unsurprisingly therefore, early efforts at producing primary legislation focussed on passing Measures which would deliver the necessary executive functions and subordinate law-making powers to enable the business of government as administration to continue as usual. It can be argued further that the difficulties and complexities encountered in obtaining legislative competence from Westminster by means of Legislative Competence Orders (LCOs) during the Third Assembly exacerbated this problem and thereby entrenched this perspective. The long delays experienced in obtaining powers to legislate and the protracted negotiations of uncertain outcome regarding the extent of those powers without doubt made it difficult for officials to develop policy proposals effectively in the manner of their counterparts in Whitehall departments. Moreover, the precise and often limited powers granted in relation to a particular matter often made it difficult to construct suitable, comprehensive policies. This may explain why, once powers to legislate had been conferred, the subsequent legislative proposals frequently fell back on providing ministers with a framework within which to produce subordinate legislation, insufficient time having been left to produce robust policy proposals for incorporation on the face of the primary enactment. Circumstances may therefore have conspired to increase the attractions of the historical comfort zone, and militate against moving on from it.

With the vastly increased and clarified legislative powers now enjoyed by the Assembly since 2011, there is now an opportunity to move on from this historical comfort zone. It was only a matter of two months before the Assembly elections that the referendum delivered this increased legislative competence which necessarily made it virtually impossible to hit the ground running in its exercise during the first year of the Fourth Assembly. However, those developing policy for delivery by means of primary legislation must now engage with the steep learning curve which moving out of the comfort zone into the new reality of primary law-making involves. Again, the particular rôle of the scrutiny provided by the Constitutional and Legislative Affairs Committee regarding the appropriateness of provisions in Assembly Bills that grant powers to make subordinate legislation to the Welsh Government is key to ensuring that this step forward is taken. There is persuasive evidence that the Committee's scrutiny in this regard has been effective. The outstanding examples of this during the Fourth Assembly have been its scrutiny of, and reports on, the Education Bill and the Social Services and Well-Being Bill, both as introduced. The Committee's scrutiny effectively challenged:

- the extent of subordinate law-making envisaged;
- the lack of consistency in the choices made, particularly in the Education Bill regarding the appropriate levels of scrutiny; and
- the lack of rigorous policy making which apparently lay behind and caused these shortcomings.

This led to improvements being made as the bills progressed.

It is tempting for those involved in the work of government to view the legislative process as a means of furthering their policy objectives, rather than as a method by which the needs of democracy are served. Those making choices regarding whether to place provisions on the face of primary enactments or to reserve them to later subordinate legislation, as well as choosing the level of scrutiny to which that subordinate law-making is subjected, should be constantly justifying their choices according to the principles of democratic government. If their provisions directly affect the lives of citizens by imposing duties, conferring rights or conferring powers, or intend to give government or public bodies powers which will affect such duties, rights or powers, then the democratically-elected representatives of the citizens should be afforded the opportunity fully to deliberate, debate and decide upon those proposals. Likewise the choice of whether to subject subordinate legislation made by ministers to affirmative or negative procedure should be made in accordance with a clear understanding of the need to make good the democratic deficit involved

when law-making is delegated, and not be treated as a game in which as much power as possible should be retained in the hands of the executive.

There is no reason to believe that the problem identified above is any worse in Welsh law-making than anywhere else in the UK including Westminster, and there is widespread evidence that it is – or at least has been – worse in other parts of Europe, although in Germany the courts can set aside subordinate laws which purport to directly affect the rights, duties and powers of the citizenry. Concern is frequently expressed at the extent to which the UK Parliament's legislation grants subordinate law-making powers to ministers, which is why pleading precedents from Westminster in relation to these matters is not necessarily consonant with developing good practice in Wales.

The practice of reserving powers to government to amend what appears on the face of a primary enactment by means of subordinate legislation – so-called 'Henry VIII powers' – is a particular cause of concern in this regard. If a correct choice has been made initially with regard to what democratic principle requires to appear on the face of an enactment, any suggestion that what appears there can thereafter be changed without a similar level of scrutiny deserves to be treated with suspicion. There have been some bad examples of this in bills before the Fourth Assembly, notably the Education Bill and the Social Services and Well-Being Bill, both lengthy and large-scale enactments. The latter, as enacted, would appear to allow the meaning of key concepts in the law to be changed by regulations, despite the clear criticism made at Stage One that this 'flexibility and future-proofing' was being bought 'at the expense of having a clear understanding of what the Bill will deliver' (CLAC Report, ¶ 61). This is not to say that it is always inappropriate to utilize such 'Henry VIII powers'. It is submitted that a good and appropriate use of them can be found at several points in the Housing Bill as introduced by the Welsh Government.

