

WLGA RESPONSE

Constitutional and Legislative Affairs Committee Inquiry: Making Laws in the Fourth Assembly

30th June 2014



The WLGA welcomes this second inquiry in the law making in Wales and looks forward to continued engagement throughout the Committee's Inquiry and consideration of any forthcoming recommendations. The themes of the WLGA's response have also been discussed by Lawyers in Local Government, the society that represents Monitoring Officers in Wales.

1. What constitutes good practice in the drafting of a Bill? For example in relation to:

(a) the policy development process leading up to introduction;

The Welsh Government's policy development process varies across Ministerial portfolios and often varies within a portfolio depending on the nature and scope of a prospective Bill. Earlier informal and formal dialogue and engagement with stakeholders, notably with those public service bodies expected to exercise any prospective powers or duties, is critical not only in the development of the overarching policy direction but, in particular, the practicability of implementation of the legislation, including financial implications and any unforeseen impact.

In terms of formal consultation, the statutory Local Government Partnership Scheme states that:

"Normally twelve weeks will be allowed for consultation. However there may be circumstances, for example where the Welsh Government is constrained by legislative or other timetables, when a shorter period is necessary. The Welsh Government will endeavour to keep such instances to a minimum, but if this is not possible, an eight-week period could be considered realistically achievable."

The WLGA believes that twelve weeks consultation around each of the policy provisions and the draft legislation is necessary to allow appropriate and informed engagement with stakeholders.

Explanatory Memoranda could also be improved if there was greater consistency in including summarised detail of the policy consultation process. This would aid Assembly Members (AMs) in understanding whether (and, if so, why and by whom) it was contested that there was a need for legislation in the first place or whether the scope of the legislation was appropriate, which could inform AMs' or Committees' lines of inquiry.

Similarly, there is often an inconsistent approach across Welsh Government Departments regarding the level of engagement in either drafting or testing key clauses in legislation. Early constructive and mature dialogue with relevant external stakeholders, in particularly those bodies expected to implement the legislation, helps ensure that better legislation is drafted.

On a related point, it would provide greater clarity to the Assembly and the relevant committee if the Explanatory Memorandum included a Register of Organisations included in Pre-Legislative Discussions to ensure AMs could see the details of who, if anybody, had been engaged or involved in discussions on the drafting of a Bill.

(b) the drafting accuracy and completeness of a Bill on introduction;

The WLGA does not have any strong views on the drafting accuracy of Bills, however, there have been occasions where Draft Bills (for example, the draft Planning (Wales) Bill) have been incomplete, this means that it can prove difficult to provide informed comment on an incomplete Bill and some instances where there was little or no opportunity for consultation on or Assembly or stakeholder scrutiny of some substantial sections.

(c) the balance between what is included on the face of a Bill and what is left to subordinate legislation;

Whilst there are fewer examples than in the previous Assembly, there are still a number of framework Bills being introduced (such as the Active Travel (Wales) Act), the Social Services and Wellbeing (Wales) Act and the proposals outlined in the Environmental Bill White Paper).

Given such legislation allows statutory implements and statutory guidance to be introduced subsequently, there is often reduced consultation and scrutiny, and scope for post-hoc 'policy-creep'. Whilst this may have capacity implications, a more complete legislative package, including accompanying statutory guidance (at least in draft form) would improve the process and avoid the need for post-legislative amendments in some instances.

The forthcoming Future Generations Bill is a good example of the challenges of a Framework Bill; it is difficult to disagree with the high level targets that it is assumed will appear on the face of the Bill but the critical issue for the Bill will be the guidance that follows. If that is well thought through the Bill could have a substantial impact and help to drive performance across a wide range of services. However, if the guidance is poor it could encourage a 'compliance-based' tick box approach that has little impact on outcomes.

(d) the accessibility of the language used (both English and Welsh);

Explanatory Memoranda seek to provide a summary of objectives and rationale of a piece of legislation, a plain English/Cymraeg Clir summary of the draft and final Bill would improve accessibility and the general understanding of the public and, in some cases, the public service bodies subject to the legislation.

(e) the way in which a Bill is structured;

The structure of Bills could be improved significantly, notably where sections of a Bill seeks to amend previous legislation. It would be good practice and be much clearer and accessible if a Bill could restate the whole amended section rather than including 'drafting instructions' such as "after x, delete y and insert z'. Whilst this may have been a necessary drafting style during an era where legislation was read in a printed medium, this appears unnecessary and undermines accessibility and clarity in an era of modern electronic communications.

