

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW05
Ymateb gan Keith Bush QC¹

Evidence from Keith Bush QC

Introductory

1. The Bill is divided into two substantive parts (Parts 1 and 2) which deal with distinct aspects of legislation, namely:
 - The accessibility of Welsh law, including the fostering of a process of consolidation and codification;
 - The interpretation of Welsh law by the enactment, in effect, of an Interpretation Act applying to Welsh legislation.
2. Given the distinct character of these two Parts each Part (together, in the case of Part 2, with the relevant provisions of Parts 3 and 4, which deal with matters ancillary to that Part) will be discussed separately.

Accessibility of Welsh law (Part 1)

3. Part 1 of the Bill gives effect to the Welsh Government's response to the Law Commission's proposals "Form and Accessibility of the Law Applicable in Wales" (2016)² by:
 - Placing a statutory duty on the Counsel General to keep the accessibility of Welsh law under review;
 - Placing a statutory duty on the Counsel General and the Welsh Government to prepare, for each term of the National Assembly, a programme setting out what they intend to do to improve the accessibility of Welsh law, including their proposed activities intended to contribute to an ongoing process of consolidating and codifying Welsh law, maintaining its form and facilitating the use of the Welsh language.

¹ See Appendix for the author's cv.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560239/57148_Law_Comm_366_V1_Eng_Web.pdf

4. Given the nature of these provisions, the author need not go into detail in his response. They seem to him to be a small but highly significant step in responding positively to the Law Commission's recommendations. They are likely to lead to a highly desirable improvement in the accessibility and effectiveness of Welsh law. The only caveat which the author would wish to enter is that the duties to be imposed by Part 1 will only be meaningful if the work of codifying, consolidating and generally improving the accessibility of Welsh law is adequately resourced. If that is not done then either the programme required by section 2 will be unambitious and ineffective or (which would be even worse) will turn out to have been overambitious and incapable of achievement.

Interpretation and Operation of Welsh legislation (Part 2)

General Principles

5. The fact that there is a growing body of Welsh legislation produced by the Assembly (and by Welsh Ministers under delegated powers) means that there is a clear need for legislation which deals with its interpretation. The Assembly's legislative output is already manifesting distinctive form and content as well, as course, as being unique within the United Kingdom in that it takes bilingual form. Although it builds on the foundation of the Westminster tradition of legislative drafting, it is inevitable that, as it develops, the Interpretation Act 1978, which was conceived as an aid to the interpretation of legislation drafted for and produced by that specific legislature, will become increasingly inadequate as a means of discharging that function in relation to a different legislature.
6. The precedent of having separate interpretation statutes for devolved legislatures within the UK is well-established. The Interpretation Act (Northern Ireland) 1954 dates back to the days of the Northern Ireland Parliament established under the Government of Ireland Act 1920 but now applies to the interpretation of Acts of the Northern Ireland Assembly and subordinate legislation made under them. The Scottish equivalent is the Interpretation and Legislative Reform (Scotland) Act 2010. Wales is currently the odd one out and there is no logical or practical reason why this should continue to be the case. On the contrary, for the reasons referred to in the last paragraph, the need for a Welsh equivalent to the other devolved interpretation statutes is obvious.

