

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) LW06
Ymateb gan Capital Law

Evidence from Capital Law

1) The general principles of the Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives

The policy objectives of the Bill – i.e. to make Welsh Law more accessible, clear and straightforward in its use and application – are long overdue. We discussed the general principles of the Bill in far more detail in our response¹ to the Welsh Government's ("**Government**") initial Consultation on the Bill – we'll refrain from repeating our responses here, though note that our views remain the same.

In summary, however, we see a clear need to legislate in this area to fully achieve the desired effect of the Bill's objectives. In the Bill's current form, there is an entrenched (and in our view necessary) *duty* on successive Counsel Generals and Welsh Ministers to undertake reviews of the codification/ consolidation of Welsh Laws. Were it a *discretionary* programme in comparison, there'd clearly be less pressure, incentive and appetite to fully implement the policy objectives.

Equally, requiring Ministers, during each Assembly term, to set out how they intend to improve the accessibility and the interpretation of Welsh Law will inject momentum into the project – given the expected timescale of implementation (which, in theory, could be an infinite task), this ongoing duty is a neat way of keeping the project on track.

2) Any potential barriers to the implementation of the provisions and whether the Bill takes account of them

Naturally, implementation of the Bill will result in considerable time, cost and resource implications (see more in sections 3 and 4 below) – a balance must be struck between ensuring that "*consolidation and codification exercises, which may not be political priorities, are carried into law without competing for Assembly time with other Bills.*"²

But, despite it being a long-term project, the Bill does make room for efficiency. To preserve political motivation, the Government's intention is that the Counsel General will present a codification programme and regularly report on its progress

¹ <https://beta.gov.wales/sites/default/files/consultations/2018-08/full-responses-legislation-bill.zip>.

² http://www.lawcom.gov.uk/app/uploads/2016/06/lc366_form_accessibility_wales_English.pdf (at para 3.6).

to the National Assembly.³ In our view, this will maintain focus, introduce flexibility where required, and minimise diversion from the objectives of the Bill.

Determining the correct procedures is also fundamental to ensuring a successful and within-limits implementation.⁴ For example, lawmakers should clearly avoid exposing existing laws to *substantive* reconsideration⁵ – but again, these potential barriers have been considered in our opinion, and the right balance has been struck between reform and consolidation.⁶

3) Whether there are any unintended consequences arising from the Bill

4) The financial implications of the Bill (as set out in Part 4 of the Explanatory Memorandum)

We see a cross-over between questions 3 and 4, and so will respond to both together.

At first glance, we don't foresee any notable unintended consequences – at least none which are detrimental.

From a regulatory perspective (and in line with the Government's impact assessment⁶ on the topic), we foresee no substantially negative impact of the Bill.

That being said, some potential consequences which initially came to mind include:

1. Cost, time and resource:

Codification and consolidation is naturally a mammoth task – the costs involved and financial implications are likely to be huge. As a rough and illustrative figure, the Government⁷ has estimated that the cost of preparing and delivering a programme of improving accessibility would be in excess of £500k per annum.

The question of allocation and extent of resource is a further key concern of the Bill – should there be, for example, a dedicated team for preserving Welsh Law codes and maintaining the Cyfraith Cymru/ Law Wales website? It's worth noting, however, that the Government does intend to use existing resources to cover some of the associated costs.⁸

³ See footnote 2 above (at para 1.58).

⁴ See footnote 2 above (at para 3.22).

⁵ See footnote 2 above (at para

3.23). ⁶ See footnote 4 above.

⁶ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Regulatory%20Impact%20Assessment.pdf>.

⁷ See footnote 7 above (at para 17).

⁸ See footnote 7 above (at paras 16-20).

Timing of implementing the Bill is another focal point. The Law Commission's June 2016 recommendation paper⁹ rightly stressed the need to maintain the impetus of a programme and to provide sufficient resources for the complex work involved, without hampering the rest of the Welsh legislative programme. The Government¹⁰ predicts, for example, that the goal of the ongoing programmes could take over 20 years to achieve – with Brexit's priority status in the play, this could be an even longer timeframe.

