive concerns about this question being biased or leading. Both options are set out in the answer options, giving a clearer balance compared to the ‘yes/no’ option.

Does the question avoid misleading voters?

5.31 We did not hear concerns that this question is misleading for voters. Respondents to the consultation and participants in the research made the case that a question with ‘either/or’ answer options was clearer about the option being presented to voters.

Welsh language version of the question

5.32 As with the English version of the question, research participants who saw this question in Welsh did not raise significant issues with its intelligibility or neutrality.

5.33 As set out above, the significant amendment identified through the research was to replace the word ‘para’ or ‘bara’ with either ‘aros’ or ‘ddal i fod’. Support for either was based on personal preference and was mixed. Overall, participants agreed that either ‘ddal i fod’ or ‘aros’ could be used as synonyms alongside the English word ‘remain’.

5.34 We have recommended the use of ‘aros’:

> **A ddylai’r Deyrnas Unedig aros yn aelod o’r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?**
>
> **Aros yn aelod o’r Undeb Ewropeaidd**
>
> **Gadael yr Undeb Ewropeaidd**

Moving away from a ‘yes/no’ question

5.35 We are aware in making this recommendation that we are recommending a change from a ‘yes/no’ question to one that has longer answer options based on the specific action to be taken.

5.36 This would not be the first time that a referendum in part of the UK has not used a ‘yes/no’ question. The most recent national referendums not to use ‘yes/no’ were those held in Scotland and Wales in 1997.

5.37 The Scotland referendum asked two questions. The first question presented two answer options, asking voters to mark either, ‘I agree that there should be a Scottish Parliament’ or ‘I do not agree that there should be a Scottish Parliament’. The second question to voters asked them to mark

either, ‘I agree that a Scottish Parliament should have tax-varying powers’ or ‘I do not agree that a Scottish Parliament should have tax-varying powers’.

5.38 The 1997 Wales referendum asked voters to mark either, ‘I agree that there should be a Welsh Assembly’ or ‘I do not agree that there should be a Welsh Assembly’.

5.39 A few stakeholders raised concerns about campaigning on a ‘remain/leave’ question. For example, Caroline Flint MP said a yes/no question would be preferable for campaigning. However, this was not a theme that was raised as a concern by most of the potential campaigners we heard from.

5.40 The Commission always seeks to put the voter first. We received many responses from members of the public expressing concerns about the use of a ‘yes/no’ question, with only a small number of exceptions to this. We have taken serious consideration of their views in reaching our recommendation.

Ballot paper format

5.41 Our recommended redraft of the question, in ballot paper format, is:

Referendum on the United Kingdom’s membership of the European Union	
Vote only once by putting a cross [X] in the box next to your choice	
Should the United Kingdom remain a member of the European Union or leave the European Union?	
Remain a member of the European Union	☐
Leave the European Union	☐

5.42 This recommended ballot amends the title from “Referendum on whether the United Kingdom should remain a member of the European Union” to “Referendum on the United Kingdom’s membership of the European Union”. We think this is preferable to a long title which mirrors our recommended question (as is the case in the currently proposed ballot paper title).

Ballot paper for Wales

5.43 Our recommended Welsh language question is also set out below:

Refferendwm ar aelodaeth y Deyrnas Unedig o'r Undeb Ewopeaidd **Pleidleisiwch unwaith yn unig** drwy rhoi croes [X] yn y blwch nesaf at eich dewis	
A ddylai'r Deyrnas Unedig aros yn aelod o'r Undeb Ewropeaidd neu adael yr Undeb Ewropeaidd?	
Aros yn aelod o'r Undeb Ewropeaidd	☐
Gadael yr Undeb Ewropeaidd	☐

What happens next?

5.44 It is for Parliament to make the final decision about the question to be included European Union Referendum Bill. We have aimed to provide a constructive recommendation based on the evidence now available and hope that this is helpful when decisions are made.

5.45 The wording of the referendum question currently included in the European Union Referendum Bill is broadly intelligible. However, we have heard from many campaigners and members of the public, including participants in our research study, that the question is not as balanced as it could be.

5.46 The alternative we have proposed is intended to address this concern so that there can be no doubts about the legitimacy of the referendum result.

Voters' information needs

5.47 At the time of undertaking this assessment, we know that the Government has committed to a process of negotiation on the United Kingdom's membership of the European Union. That process is not yet complete. There is therefore a level of uncertainty about some of the specific issues which will frame the vote and what impact or otherwise these may

have on how people approach the question. There is also uncertainty about the precise steps that will be taken immediately following a referendum.