Potential Barriers to Implementation

7. When it comes to codifying the interpretation of statutes, all three devolved legislatures face the common challenge of the relationship between the devolved interpretation statute and the UK equivalent.
8. UK and devolved legislation exist alongside one another, with both the UK and devolved legislatures producing legislation, each within their respective legislative competences, at the same time. The statute law that applies in each devolved territory therefore comprises both UK and devolved legislation.
9. In addition, even where the subject-matter of legislation is devolved, much UK legislation, dating from the time prior to devolution, continues to operate. This is least significant a factor in the case of Northern Ireland, since devolution began as long ago as 1921 (although it has of course been suspended for substantial periods since then). In the case of Scotland, all legislation prior to 1999, whether relating to devolved subjects or not, was UK Parliament legislation although often in the form of Scotland-only Acts of Parliament drafted by Scots drafting lawyers.
10. In the case of Wales the impact of UK legislation on Wales is even greater, as a result of three factors:
 - Prior to 2007 (a later date than in the case of the other devolved legislatures) all legislation applicable to Wales was UK Parliament legislation;
 - Because of the more limited scope of Welsh devolution – primarily the reservation to the UK of policing, the general criminal and civil law and the single England and Wales legal jurisdiction, the scope of continuing UK legislation applicable to Wales is greater than in the case of Scotland or Northern Ireland;
 - The fact that almost without exception legislation applying to Wales was, prior to legislative devolution, England and Wales legislation (rather than legislation specific to Wales) has meant that Assembly legislation, in the past, has very often proceeded by amending existing England and Wales legislation rather than by creating comprehensive self-contained new statutes applicable only to Wales.
11. As a result, the interrelation between the UK Interpretation Act and any new devolved interpretation act (such as the current Bill) is more close and

complex than in the case of the other devolved territories. In order to deliver the aim of improving the clarity and accessibility of Welsh legislation particular attention therefore needs to be given to the definition of the boundary between the province of the new Welsh interpretation statute and that of the Interpretation Act 1978.

12. The Bill proposes³ that its provisions should apply to:
- (a) Assembly Acts which receive the Royal Assent on or after the day when Part 2 of the Bill comes fully into force and
 - (b) Welsh subordinate instruments made on or after that day, except those made under UK Acts (or retained direct EU legislation) unless they are made only by Welsh Ministers or devolved Welsh authorities and apply only in relation to Wales.

The Welsh Government's intention is to commence Part 2 on 1 January 2020, so as to make it as easy as possible to tell whether an Act of the Assembly (or a piece of subordinate legislation) is governed by the new Act or by the Interpretation Act 1978.

13. As far as Assembly Acts are concerned, this is not the only possible approach. It accords with that which applies in relation to Scotland⁴ but the corresponding Northern Ireland⁵ legislation was applied to all Acts of the Northern Ireland Parliament whether passed before or after the devolved interpretation act came into force. The consequence of the adoption, in the Bill, of the former rather than the latter approach will be that there will be a class of Assembly statutes (22 Measures and approximately 40 Acts) which, until repealed in full⁶ will fall to be interpreted under the Interpretation Act 1978 rather than under the Legislation (Wales) Act 2019. The Explanatory Memorandum⁷ considers the advantages and disadvantages of applying the Bill to all Assembly Measures and Acts whenever made. The advantage would

³ Section 3

⁴ Interpretation and Legislative Reform (Scotland) Act 2010 section 1(1)

⁵ Interpretation Act (Northern Ireland) 1954 section 2(1)

⁶ A future textual amendment to such an Act will (section 30(1)) "have effect as part of that Act". So existing Assembly primary legislation, and even future amendments to it, will continue to be subject to the Interpretation Act 1978. See, further, paragraph 21(ii) below

⁷ Paragraph 67 - 69

be the achievement of a clear and comprehensive rule that all Welsh legislation would be interpreted under a single, bilingual, code of interpretation. The Explanatory Memorandum sets out the disadvantages, which are primarily practical but include one legal difficulty, namely that existing Assembly legislation will have been drafted with the intention that the rules and definitions in the 1978 Act apply to it. Applying distinct and possibly materially different rules of interpretation to existing legislation retrospectively could give rise to unexpected consequences if a dispute arose as to the interpretation of the legislation in question.

14. Careful thought having been given to the issue and a reasoned decision made, it might have been expected that the approach adopted in relation to the interpretation of primary legislation, avoiding any element of retrospectivity in the application of the rules of interpretation in the Bill would also be applied, in modified form, to subordinate legislation. The approach taken in relation to new subordinate legislation made under existing primary legislation is, in the view of the author, one which alters the approach to interpreting that subordinate legislation in a way that is in danger of creating a confusing divergence between the rules for interpreting a large body of existing primary legislation applicable to Wales and that for interpreting subordinate legislation made under it.