The Structure of Bills and their accessibility

The drafting style of the primary legislation enacted by the Assembly is largely similar to that found in the legislation of both the UK parliament and the other devolved legislatures in the UK, and it is unlikely, it is submitted, that anyone other than a keen observer would notice much difference in style or standard. The structure of primary enactments continues to exhibit the ordering into sections, subsections, paragraphs and sub-paragraphs, and the grouping of sections where appropriate into Parts and Chapters and under suitable cross headings, which owes its existence to the ideas and principles developed by Henry, Lord Thring, when Parliamentary Counsel over a century ago. Thring's object was to present legislative enactments in a manner which would make them as comprehensible to the reader as possible without compromising the certainty of meaning necessary in framing laws.

Over time, Thring's approach itself became an orthodoxy which attracted criticism for its formality of style and more than occasional complexity of structure, both of which it was suggested defeated the objective of clarity. Drafting counsel have therefore, particularly in recent decades, sought fresh approaches to drafting in order to recapture the accessibility espoused by Thring. The danger however remains that such innovations in their turn become the new objects of slavish conformity, thus defeating their purpose.

The legislation made by the Fourth Assembly shows a willingness to engage with innovations as well as a due respect for the tried, tested and – very importantly – familiar forms. Those producing legislation need however to beware of the dangers of uncritical conformity to new orthodoxies and to constantly apply the test of whether their choice of approach serves to elucidate the purpose and meaning of their product both for the members of the legislature who have to scrutinize it and for its end-users − citizens and their legal advisers.

Overview and Purpose Provisions

There has been controversy among legislative drafters regarding the inclusion on the face of enactments of material which seeks to provide the reader with the purpose of the legislation or to give an overview of its structure as well as its contents. Some drafters are very much in favour of doing this, and others equally opposed. Some believe that it is in explanatory notes and memoranda that such material rightly belongs, not on the face of an Act. The legislation of the Fourth Assembly has in large measure embraced the innovative techniques enthusiastically, so that Overview sections at the start of bills are a common feature.

A good example of an effective Overview provision is to be found in the Food Hygiene Act 2013. It describes sequentially what the Act does, giving references to the sections in which the relevant provisions are to be found. The arrangement of the Overview section, and indeed of the Act as a whole, is easy to follow. As some would say, it tells a clear story. Further, the long title provides a clear statement of the purpose of the legislation, and the Table of Contents gives a guide to the structure of the enactment with effective use of italic cross headings. The content of the schedule is also clear from the Contents.

The much longer Housing Bill shows a clear appreciation of how overview sections can be used regularly throughout a lengthy enactment to introduce the content and structure of either Parts or Chapters within an Act. This Bill shows what might be termed a discriminating use of overview provisions where they assist in elucidating the enactment for the reader, as opposed to a slavish inclusion of one at the start. The longer Social Services and Well-Being Act 2014 on the other hand confines itself to providing an overview of the Act as a whole at its beginning with, despite its length and numerous distinct parts, no further attempt at providing such guidance. The Overview of the Act in many respects is little more than an expanded table of contents.

This raises the question of the relationship between the long title, the Contents and any overview or purpose provisions. The Overview section in the Active Travel Act 2013, for instance, arguably adds little to the long title, and does not include references to the sections which deliver the content it describes. A better balance between the long title and the overview can be seen in the Agriculture Sector (Wales) Bill, although that overview also lacks references to sections. It may well be questioned whether a short enactment requires an overview provision at all, for instance the Control of Horses Act 2014, where the overview in truth may be more of a purpose provision. The National Health Service Finance (Wales) Act 2014, again has an opening overview section which states the purpose of the following substantive section, and while it might be thought odd to have an overview section in an enactment which only includes two other sections, the concise statement of the purpose of the following substantive section is very helpful given that that section proceeds by amending earlier legislation.

One device which was used to provide a statement of the purpose of an enactment but which has fallen out of favour is the Preamble. It is arguable that the inclusion of purpose sections in contemporary legislation is a reflection of the loss sustained through abandoning preambles. Some argue that such statements properly belong in preambles rather than intruding into the operative provisions of statutes.

The Further and Higher Education (Governance and Information) (Wales) Act 2014 seemingly recognizes that a short Act does not necessarily need an overview if the content is clear from the Table of Contents. The question should always be asked whether the inclusion of descriptive material is justified in order to assist the reader, and whether the reader is helped by what it has been decided to include. The same is true for Assembly Member promoted legislation, where the

Mobile Homes Act 2013 and the Holiday Caravan Sites Bill as introduced both provide an overview of the proposed legislation as a whole and additional overviews of lengthy parts of the enactments.