5.48 As indicated in Chapter 3, our research has shown that there is clearly an appetite from members of the public for detailed and clear information about the implications of any decision to either remain a member or leave the European Union. As many of those requesting this information also acknowledged, however, it is likely that much of the information that voters would like will not be simply factual in nature, but will sit at the heart of the campaign arguments put forward by those on both sides of the referendum debate. We do not think it would be appropriate in these circumstances for the Commission to attempt to provide this type of information ourselves.

5.49 The questions that voters identified as the most important to receive information about were:

- What will a majority 'yes/ remain/ stay' vote mean? For example, will it mean:
    - Continuation of current terms of membership?
    - Continued membership with different terms of membership?
- What will a majority 'no/ leave' vote mean? For example, will it mean:
    - Entire separation from the European Union?
    - Renegotiated terms of membership?
    - A relationship with the European Union with trade agreements similar to other European countries that are not part of the European Union?

5.50 It is likely that the Government will give its views on these questions ahead of the poll. In addition, **we recommend that all campaigners' websites include a section with their answers to these questions, highlighting any wider sources that they have relied upon in formulating their response.** We will highlight these questions to campaigners as they register with us so that they are aware of this recommendation.

5.51 If two lead campaign groups, one for each referendum outcome, are designated by the Commission, we will in due course provide the links to where any information they provide is hosted on our voter information website, www.aboutmyvote.co.uk, alongside the background to this recommendation.

5.52 In addition to providing the links online, if the lead campaigners are both able to prepare their responses in sufficient time, we will also include the links to both of their websites in the public information leaflet that we will send to all households across the UK. The Commission's booklet will include factual, impartial information about how voters can properly cast their vote, including an image of the ballot paper.

5.53 There were a number of more general questions that voters indicated they expected to see answers to before casting their vote. A full list of these can be found at Appendix 3. Many of these relate to issues that will inevitably

form part of the wider debate that takes place before polling day and we will highlight them to all campaigners as they register with us so that they can consider how to respond to them as part of their campaign plans.

Appendix 1: The Electoral Commission's approach to assessing the intelligibility of referendum questions

November 2009

The Electoral Commission

Our approach to assessing the intelligibility of referendum questions

Our responsibilities

A referendum gives the public the opportunity to vote on a proposal put forward by government.[1] If a referendum is going to take place, a piece of legislation is written containing the proposed question. The law requires us to publish our views on the intelligibility of proposed questions for UK-wide, national or regional referendums.[2] The UK Government must also consult us on the intelligibility of proposed questions for local referendums in England and Wales on the way local authorities are run.[3]

This statement sets out the approach we will take to assess the intelligibility of referendum questions, including the timetable for this work.

Our aim and approach

Our aim is to look at a proposed question from the perspective of voters,[4] to see if it is written in a way that means they are likely to understand it. This includes whether or not they can understand how to answer it. It is important that voters can mark their ballot papers easily, and that they are confident that they have voted the way they intended to. Governments may make important decisions based on the outcome of a referendum, and so that outcome needs to be an accurate reflection of what voters want. This means that the question should present the options to voters clearly, simply and neutrally.

We have produced some referendum question guidelines that set out the criteria we will use to assess how intelligible a question is (see our referendum question guidelines).[5] As well as looking at the question ourselves, we will gather evidence to help us with our assessment. This will include:

- carrying out research with the public (see next section for more details)
- asking for advice from experts on accessibility and plain language
- talking to other people, for example political parties and campaign groups associated with the referendum, and other key groups or individuals who have an interest in the referendum and its outcome

We will publish the research reports and a summary of the other evidence we have gathered and used in our assessment.

Research with the public

Because we want to look at whether or not voters can understand a proposed referendum question, we would need to get evidence of this from voters themselves. The best way for us to get this evidence is by carrying out research to see how people react to and understand the question, and we would want to do this for any referendum question we are asked to assess.

The research would usually be done through focus groups and one-to-one interviews. This type of research will help us to find out people's understanding of a proposed referendum question, their attitudes towards it, and the reasons why they think or feel the way they do about it. It also helps to explain why people may find a question easy or difficult to understand, and to

Putting voters first

explore how the question could be made more intelligible. The research would focus on the question itself and how it is written, rather than on how people would vote.

We would include a wide range of people in the research, so that we can get the views of people with different backgrounds (e.g. people of different ages, gender, and levels of education), or people who live in different places.