(f) their fitness for purpose;

Earlier dialogue and policy development consultation and engagement (as noted above) should lead to more relevant and proportionate legislation. There are some clauses in Bills, notably where new duties are conferred on local authorities, which have been questioned either because the new duties will not deliver the outcomes intended or would create a disproportionate regulatory burden.

(g) the use of consolidation provisions;

The WLGA supports the increased use of consolidation provisions, particularly where it improves the clarity and consistency of complementary legislation. That said, there are, on occasions, several Bills introduced in 'complementary' policy areas (for example in Planning, Environment, Future Generations) and it is not always clear how the Bills interrelate or connect. More explanation could therefore be included in Explanatory Memoranda and/or in consultation documents.

(h) any other matter you consider to be of relevance.

The Assembly's approach to managing amendments should be reviewed.

Whilst AMs are expected to complete a 'Notice of Amendment' form, Section 4 on 'Amendment Explanation' is marked as 'Optional'. This section should be mandatory, and AMs should state the rationale behind an amendment which should then be published to provide clarity, context and understanding, in effect, a supplement to the Explanatory Memorandum that the Government is expected to produce outlining the rationale for the Bill in the first place.

The Assembly should produce a summary of Amendments at Stage 3 and Report Stage for each Bill, as it does as a matter of course at the end of Stage 2 process. The approach to introducing a summary Report at the end of Stage 3 proceedings (e.g. for the Mobile Homes (Wales) Bill and the Social Services and Well-being (Wales) Bill) is a welcome innovation and should be introduced as the norm.

The Assembly should introduce a referral mechanism into the legislative process, whereby significant amendments (either in number or nature) introduced at Stage 3 may have a significant impact on the scope or practicability of the Bill and may require further Stage 1 scrutiny and engagement with relevant stakeholders. It may

not be a necessary process for all Bills, however, would be a valuable safeguard for scrutiny in a unicameral legislature.

The Assembly should keep an up-to-date schedule of commencement for each Act; whilst it may be clear when a Bill has been enacted there are various timescales and mechanisms for particular sections of an Act to be commenced and it is often unclear to organisations subject to the legislation to determine whether and when sections are in force. It would also be beneficial if the Assembly could with the UK Parliament to also include the commencement dates of Welsh or UK Bills with Welsh clauses passed in the UK Parliament. For example, the commencement provisions under S127 of the Housing (Wales) Bill are as follows:

"127 Commencement

(1) The following provisions come into force on the day on which this Act receives Royal

Assent—

(a) section 124;

(b) section 125;

(c) this section;

(d) section 128.

(2) Sections 115 to 119 in Part 5 (Housing Finance) come into force after the end of the period of 2 months beginning with the day on which this Act receives Royal Assent.

(3) The remaining provisions of this Act are to come into force on a day appointed by the Welsh Ministers in an order made by statutory instrument.

(4) An order under this section may—

(a) appoint different days for different purposes;

(b) include such transitory, transitional or saving provision as the Welsh Ministers consider appropriate."

Such a complicated and often protracted approach to commencement means that professionals and service users are unclear whether or when law is in force and, currently, the only way to find this out is to invest in often expensive access to commercial legislative databases.

2. What impact has the Assembly's conferred powers model of legislative competence had on the drafting of Bills? What would be different if the Assembly has a reserved powers model?

The WLGA supported the Silk Commission's recommendation that the UK Government should introduce a Bill introducing a reserved powers model in the Assembly. Such an approach would provide greater clarity around which powers could or could not be exercised by the Assembly. Currently, under the conferred model of legislative competence, there is less clarity and, crucially, differences in legal opinion around some areas of the Assembly's competence which has resulted in three referrals to the Supreme Court (Local Government Byelaws (Wales) Bill, the Agricultural Sector (Wales) Bill and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill).

Given the conferred powers model of legislative competence remains in place for the Assembly, it would be preferable for any inter-governmental discussions over competence to be settled in advance during initial legislative planning or where consensus was not possible, an early referral to the Supreme Court should be allowed. An earlier referral would avoid the risk of wasting considerable Welsh Government, National Assembly and stakeholders' resources and time shaping legislation through the Assembly's legislative process only for it to, potentially, be ruled out of competence once completed. Inevitably, there will remain a need for referral at the end of the legislative process to cover any amendments that may exceed competence, but this is less likely to undermine the substantive competence underpinning the wider Bill if this was approved at or before Stage 1.

3. What is your view of the content of the Explanatory Memoranda which accompany Bills and how useful are they in explaining the purposes of Bills?

Explanatory Memoranda could also be improved if there was greater consistency in including summarised detail of the policy consultation process, as noted in 1a) above.