The problem of identifying a simple and consistent rule for interpreting Welsh subordinate legislation

15. Much Welsh subordinate legislation is made under powers conferred on Welsh Ministers by UK Acts of Parliament. These are usually (but not always, since Westminster continues to legislate occasionally on devolved matters under the Sewel Convention) pre-devolution England and Wales Acts whose powers to make subordinate legislation have been transferred to Welsh Ministers in relation to Wales.
16. An idea of the scale of this practice can be gained by analysing the 259 Wales Statutory Instruments published by legislation.gov.uk for 2018. Of these, 134 were routine local highways orders. These use limited standardised terminology and are very unlikely to give rise to issues of interpretation. Of the remaining 125 instruments, only 45 were made under powers conferred on Welsh Ministers by Welsh primary legislation (Acts of Measures), whilst 22 were made primarily under section 2(2) of the European Communities Act

1972, giving effect to EU directives. That leaves 58 made under Acts of Parliament.

17. So, of the general (ie non-local) Welsh statutory instruments made in 2018 under either Acts of Parliament or under Acts (or Measures) of the Assembly, 56% were made under Acts of Parliament and 44% under Assembly Acts or Measures. Over time, the proportion of Welsh statutory instruments made under Acts of Parliament will tend to decrease but for the foreseeable future they will inevitably form a substantial proportion of Welsh subordinate instruments as defined by section 3(2) of the Bill.
18. The proposed effect of section 3(1) of the Bill is that from the date when the Act comes into force the rules of interpretation contained in it will apply to all Welsh subordinate legislation, irrespective of whether that subordinate legislation was made under an Act of Parliament or an Act of the Assembly. The rationale for this rule is that henceforward all “made in Wales” legislation will be subject to interpretation under the provisions of the Legislation (Wales) Act rather than those of the UK Interpretation Act 1978.
19. Whilst the aspiration of creating a single code of interpretation for all Welsh legislation, primary and secondary, is laudable, it must be remembered that the Bill will not, in fact, achieve this. Welsh primary legislation enacted prior to the coming into full force of the Bill will continue to be subject to the Interpretation Act 1978. And Welsh subordinate legislation made jointly with UK Ministers (for example in order to give effect to retained direct EU legislation on an England and Wales, Great Britain or United Kingdom basis) will also continue to be interpreted under the 1978 Act. So the advantage of creating a single set of rules of interpretation for all Welsh legislation will not, in fact, be achieved by section 3(1)(c). Some Welsh subordinate legislation will, continue to be subject to different rules.
20. The fact that the Bill, as it stands, will still mean that two sets of rules for interpreting Welsh subordinate legislation will continue in existence opens up the possibility that there may be an alternative approach dual approach (but differently framed) which, whilst sharing the disadvantage that it would not embrace all Welsh subordinate legislation may be free of certain other complexities inherent in the current proposal. The alternative would be to apply the Bill only to subordinate legislation made under primary legislation to which, itself, the Bill is to apply. Welsh subordinate legislation made under Acts of Parliament would continue to be subject to the Interpretation Act

1978 (as would that made under Welsh primary legislation prior to the Bill coming fully into force).

21. There are three arguments in favour of continuing to apply the Interpretation Act 1978 to Welsh subordinate legislation made under Acts of Parliament (whenever enacted):

i) Subordinate legislation should be interpreted consistently with the primary legislation to which it gives effect. This is reflected in section 11 of the 1978 Act which provides that “Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.” As well as ensuring consistency of interpretation between primary and subordinate legislation this also, incidentally, has the practical benefit of avoiding having to either reproduce the definitions in an Act in any subordinate legislation made under it or having to repeatedly include in each subordinate instrument a provision stating that any expression used in that instrument has the same meaning as in the parent Act.

