

Constitutional and Legislative Affairs Committee Inquiry into Making Laws in the Fourth Assembly ML7 – UCAC (Undeb Cenedlaethol Athrawon Cymru)

(This response has been received in the medium of Welsh and has been translated by the Assembly Commission)

Making laws in the Fourth Assembly

Drafting techniques

1. As a general rule, are there specific respects in which the quality of legislative drafting for the National Assembly appears particularly admirable?

We greatly admire the fact that legislation is made in Welsh and English from the offset and that both versions are of equal status. The standard of the work drafted in both languages is commendable.

2. As a general rule, are there specific causes for concern in the quality of legislative drafting for the National Assembly?

In general, we have no concerns. However, in the context of the recent Education (Wales) Bill, there was a perception amongst a wide range of stakeholders that the Bill was trying to address too many different issues in one piece of legislation, and that it was impossible, therefore, to do all of those issues justice. However, this was an issue regarding policy rather than technical drafting.

3. As a general rule, do Bills of the National Assembly appear to be drafted with the aim of making them reasonably accessible to, and intelligible by, the appropriate target audiences for each Bill?

It is natural that Assembly Bills contain technical and legal language and vocabulary that might seem unfamiliar to the target audiences. However, we are of the general opinion that the Bills are accessible enough to those that deal with legislation in the course of their work. The documents accompanying the Bills, such as the Explanatory Memoranda, offer an opportunity to explain certain things.

4. In particular, is the practice in relation to any of the following matters particularly admirable, or a cause for concern?

translation – the standard of translation, and the fact that the Welsh and English versions of (proposed) legislation have equal status is particularly admirable.

5. In general, do Bills before the National Assembly appear to follow equivalent or similar Acts of Parliament or other enactments:

a. to the extent appropriate;

b. more than is appropriate;

c. less than is appropriate?

In general, we feel that Bills laid before the Assembly are independent of other Acts to an appropriate extent in line with the devolution settlement.

6. Are there significant differences, as a general rule, between the quality of the drafting style of Bills and amendments presented by the Welsh Government and other Bills and amendments?

We are yet to work on any Bills other than those laid by the Welsh Government, and so we cannot comment on this matter.

In terms of amendments, the process of making recommendations or proposals for amendments, in discussion with Ministers or Assembly Members, can be complicated for external organisations. The need for legal advice and expertise can make the process difficult – or expensive. UCAC welcome the opportunity to respond to this inquiry by the Constitutional and Legislative Affairs Committee into making laws in the Fourth Assembly. UCAC is a trade union representing teachers, school leaders, local authority staff and lecturers in each education sector in Wales.

7. In general, are appropriate opportunities taken for the consolidation of legislation, whether as a separate exercise or in the course of making new substantive legislation?

The lack of consolidation can cause considerable frustration. Often, when working on a Bill, or Regulations (in particular), you have to print pieces of the original legislation, work out how many amendments have been made to that legislation/those Regulations, and then work from these numerous documents. You are rarely able to find a consolidated version of the legislation/Regulations containing the amendments.

It is possible that professional lawyers are used to this practise – but it is very challenging for organisations trying to respond to the consultation process and scrutinise in an intelligent and comprehensive way.

8. Might a different model have advantages or disadvantages in relation to the form of, or techniques used in, the drafting of Bills?

A reserved powers model would be much simpler and clearer and it would avoid considerable bickering between the Assembly and Westminster regarding legislative competence in different areas.

Policy development and explanation

9. As a general rule, is there evidence to show that the processes for policy development lead to Bills being brought into the National Assembly with a properly constructed and tested policy?

In particular—

a. do the processes for consultation in the development of policy appear to be appropriate and effective?

In general, in the area of education, there is no lack of consultation when developing policies. However, it is fairly common for many stakeholders to have responded to a consultation, or even a series of consultations on a particular policy issue, and possibly to have voiced the same opinion in meetings with politicians and/or civil servants, and to have sent correspondence on that issue, only to discover that their efforts have had no influence. The problems foreseen and forewarned by the stakeholders come to light after passing the legislation and implementing the policies. An example of this was the deregulation of the further education sector (Further and Higher Education (Governance and Information) (Wales) Act 2014), and the same thing is likely to happen with the appointment of members to the Education Workforce Council (in the Higher Education (Wales) Bill 2014).

b. do the processes for impact assessment appear to be appropriate and effective?