Explanatory Memoranda should also be strengthened in terms of their assessment of the financial implications of legislation. Good policy development and consultation should include a thorough assessment of the any financial implications, in particular for local authorities. New powers conferred upon local authorities tend to lead to increased spending. If this is not funded by Welsh Government it leads to an increase in council tax which confuses local accountabilities or impacts on the resources available for existing services. The UK Communities and Local Government Department provide UK Government Departments with good guidance for assessing the financial implications and justification of new powers and duties as part of its New Burdens' Doctrine. It would be useful to adopt such an approach in Wales.

4. In a single chamber legislative system, what value to you place on the use of:

- (a) draft Bills for consideration before a Bill is formally introduced;**
- (b) more time for Stage 1 scrutiny;**
- (c) the optional Report stage at the end of Stage 3 proceedings (as for example in the Mobile Homes (Wales) Bill and the Social Services and Well-being (Wales) Bill.**

The WLGA would support the greater use of Draft Bills in aiding earlier engagement in the legislative process.

The WLGA would also welcome more time for Stage 1 to allow wider engagement, exploration and scrutiny of legislation. Although some Bills are narrow in scope and perhaps require less extensive engagement and scrutiny, many are broad and are inevitably complex requiring extensive consultation and engagement with relevant experts and stakeholders. The WLGA is often one of the earlier stakeholders to be invited to give evidence during the Stage 1 process, often with an expectation of written and/or oral evidence to be submitted within

a month or two a Bill being published. Most pieces of Assembly legislation often have significant and far-reaching resource or procedural ramifications for local authority governance or service delivery arrangements and the brevity of the current Stage 1 process can prove a challenge in gathering local authority professional or political perspectives, particularly those which have been through Councils' local democratic and decision-making processes.

As noted above, the introduction of a summary Report at the end of Stage 3 proceedings (e.g. for the Mobile Homes (Wales) Bill and the Social Services and Well-being (Wales) Bill) is a welcome innovation and should be introduced as the norm.

5. What is your view of the need for, and impact of, curtailed scrutiny of Bills? In considering this issue you may wish to consider the scrutiny arrangements that applied to the following Bills in the 4th Assembly:

(a) the Agricultural Sector (Wales) Bill (procedures for Emergency Government Bills used)

(b) the Control of Horses (Wales) Bill (bypassed Stage 1 committee scrutiny)

(c) the National Health Service Budgets (Wales) Bill (bypassed Stage 1 committee scrutiny)

Whilst it may be necessary for Governments to have some flexibility to introduce Emergency Government Bills on occasion, it should be a back-stop power and should follow clear agreed criteria set out in Standing Orders. It is important that each piece of legislation is subject to appropriate levels of scrutiny, both within and outside of the Assembly. It might therefore be appropriate that Standing Orders should build in post-legislative scrutiny where emergency legislation is introduced to be commenced after a set-period of time, in order to assess whether the legislation is effective or could be improved.

6. What is your view of the scope for "fast-tracking" Bills within the Assembly's existing procedures?

See above.

7. What is your view of the Welsh Government's and the National Assembly's capacity to legislate?

The WLGA notes that some of the Welsh Government's proposed legislative programme has not progressed within the timescales as originally set out (15 of the 20 Bills outlined in the Welsh Government's legislative programme for the years 2011-12, 2012-13 and 2013-14 have so far been introduced and/or enacted); this may be due to re-prioritisation of legislation, emerging policy developments and new priorities or may reflect capacity constraints.

The National Assembly's capacity to legislate (and stakeholders' capacity to engage in the legislative process) is inevitably impacted upon by the Welsh Government's planned management of the legislative programme, notably:

- the timetabling of legislation generally;
- the number (and scope) of Bills under scrutiny at any one time;
- the introduction of legislation at or around dates of Assembly Recess;
- the introduction of Emergency or urgent legislation (which may be introduced bypassing Stage 1 as noted above); and
- the tabling of substantial Stage 2 or Stage 3 Government amendments.

8. What is your view of the Welsh Government's management of the legislative programme?

See above.

9. If you have had experience of following plenary and committee proceedings on the scrutiny of Bills, or participating in the process, what are your views on this experience and what improvements, if any, could be made?

See above.

10. What other comments would you like to make about the making of laws?

The National Assembly is to be commended on the accessibility and navigability of its website, particularly around the legislative process, for example, the 'Guide to the Legislative Process' section (<http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance.htm>) provides an excellent introduction to the process and the 'Progress of Assembly Bills' section (<http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-progress-bills.htm>) provides an easy to read summary of progress of each of the Bills, along with links to key accompanying documents or explanatory guidance around the legislative process.