One feature which is surprising is that it is never thought fit to set out the contents of schedules in any detail even where they are very significant parts of the enactment for the end-user. Nor has the concept of providing an overview extended to schedules. While this may not have been done previously elsewhere, there appears no good reason why such features should not be as helpful in the case of lengthy and important schedules as in the case of lengthy parts in the main body of an act.

As these issues are essentially presentational and do not go to the substance of what is being enacted, there would be considerable merit in the Assembly and the Welsh Government giving careful consideration to these matters and reaching an agreement as to how to achieve greater consistency, so that readers can enjoy the benefits of encountering familiar structures when accessing Welsh legislation.

Schedules and Short Titles

The method by which schedules are brought into effect varies from enactment to enactment, as is the case with Westminster legislation. While with the drafting of substantive provisions a good case can be made for not being prescriptive with regard to drafting style, the case is not so immediately apparent when it comes to routine provisions such as the introduction of schedules. It is arguable that the purpose of the provision should be clear from the wording rather than expecting the reader to know why the provision is there. The Food Hygiene Rating Act 2013 and the Education Act 2014 both use the simple but clear formula “The schedule has effect”, and it is submitted that this is preferable to the descriptive devices sometimes found in Westminster legislation: for instance, “The schedule contains consequential amendments”.

The same is true with regard to the provision of a short title, the purpose of which is to allow the Act to be referred to concisely. The formula “This Act may be cited as…” is to be preferred to “The short title of this Act is… ” which gives no clue as to why a short title is proposed.

Substantive provisions

One of the principal complaints sometimes levelled regarding the clarity of legislation has been the tendency to complicate provisions by extending their length, often beginning a provision with a list of conditions relating to its application before following with the substance of the enactment and then setting out further provisos. One way that has been adopted to avoid such complexity has been to state the main positive provision in one subsection and then set out the conditions and any provisos in separate subsections. This approach can be very effective, a good example being the clarity achieved in section 44 of the Holiday Caravan Sites Bill.

However, too much faith can be placed in form and not enough reflection given as to whether it truly elucidates the enactment. Sometimes a lengthy succession of subsections can be as bewildering as a lengthy section with built-in conditions and provisos in the old style. Section 60 of the Housing Bill is arguably such a section, where the chosen form does little to remove the complexity and may be thought to add to it. Fashion should not govern form, any more than undue respect for past practice. The same goes for the introduction of letters to demarcate the subjects of provisions where there is little chance of confusion and no greater clarity achieved by their introduction, instances being the person “P” in section 31 of the School Standards and Organization Act 2013 and sections 9 and 10 of the Human Transplantation Act 2013. The test should always be whether the usage enhances readers’ understanding.

Enhancing Understanding

There are good examples of devices being used to good effect in the Fourth Assembly's legislation. Setting out the meaning of key words and phrases early in the enactment, describing briefly in parentheses the subject matter of sections and sub-sections to which reference is made, collecting defined expressions – sometimes in tabular form – in an Index at the end of the Act, all help the reader.

The inclusion of the corresponding Welsh and English terms in such tables is also extremely useful, as in Schedule 4 to the Education Act 2014. The policy of only including the other language's term within a definition when the order of the terms may vary in the two language versions might however be usefully reconsidered. The rationale may not be apparent to an uninitiated reader and there is something to be gained – and nothing to be lost – from making the practice general.

The Scottish Parliament has also produced its own Interpretation Act, and some argue that it would be beneficial for the National Assembly to do the same. This might well make it possible to remove from each and every enactment some of the technical provisions which follow a standard form, as well as giving an opportunity to provide for a proper approach to the interpretation of bilingual legislation in Wales, and facilitate use of modern technological innovations.

Bilingualism

Assembly legislation is distinct from that of the UK Parliament and the other devolved legislatures in being bilingual. It is regrettable that in the articles of inquiry, reference is made to *translation* rather than the drafting or production of the two language versions. The legislation is enacted in both language versions so that they become law by being enacted not translated. How the versions are produced prior to being introduced, scrutinized and decided upon is not material to their status as law, and the notion that one version is a translation of the other can serve to perpetuate the misapprehension that one of the versions can be relied upon as that which alone expresses the intention of the legislature.