Not sure. The impact assessment documents are usually very longwinded, and we are not sure whether they always address "grass roots" issues, they tend to concentrate on a wider financial/environmental level, and do not necessarily assess the effect on practitioners and stakeholders.

c. are the policy purposes of legislation accurately and sufficiently explained to Assembly Members and to the public?

On the whole, yes – but time will tell the exact purposes for which the legislation will be used.

10. Are there appropriate and effective mechanisms for determining whether the policy underpinning a legislative proposal is accurately and effectively addressed by the form of the legislation proposed?

We feel that the scrutiny process is appropriate and effective to accomplish this task.

11. In general, do the Explanatory Memoranda provided with Bills serve the purpose for which they are designed?

In our experience, the Explanatory Memoranda are not particularly effective, and therefore an important opportunity is being missed. They tend to be very long and very repetitive. Despite their length, they do

not always manage to throw further light on the provisions of Bills (in the Explanatory Notes), beyond that which is in the Bill itself. We believe that there is considerable room to improve these documents, and documents of a higher standard could be very helpful for those trying to contribute constructively to the scrutiny process.

12. In particular, is the practice in relation to any of the following matters particularly admirable, or a cause for concern?

a. the length of Explanatory Memoranda; far too long, and their length does not equate to additional value

b. the inclusion of background policy material; background policy material is an important part of the Explanatory Memoranda

c. the use of examples to illustrate the intended effect of provisions; it is important to offer examples

d. the use of tables, diagrams and other illustrations: this is also important.

13. Are there significant differences, as a general rule, between the quality of Explanatory Memoranda for Bills presented by the Welsh Government and other Bills?

We are yet to gain experience in this area.

14. Are there specific Bills before the Fourth Assembly which provide particular illustrations of, or significant exceptions to, any of the answers given to Questions 15 to 20 above?

We have tried to offer examples in the answers above.

Balance between primary and secondary legislation

15. Overall, does primary legislation passed by the National Assembly in the Fourth Assembly appear to strike the correct balance between detail on the face of the Act and powers to make subordinate legislation?

We understand that balance is needed between the details on the face of legislation and the powers to make subordinate legislation – this offers an opportunity to create a degree of flexibility for the future (within the confines of the Act) and to avoid going into too much detail within the Acts themselves.

However, we tend to think that too many details are set aside for subordinate legislation, and are subject to less scrutiny as a result. Ultimately, this leads to Ministers being given more power.

Some issues are a matter of basic principle, and it is therefore inappropriate for them to be set aside for subordinate legislation. An example of this is the Education (Wales) Bill 2014, where all aspects, from decisions regarding fee increases to registration with the Education Workforce Council, were set aside for regulations. We agree that it is appropriate to set some aspects of this process aside for subordinate legislation, however, we firmly believe that decisions regarding who sets the fees (e.g. the Welsh Ministers/the National Assembly for Wales/the Education Workforce Council) should be on the face of the Bill.

16. Overall, where powers are granted to make subordinate legislation do they appear to be subjected to an appropriate level of scrutiny by the National Assembly?

We feel that it would be worth increasing the level of scrutiny for subordinate legislation. Very important issues are set aside for subordinate legislation, and apart from the rare occasions where the positive procedure is used, Regulations are subject to little scrutiny beyond the general consultation process. We do not feel that the consultation process offers an appropriate level of scrutiny for material issues.

17. Are there appropriate and effective arrangements for explaining and justifying the taking of powers to make subordinate legislation?

It is possible that there are not.

18. What principles should the National Assembly apply in considering the appropriate balance between detail on the face of Bills and powers to make subordinate legislation?

If it is generally agreed that it is important to maintain flexibility (i.e. the likelihood that changes will need to be made over time), it is appropriate to set aside powers to make subordinate legislation. An example of this is the number of courses that are required in the Local Curriculum under the Learning and Skills (Wales) Measure 2007. It was wise to set the exact numbers aside for subordinate legislation, as it was highly likely that the figures would need to be changed within a comparatively short period of time –and, indeed, that is what happened.