Timetable

We should be able to publish our views on the intelligibility of a proposed referendum question around 10 weeks after finding out what the question is. This includes eight weeks to carry out public opinion research, based on getting at least two weeks' notice of the date when we will be given the exact wording of the question. We will do as much advance preparation as we can for the research – which is the part of our evidence-gathering that will take the longest – so that we can make sure it is completed as quickly as possible.

1 This statement only covers referendums on proposals put forward by governments, although referendums can be held on other issues. By 'government' we mean the UK Government, the Scottish Government, the Welsh Assembly Government or the Northern Ireland Executive.

2 The requirement is set out in the Political Parties, Elections and Referendums Act 2000 (PPERA). Our responsibility relates to referendums held under the framework of PPERA.

3 Under Section 45 (8A)–(8D) of the Local Government Act 2000, inserted by Schedule 21 of PPERA.

4 By 'voters' we mean people who would be eligible to vote in that referendum.

5 We produced our original guidelines in 2002 and have recently reviewed and updated them. The guidelines are available at www.electoralcommission.org.uk/elections/referendums

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The Electoral Commission

Appendix 2: The Electoral Commission's referendum question assessment guidelines

November 2009

The Electoral Commission

Referendum question assessment guidelines

By law, the Electoral Commission must comment on the intelligibility of UK, national and regional referendum questions, and some local government referendum questions.[1] In this context, we mean referendums where voters are asked to vote on a proposal put forward by government. At this type of referendum, voters are given a ballot paper that contains the question and at least two possible responses to choose from.[2]

We have developed these guidelines to:

- help us assess how intelligible a proposed question is
- help people draft intelligible referendum questions

In this context, 'question' includes the question, the responses, and any statement that comes immediately before the question.

Guidelines for assessing referendum questions

A referendum question should present the options clearly, simply and neutrally. So it should:

- be easy to understand
- be to the point
- be unambiguous
- avoid encouraging voters to consider one response more favourably than another
- avoid misleading voters

Checklist

We will use the following checklist to help us assess how intelligible a question is.

- Is the question written in plain language? That is, language that:
  - uses short sentences (around 15–20 words)
  - is simple, direct, and concise
  - uses familiar words, and avoids jargon or technical terms that would not be easily understood by most people
- Is the question written in neutral language, avoiding words that suggest a judgement or opinion, either explicitly or implicitly?
- Is the information contained in the question factual, describing the question and the options clearly and accurately?
- Does the question avoid assuming anything about voters' views?

1 Under the Political Parties, Elections and Referendums Act 2000.

2 How many responses voters can vote for depends on the voting system used at that referendum.

Feedback

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Putting voters first

Appendix 3 Public information – detailed issues raised by research participants

A range of issues were mentioned across the research with participants who were keen to know how they would be affected by a majority vote either way. These issues tended to be those that participants personally felt were important to them or their local area, or key issues that they had heard were impacted by European Union decisions in the media. Key questions mentioned were similar to those cited in the previous research:

- Finances:
    - What does being a member of the European Union cost the United Kingdom?
    - What is the financial saving for the United Kingdom if it leaves the European Union?
    - What is the funding received and what projects are financially supported by the European Union?
- Trade and economy:
    - What impact will leaving the EU have on trade agreements and how does this compare to current trade agreements?
    - What impact will leaving the EU have on any 'bail out' role for supporting struggling economies in the European Union and how does this compare to the UK's current/ likely role in any 'bail out' for struggling economies in the EU? (this was specifically mentioned as the research happened around the time of the Greek referendum);
    - What is the likelihood of the United Kingdom adopting the Euro if staying in the EU? (this was only cited by a few participants).
- Immigration, travel and border control:
    - What impact will leaving the EU have on immigration numbers and how does this compare to current numbers?
    - What impact will leaving the EU have on the ability to work/ travel in countries in the European Union?
    - What impact will leaving the EU have on British people living in European countries?
- Laws:
    - How does law making within the European Union currently work?

    - Which laws will be impacted by remaining in or leaving the European Union?

- What is the impact on jobs, working directives and housing of staying or leaving the EU?

- What impact will leaving the EU have on public services? (e.g. NHS, police and education)

- Impact on the European Union:

    - Which other countries are members?

    - What will the impact on the remaining members/ the European Union be if the United Kingdom leaves?

Appendix 4 Consultation letter

European Union Referendum Bill – referendum question assessment

I am writing following the introduction of the European Union Referendum Bill in the House of Commons on Thursday 28 May to invite comments on the proposed wording of the referendum question included in the Bill. Under the Political Parties, Elections and Referendums Act (PPERA), the Electoral Commission is required to assess and comment on the intelligibility of any question included in a Bill for a UK-wide referendum.