The history of the development of techniques for the production of bilingual legislation for Wales is again pertinent. From 1999 until 2007, when only subordinate legislation was being made by the Assembly, many of the statutory instruments containing that legislation were based on similar instruments laid before the UK Parliament. This may have resulted in an unwillingness to alter the English text of such legislation for fear that a change of meaning might be thought to be intended. As a consequence, those producing the Welsh version of those instruments were required to follow the English text, rather than being free to seek to have that text amended where that would be useful with regard to ensuring clarity and a natural mode of expression in both languages. With the growth of primary and secondary enactments specific to Wales, this obstacle to the legal and linguistic revision of the two versions has been removed. There remains however the question as to whether the two versions need to correspond closely or whether divergence is permissible where the content would be expressed differently in the two languages, so that each version reads naturally rather than slavishly following the other, providing there was no resulting contradiction in the meaning of the legislation.

It is pleasing to see that this freedom of natural expression is being embraced across both languages. The Housing Bill currently includes a simple but important example of this. Reference in made in the English version of section 44 to *grandparents*. There is no word in Welsh which means 'a grandparent' of either sex. The Welsh version therefore refers to 'a grandfather' and 'a grandmother' – *taid* and *nain*, helpfully adding in parentheses the alternative terms also in common usage, *tad-cu* and *mam-gu* – resisting the temptation of coining a term for 'grandparent' which

would not be a natural usage in the language. Equally, the temptation has been resisted of altering the English version to refer to ‘grandfather’ and ‘grandmother’ separately, which would not be the natural way – albeit a perfectly understandable way – of expressing the concept in English. This simple example speaks volumes of a growing confidence in the production of bilingual texts, and in the new-found status of Welsh as a language of the law. In turn, this increases the need for careful review of the two versions to ensure legal, as opposed to linguistic, equivalence. This is a skill highly prized in multilingual law-making, for instance in the institutions of European Union, where the legal revisers have a status at least comparable to that of legislative counsel in other jurisdictions.

The legislative process

A further distinguishing feature of legislation made in Wales when compared with UK legislation relates to the manner in which proposed amendments are treated. This feature probably results from the fact that no one political party has yet managed to secure a comfortable working majority in Assembly elections, as a consequence of which a spirit of collaboration has been required in order to get legislation passed. There are few if any examples of opposition members tabling ‘wrecking’ amendments to government bills, nor of amendments being tabled in large numbers so as to delay or frustrate the process of scrutiny and thus requiring curtailment of debate. Likewise, as amendments which are tabled generally reflect genuine views as to how a policy can be improved or better implemented, it is not uncommon for amendments to be accepted or at least to form the basis for government amendments to be tabled which accommodate an idea accepted as a consequence of a ‘genuine’ amendment having been proposed. The same is true of the manner in which legislative proposals from Assembly Members are often supported by government and assisted through scrutiny to reach the statute book. While it may be the case that political expediency or necessity are in large part responsible for this outcome, nevertheless the result is a more mature and less adversarial attitude to the politics of legislating in Wales than is the case at times in other legislatures.

The legislative process and technology

Some argue that, throughout history, legislative processes have been shaped by the technology available to assist them, but that they nevertheless tend to lag well behind what the available technology can provide. The Assembly’s legislative process is based very solidly on the practice at Westminster, a practice which reflects the needs of producing printed texts of legislation, of legislative proposals and of amendments to such texts, all in the form of instructions which one would give to a printer – for instance, ‘insert…’, ‘delete…’, ‘substitute…’.

While the Assembly makes use of modern technology to allow access to its legislation and the accompanying documentation, the content of that material remains relatively immune from any innovation based on what that technology can provide. A clear instance is the production of amendments, which remain in the form of printers’ instructions and are presented in lists which a reader has to collate with the bill and possibly other items of legislation. The use of Keeling schedules within bills has virtually disappeared at Westminster and they are not much used in explanatory materials. Yet, with modern technology, amendments could be presented in electronic form to allow AMs and the public to see the original text, the effect of the amendment upon it in a ‘tracked-change’ format, and what the final text would look like when amended, all at the press of a computer key, and much the same could be done with proposals amending earlier legislation.

During September of this year, the International Association of Legislation is to hold a conference on ‘Innovation of Legislative Processes’ in Seoul, with a follow-on event in Stockholm in December. Consideration is also being given to a series of seminars in the United Kingdom next year to examine the links between the form of legislation and technological innovations and the implications of those

links for the future. The Assembly and the Welsh Government might well wish to monitor these events and their outcomes, as the National Assembly is well-equipped to engage profitably with such innovation, and the volume of legislation it has produced is still sufficiently manageable so as to be able to adapt to, and benefit from, it.

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