

Jeremy Miles AS/MS

Cwnsler Cyffredinol a'r Gweinidog Pontio Ewropeaidd
Counsel General and Minister for European Transition



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Mick Antoniw MS, Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
Cardiff
CF99 1SN

28 October 2020

Dear Mick

Thank you for your letter of 9 October 2020 concerning the drafting of Welsh Bills.

We appreciate the Committee's interest in the points you have raised, recognising that you are seeking to understand the work of the legislative drafters and some of the challenges that are faced in preparing legislation. I will turn in due course to the wider points on accessibility you raise, but wanted to first consider those points in the context of the Curriculum and Assessment (Wales) Bill.

The Government is strongly committed to promoting accessibility in legislation, and the use of the Welsh language. This lies behind the position set out in our drafting guidance that, when a definition or expression is used in a Bill, consideration should always be given to whether it should be set out in full in the Bill concerned (as opposed to including in that Bill a pointer to a pre-existing definition set out elsewhere in legislation). In the context of bi-lingual legislation, this decision (whether to restate a pre-existing definition) is a particularly significant one. This is because the result of not restating a definition or expression given in an existing Act of Parliament is that the definition or expression is available only in English, not in both Welsh and English.

In the context of the Curriculum and Assessment (Wales) Bill, as you have noted, the Bill does not restate definitions used in the Education Act 1996. Instead the Bill provides (in section 77) that expressions in it that are defined in, or given a meaning by, the Education Act 1996 have the same meaning as in that Act. The Bill also includes provision (in section 68) to the effect that it is one of the Education Acts.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

YPCCGB@llyw.cymru PSCGMET@gov.wales

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The “Education Acts” in this context are certain Acts that are listed in the Education Act 1996. These Acts are defined together with the Education Act 1996 itself as being the “Education Acts”. Definitions and expressions used in the Education Act 1996 feed through into the other “Education Acts” unless there is express provision otherwise.

This approach permits a high degree of uniformity and cohesion within the education law system as a whole. It means that definitions and expressions used in any one of the “Education Acts” are likely to build on expressions in the parent Act, i.e. the Education Act 1996, that are also used in other “Education Acts”.

In case it is helpful for the Committee, I attach a list of the expressions used in the Bill that are defined in, or given meaning by, the Education Act 1996.

In the course of drafting the Bill, consideration was given to whether these expressions should be restated in the Bill. The issue was considered from a drafting and legal policy perspective, taking into account our commitment to accessibility and bi-lingual drafting: the advantage of restatement would be to achieve bilingual definitions of terms used in the Bill. Though it is worth noting that where expressions are integral to the new curriculum framework, for instance “the four purposes”, “mandatory elements”, “cross-curricular skills”, they are in any event defined in the Bill. Despite this advantage it was decided on both drafting and legal policy grounds to avoid restatement. The object of this decision was to avoid undermining accessibility and the coherence of the body of education law set out in the Education Acts.

A range of factors were taken into account in reaching the decision that restatement, on this occasion, would undermine accessibility and coherence. It may be helpful to the Committee if I set these out in more detail:

- The starting point in considering the issue was the complex nature of the expressions that would need to be restated, given their relationship with other defined expressions. Restatement of an expression defined in the Education Act 1996 would involve restatement not only of expressions defined in that Act, but of expressions and definitions feeding into those definitions, and even of expressions and definitions feeding into those subsidiary expressions and definitions.
- Say for instance the Bill was to restate the definition of “school” given in the Education Act 1996, rather than relying on the definition given in the 1996 Act. In order to achieve this, the Bill of course would need to restate the definition of “school” set out in section 4 of the Education Act 1996. But this would just be a starting point. The Bill would also need to restate certain expressions (defined in the 1996 Act and elsewhere) that feed into the definition of “school” in section 4: for instance, “further education sector”, “higher education sector”, “primary education”, “secondary education”, “further education”, “early years provision”, “maintained nursery school”, “further education corporation”, and “sixth form college”.
- In addition to this, the Bill would need to restate any expressions and definitions themselves feeding into the subsidiary terms mentioned in paragraph 15. For example, in order to restate the definition of “primary education” (which would be needed in order to restate the definition of “school”) the Bill would also need to restate the definitions of “pupil”, “junior pupil”, “compulsory school age”, and “governing body”.