However, if the matter is one of basic principle, where there is no foreseeable need for flexibility (e.g. deciding who should set the Education Workforce Council's registration fees), provision should be made on the face of the Bill. It is too easy to revoke or vary subordinate legislation, and therefore the basic principles should appear on the face of the Bill.

Also, if it is a matter of offering a defence for a specific sector or group, this should count as a matter of basic principle which appears on the face of the Bill; it would be inappropriate for it to be aside for subordinate legislation e.g. the responsibility to promote the availability of and access to Welsh

medium courses in the Learning and Skills (Wales) Measure 2007, or the responsibility to promote access to Welsh medium education in the Learner Travel (Wales) Measure 2008. It was a struggle to ensure that both these matters appeared on the face of the relevant Bills, after it was suggested that they should be set aside for subordinate legislation.

19. How can those principles be applied effectively in practice?

It might be useful to have a basic list of principles for allocating issues for legislation and ones for subordinate legislation, as a basis for committee scrutiny.

Assembly scrutiny

20. As a general rule, are appropriate and effective arrangements made for the pre-legislative scrutiny of draft legislation?

We are not convinced that there is consistency in this area. A consultation White Paper is sometimes published, but not every time – and we do not know the logic for deciding to publish such a paper, or not.

We are aware that scrutiny of the Qualifications (Wales) Bill is currently underway – and this is certainly to be welcomed (especially in light of the controversial policy background). However, we are unsure of the arrangements for that process, e.g. who are the persons viewed as stakeholders to be contacted for this initial process? It is not completely transparent.

21. As a general rule, is scrutiny at Stage 1 sufficient and effective for probing the fundamental policy objectives of legislation before the National Assembly?

On the whole, we feel that Stage 1 is a detailed and thorough process, and an excellent opportunity to sound out all of the relevant issues.

22. Could more effective use be made of the optional Report Stage following Stage 3?

In general, all of the stages after Stage 1 move swiftly and are a lot less interactive with stakeholders.

It would be very useful to establish some sort of email list (optional, of course) for each stakeholder who was part of Stage 1, to send regular updates on the Bill's progress and any relevant deadlines, any reports that have been published, or any new evidence that has been given.

23. Are the arrangements for expedited processing of emergency Bills efficient and effective?

UCAC feels that there is a need to tread very carefully when implementing processes for emergency Bills. Emergency Bills should not be passed unless there is real justification for doing so. The principle of detailed and thorough scrutiny, with a wide range of stakeholders being given the opportunity to express their views and present evidence, is central to the National Assembly's integrity; the pros and cons of omitting any part of that process need to be weighed up very carefully.

24. Does the experience of the Fourth Assembly suggest that the present capacity of the Welsh Government to bring forward legislation is:

a. sufficient;

b. insufficient; or

c. unnecessarily large?

The Fourth Assembly has caused frustration for those trying to respond to the legislative scrutiny process. There was a long period at the start of the Fourth Assembly where there was very little legislation, and the Bills have been piling up since then. We must remember that most of the organisations who respond to the scrutiny committees' calls for evidence are relatively small organisations, with a limited number of staff – nothing like the hundreds of staff working in government departments. Given that the National Assembly was established on the principle of engaging proactively with civil society, the process of tabling legislation can make such engagement challenging.

25. Does the experience of the Fourth Assembly suggest that the present capacity of the National Assembly to process Government legislation is:

a. sufficient;

b. insufficient; or

c. unnecessarily large?

We assume that Assembly Members are under exceptional pressure in terms of their scrutiny responsibility, in addition to inquiries and the functions of the committees and the Assembly more generally. It would be beneficial to widen the Assembly's capacity to process legislation.

26. Does the experience of the Fourth Assembly suggest that the present capacity of the National Assembly to propose and process legislation other than Government legislation is:

a. sufficient;

b. insufficient; or

c. unnecessarily large?

The lack of Member's Bills strongly suggests that there is a lack of expertise, support or capacity for proposing legislation.

27. Do any aspects of the Welsh Government's management of its legislative programme appear particularly admirable or to give cause for concern?

As mentioned above, imbalance in terms of timing, with a lack of work at the beginning of the period and work piling up over the remaining period.

28. Have there been any particular successes in the National Assembly's ability to pass Acts acquired under the Government of Wales Act 2006?

The process is now much more efficient as there is no need to go through the process of passing Legislative Competence Orders before moving on to the Bills themselves.