1. The Bill dispenses with this rule. But Acts of Parliament will still be subject to it and will have been drafted on the understanding that it applies. So Welsh subordinate legislation will, if the current approach of section 3 is maintained, often be required to be interpreted according to a different rule from that which those who drafted the primary legislation will have assumed would apply. This seems to be a fundamentally unsound approach. Primary and secondary legislation should be drafted according to a common set of rules. These may in future either be the rules applicable to Welsh legislation or the rules applicable to UK legislation. But to mix the two as is proposed is likely to generate confusion.

ii) Subordinate legislation often amends earlier instruments. If a Welsh subordinate instrument which is made after the Bill comes fully into force amends an earlier instrument, what is the situation? Section 30(2) provides that where an existing enactment is amended by a Welsh subordinate instrument by inserting or substituting words, those words “have effect as part of that enactment”. This appears to mean that whatever rules of interpretation apply to the existing instrument also apply to the words inserted. So, as is often the case, a subordinate

instrument contains both new free-standing provisions and ones amending an existing instrument made under an Act of Parliament (or Welsh primary legislation) before the Bill comes fully into force, the rule for interpreting some provisions of the instrument will be different from those which apply to others – an obvious source of confusion and uncertainty.

2. This problem will unfortunately arise inevitably in relation to instruments made under Welsh primary legislation enacted before the Bill takes effect but the risk of such an instrument containing provisions inconsistent with the Bill is limited and is probably manageable. In the case of the very large body of existing subordinate legislation applicable to Wales which has been made under Acts of Parliament the risk of material inconsistencies between the meaning required to be given to different provisions within the same instrument is likely to be much larger.

- iii) Where powers to make Welsh subordinate legislation arise under Acts of Parliament these have usually been conferred on “the Secretary of State” and transferred to Welsh Ministers in relation to Wales. Such powers will almost always exist in parallel with identical powers to make subordinate legislation on the relevant matters conferred on a UK minister in relation to England. The effect of section 11 of the Interpretation Act 1978 means, at present, that subordinate legislation made on a particular matter in relation to each territory falls to be interpreted, by courts operating within the common England and Wales jurisdiction, according to the same rules. The effect of 3 would be to undermine this common approach not as a result of any policy divergence but because of possibly unforeseen distinctions in the rules of interpretation which apply to what will often be identical wording. For those having to understand and apply subordinate legislation, for example in industry or the legal profession, this may well give rise to an unnecessary uncertainty in applying identical wording on either side of the border.

Conclusion

- 22. In the interests, therefore, of safeguarding the principle of promoting certainty and consistency when interpreting and applying Welsh legislation, the author proposes that the Bill should not apply to

subordinate instruments made under Acts of the UK Parliament, so that these will continue to be interpreted in accordance with the Interpretation Act 1978.

APPENDIX

Keith Bush QC LLM (London) Barrister is an Honorary Professor at the Hillary Rodham Clinton School of Law at Swansea University. He is also President of the Welsh Language Tribunal, a member of the Law Commission's Advisory Committee for Wales and Treasurer of the Legal Wales Foundation.

Having practised at the Bar in Cardiff for over 20 years, he joined the Welsh Government's legal service in 1999, where he became Legislative Counsel, leading the legal team which worked on a number of bills relating to Wales, including the one that became the Government of Wales Act 2006. From 2007 until 2012 he was Chief Legal Adviser to the National Assembly for Wales.

He has contributed to the *Statute Law Review*, the *Cambrian Law Review*, the *Wales Legal Journal*, the *Journal of the Welsh Legal History Society* and the *New Law Journal* and he frequently lectures on public law issues in both English and Welsh. He is Module Director for two innovative undergraduate modules at Swansea University on Legislation and the Law of Multi-Level Governance as well as contributing to Public Law teaching in both English and Welsh. He is the author of a Welsh language work on Public Law - '*Sylfeini'r Gyfraith Gyhoeddus*' ('Foundations of Public Law') commissioned by Bangor University and the *Coleg Cymraeg Cenedlaethol* (the National Welsh Language College). His teaching and research interests include the law of devolution, federal and quasi-federal states and non-territorial constitutional structures and the legal rights of linguistic and cultural groups