As well as looking at the wording of the question ourselves, we will gather evidence to help us with our assessment. This will include:

- Carrying out research with voters from different backgrounds and across different areas, through focus groups and one to one interviews.
- Asking for advice from experts on accessibility and plain language.
- Talking to potential campaign groups, other interested groups and individuals, including political parties.

In order to inform our assessment, we are seeking your views on the wording of the referendum question which has been included in the Bill, which is as follows:

"Should the United Kingdom remain a member of the European Union?"

In Wales the following Welsh language version of the question wording would also appear on the ballot paper:

"A ddylai'r Deyrnas Unedig ddal i fod yn aelod o'r Undeb Ewropeaidd?"

We have produced referendum question guidelines that we use to assess whether a proposed question is clear, simple and neutral. These guidelines can be found on our website **here** and it would be helpful if you consider the question in the context of these guidelines when giving us your views.

The Commission has previously assessed the wording of a question for a referendum on the United Kingdom's membership of the European Union, which was included in a Private Members' Bill introduced in 2013. We recommended in October 2013 that the proposed question wording should be amended to reduce the risk of misunderstanding or ambiguity about the current membership status of the UK within the EU. We provided two alternative question wordings for Parliament to consider:

- **“Should the United Kingdom remain a member of the European Union?”**
  The response options would be **“Yes”** and **“No”**

- **“Should the United Kingdom remain a member of the European Union or leave the European Union?”**
  The response options would be **“Remain a member of the European Union”** and **“Leave the European Union”.**

However, we also highlighted in October 2013 that we had not been able to fully test the second of these two alternative question wordings in the time available to us before we reported. We therefore made clear that, if Parliament amended the question in the Bill to include this wording, the Commission would undertake further work to check whether this wording raised any new issues of intelligibility.

Following further research which we carried out in early 2014, after the question wording included in the Bill had been amended to “Should the United Kingdom remain a member of the European Union or leave the European Union?”, we were satisfied that this question wording was clear and straightforward for voters and was also the most neutral wording from the range of options we had considered and tested.

A link to information about our previous question assessments and recommendations can be found on our website **here**.

We are undertaking further research and consultation now because of the time which has passed since our previous research and assessment, and in order to ensure we have a clear understanding from campaigners about the impact of the question wording on their ability to campaign in support of or against either outcome. We would particularly welcome any comments and views on the implications for campaigners of using alternatives to “Yes” and “No” as response options in any question wording.

If you would like to give us your views on the intelligibility of the proposed referendum question, you can write to us at the address shown on this letter or email ReferendumQuestion@electoralcommission.org.uk. In order that we can consider your views as part of our assessment process, please reply not later than **Friday 19 June 2015.**

If you would like to put your views to us in a meeting, please contact us by **Friday 5 June 2015**. We will aim to hold any meeting not later than 19 June 2015. **Please note that the Commission may use extracts from named responses in its report on the question unless you let us know that you wish your comments to be considered confidential.**

We will report our views on the question to the UK Parliament and will make our findings public at the same time.

Mark Drakeford AC / AM
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: LF/MD/0775/15

David Melding AM
Chair of the Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

Dear David,

8 September 2015

Regulation and Inspection of Social Care (Wales) Bill

You will recall, during the General Principles debate on the Bill on 14 July, I confirmed that I would provide a detailed response to your Committee's Stage 1 report and its 14 recommendations. Whilst there is no strict requirement to provide a response to every single one of the recommendations, I feel that it is important to help you understand the consideration that I have given to each of them.

I am copying this letter to David Rees AM, Chair of the Health and Social Care Committee.

Best wishes,

Mark

Mark Drakeford AC / AM
Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Bae Caerdydd • Cardiff Bay
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English Enquiry Line 0300 0603300
Llinell Ymholiadau Cymraeg 0300 0604400
Correspondence.Mark.Drakeford @wales.gsi.gov.uk

Recommendations from the Constitutional and Legislative Affairs Committee Stage 1 Report into the Regulation and Inspection of Social Care (Wales) Bill.

I thank the Constitutional and Legislative Affairs Committee for their detailed consideration of the Regulation and Inspection of Social Care (Wales) Bill. I have considered each of your recommendations and am responding accordingly.

Recommendations 2, 3 and 4 call for a number of amendments to be made to the Bill, I am happy to confirm that I **accept** all three recommendations and will bring forward amendments in response to all three recommendations at stage two. My response to recommendation 2 will take the form of amending a number of sections to ensure a duty to consult applies, for example to sections 35 and 38.