- It is important to note the above example relates to the potential restatement of only one expression: “school”. If the Bill pursued a policy of restatement of all of the expression and definitions incorporated from the 1996 Act (see Annex), the same issue would arise in relation to each expression restated. For each, the question would be the extent to which restatement also required complex and lengthy restatement of subsidiary definitions without direct relationship to the subject matter of the Bill.
- The result would be likely to be lengthy provision in the Bill, not simply restating expressions of direct relevance to the Bill, but restating provision relating to the educational system more generally, and the various institutions comprised within the educational system. So a Bill about the curriculum would contain lengthy and often complex provision about matters extraneous to the curriculum.
- This would render the actual subject matter of the Bill less obvious and in this sense decrease accessibility. It would also significantly alter the scope of the Bill.
- It would also considerably increase the potential for misalignment of provisions at a future date. The body of education law is not fixed. Definitions and expressions in the Education Act 1996, and definitions and expressions in other Education Acts that are treated as being included in that Act, may be added to and revised by primary legislation. If the Bill restated these definitions and expressions, the danger of accidental divergence would inevitably increase. (It is worth noting that the approach adopted in existing law, revolving around a parent Act and a body of “Education Acts” is presumably designed deliberately to minimise the risk of this type of divergence.)
- In addition this approach would mean a significant divergence from that adopted across education law as a whole. Obviously consistency is only one of a range of factors to be taken into account: but in the context of an extensive body of law that is widely accepted by practitioners as operating on the basis of a shared cohort of definitions, this divergence is considered to have the potential in itself to undermine accessibility.

This situation is far from ideal but reflects the current state of the body of education law and in particular the interconnected nature of the various statutes and the expressions used in them, given the general and widely applied concept of “Education Acts”. I am therefore content that definitions used in the Education Acts (including in the Education Act 1996) should not have been restated in the Bill, as adopting such an approach in the context I have set out would have adverse effects in terms of accessibility, consistency and coherence across the body of education law.

Turning to your other main point on definitions, I agree there can be a value in using alternative approaches to restating them within legislation. This is something we considered as part of the consultation on *The Future of Welsh Law* last year, and I believe it will need to continue to be an area that is considered and developed further under the first formal programme to be brought forward in the next Senedd. For that reason and the for the reasons I have outlined above, I have asked for the Explanatory Notes for this Bill to be updated, at the first suitable opportunity, to include a copy of the list I have attached to this letter. It may not be an appropriate approach for other Bills, but on this occasion I consider it a sensible alternative.

Your letter also touches on issues of partial consolidation, dealing with spent provisions and restatement. I have discussed some of these matters with the Committee before, but I think it is helpful to again think about these in the context of the Curriculum and Assessment (Wales) Bill. The object of the Bill is to establish a new curriculum framework, and it is not a consolidation Bill. However the effect of the establishment of the new framework for 3 to 16 year olds is to bring that framework within one statute.

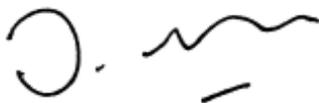
Under existing statutory provision that is not the case: the existing curricular provision for 3 to 16 year olds is currently scattered across four Acts – the Education Act 1996, the Education Act 2002, the School Standards and Framework Act 1998, and the Learning and Skills (Wales) Measure 2009. The effect of the Bill however is that the curriculum framework for this age group will now fall within a single Act. This bringing together of existing legislation with new legislative provision, so that a single substantive Act becomes the key source of legislation on a topic has been an approach we have sought to follow wherever possible since 2011. It of course forms the cornerstone of our thinking for codification. Where we can we will continue to use law reform Bills in this way, as we believe it improves accessibility for the end user and increases the amount of bilingual legislation on the statute book.

The Curriculum and Assessment (Wales) Bill is also not a statute law repeals Bill (in other words, a Bill that has as its sole purpose to remove spent and obsolete provision from the statute book). However, in producing consequential amendments opportunities have, where appropriate, been taken to remove provisions associated with the curriculum framework that are obsolete or spent, and to ensure that provisions amended are left in a form that facilitates accessibility and do not include obsolete or spent provision for Wales.

Again this is not a new approach, it is one that we have sought to use where we can. I am keen to see efforts made to tackle obsolete or spent provisions, as I consider they can be a source of confusion for readers of the legislation and do not aid clarity and certainty. A prime method for doing this will be through the consolidation Bills that we will be bringing forward, but clearly that will be insufficient in itself in dealing with this issue. We will continue to use law reform Bills where appropriate to do so, but I am also interested in considering whether opportunities could be taken to bring forward stand alone legislation aimed at dealing with particular areas of the law. Again it is something I hope will be considered as part of future programmes to improve the accessibility of Welsh law.

I am grateful to the Committee for their continuing interest in these matters. I am copying this letter to the Minister for Education.

Yours sincerely,

A handwritten signature in black ink, consisting of a large 'J' followed by a wavy line and a short horizontal stroke.

Jeremy Miles AS/MS

Cwnsler Cyffredinol a'r Gweinidog Pontio Ewropeaidd
Counsel General and Minister for European Transition