In respect of recommendation 3 I accept the principle of this recommendation, however I will not be bringing forward an amendment to change the procedure for regulations introduced under section 6(1)(d) of the Bill. I will however bring forward amendments to put more detail directly on the face of the Bill regarding the fitness test to provide services and be nominated as a Responsible Individual. I believe this goes beyond the intention for this recommendation so trust the Committee will be satisfied by this approach.

I will bring forward an amendment to put extra detail regarding the content of the annual return directly on the face of the Bill, this will set out some of the standard information that will be required. I will also propose amendments to the Bill at stage two so that the first set of regulations drafted under this section will be subject to the affirmative procedure.

As previously indicated I have considered **recommendation 5** in further detail, I remain of the view that it would not be helpful to list on the face of the Bill some of the potential circumstances in which Welsh Ministers may designate a Responsible Individual. Such an amendment would not in my view enhance the Bill and could instead have the unintended consequence of the list being interpreted as exhaustive and tie the hands of Welsh Ministers in dealing with unlisted and unexpected circumstances. On this basis I am **rejecting** this recommendation.

I have reviewed sections 26-30 of this Bill in response to **recommendation 6** and noted the views of the Committee but am of the view that there is inherent risk in placing further detail on the face of the Bill. I intend the power to be wide so that the things that providers may be required to do may be many and varied. The Assembly will have the opportunity to review the appropriateness of each of the requirements that may be imposed via the affirmative procedure. There is further detail in the Explanatory Notes which accompany the Bill. I am happy to commit to review that information to see if additional detail can be provided, however I am **rejecting** this amendment.

Recommendations 7, 8, 9 and 10 call for amendments to be made to the Bill to apply the super affirmative procedure to a number of sections of the Bill relating to ratings, offences, penalty notices and financial sustainability. I am happy to accept the principle behind the recommendations, which would require a 12 week consultation on the draft regulations themselves with a statement from the Minister regarding the consultation and detailing what the regulations change. I will give effect to this recommendation by making amendments to the Explanatory Notes detailing that it would be our intention to follow the procedure set out

in section 33 of the Social Services and Well-being (Wales) Act 2014 for substantive regulations.

The committee recommended in **recommendation 11** that the affirmative procedure is applied to section 110(5) relating to protection of title. Protecting titles of social care workers is a significant regulatory intervention and because of this I have already considered that the affirmative procedure should apply to section 110(2) where the titles of other social care workers, in addition to social workers are protected. However, I am not of the view that the affirmative procedure is needed in relation to section 110(5) as this will only need to be used if there are changes to those relevant regulators listed in subsection (4). Such changes will only be made to keep the Bill up to date. The regulation making power will not therefore substantially affect the provisions of the Bill. I am therefore **rejecting** this recommendation.

Recommendation 12 calls for an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 124(5)(d). The Committee's report refers to the fact that this is because section 124 relates to the right to a fair trial under the European Convention on Human Rights and this could therefore potentially be compromised by the composition of a fitness to practise panel. Section 124(5) deals with those persons who are precluded from carrying out an investigation. Provision in relation to the composition of the panel adjudication decisions is set out in section 172. This is to ensure that there is a separation between those carrying out investigations into a person's fitness to practise and those adjudicating on those issues. The regulation making power in section 125(5)(d) enables persons to be added to that list of persons who cannot carry out an investigation. It does not allow the Welsh Ministers to 'take away' from that list. Therefore the separation between investigation and adjudication required by Article 6 of the European Convention on Human Rights will always be maintained irrespective of whether regulations are made or not. As such, this detail is relatively minor in the overall legislative scheme and I am concerned that applying the affirmative procedure in line with **recommendation 12** would tie up National Assembly and Government resources. I am therefore **rejecting** this recommendation.

The power in section 135(2) is included in order to enable the lists of persons to whom Social Care Wales is required to disclose details of undertakings agreed with a registered person to be kept up to date and adjusted if the key organisations or structures within social care change. The disclosure of undertakings is a significant feature of public protection and as such, it is important that the list of persons to whom disclosure must be made is carefully and thoroughly considered. I therefore **accept** the **recommendation 13** that these regulations should be subject to the affirmative procedure.

Recommendation 14 calls for an amendment to apply the negative procedure commencement orders that include transitory, transitional or saving provisions in accordance with section 254(3). I am **rejecting** this recommendation as the making of commencement orders is not normally subject to any procedure, as they bring into force what the National Assembly has already approved, I see no reason to therefore deviate from the current convention in relation to commencement orders.

Agenda Item 5.1

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