2. Welsh language implications

We see no undesirable impact on the Welsh language, and note similar findings in the

Government's impact assessment.¹¹

In fact, as well as the obvious/ intended consequences of the Bill for the use and status of the Welsh language, we're likely to see an increased need for Welsh-medium drafters, jurilinguists and translators – a clear positive by-product of this mission, and one which supports the 2050

*Cymraeg*¹³ strategy as well as the general tenet of the Welsh Language Standards¹² and Government of Wales Act 2006.¹³

Equally, logic dictates that the more the law is made available and more clearly in Welsh, the more likely people will find it easier to take up and provide Welsh-medium services – particularly in the legal sector, which is worst hit by the current complexity.¹⁶ At Capital Law, we often advise

in Welsh, and anticipate that the lingual benefits of the Bill alone will have a clear positive impact on many of our clients.

3. Other impact assessments considered by the Government

No immediate issues surrounding equality come to mind¹⁴ – if anything, the Bill encourages the parity of Welsh and English being treated equally favourable.¹⁵

⁹ See footnote 2 above (at para 6.17).

¹⁰ See footnote 7 above (at para 13).

¹¹ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Welsh%20Language%20Impact%20Assessment.pdf> ¹³ <https://gov.wales/docs/dcells/publications/170711-welsh-language-strategy-eng.pdf>

¹² <http://www.legislation.gov.uk/wsi/2018/441/made>.

¹³

<https://www.legislation.gov.uk/ukpga/2006/32/section/7>

¹⁶ See footnote 12 above (at page 5).

¹⁴ And none are highlighted by the Government's Equality Impact Assessment –

<https://beta.gov.wales/sites/default/files/consultations/2018-03/Equality%20Impact%20Assessment.pdf>.

¹⁵ <http://www.legislation.gov.uk/mwa/2011/1/enacted>.

We also have no comments to make on the Government's assessments on children's rights,¹⁶ and on competition and the justice system.¹⁷

4. Inconsistency/ conflict with English law:

There's some inherent risk of conflict with English law – for example, both the Interpretation Act 1978 and the interpretation provisions in the Bill would operate side-by-side, which may give rise to confusion/ misapplication.

However, any confusion should be alleviated by the existence of:

- (i) guidance for drafters of legislation on how/ when both Acts apply
- (ii) Explanatory Notes to the relevant Act, which will assist the reader in understanding which Interpretation Act actually applies to the legislation they are reading, and
- (iii) general information on interpretation, made available on the Cyfraith Cymru/Law Wales and other relevant websites.¹⁸

5) The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Part 3 of the Explanatory Memorandum)

Whilst subordinate legislation to amend the Bill (when enacted) will sometimes be more appropriate than seeking to bring forward primary legislation,¹⁹ we urge caution on the possible overuse/ misuse of the power.

We only have to look at the recent controversies²⁰ surrounding the so-called Henry VIII powers to see the potential dangers of side-stepping primary law-making procedures. The issue with this power is clearly that, in contrast to primary law, a draft subordinate instrument will not benefit from full scrutiny.

Though, the relevant powers within this Bill are, in our view, primarily administrative in nature – they concern non-policy matters such as removing, adding or amending definitions, replacing descriptions of dates and times, and bringing the Act into force. Dealing with these clerical actions by primary means (as part of an already packed legislative agenda) would likely be disproportionate.

Equally, the absence of full scrutiny does not equate to a *lack* of scrutiny – many of the significant powers are still limited by the affirmative or negative Assembly procedures. As such, they key powers will either be subject to objection by the Assembly or, before Ministers can exercise their power to make subordinate

¹⁶ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Children%27s%20Rights%20Impact%20Assessment.pdf>.

¹⁷ <http://www.assembly.wales/laid%20documents/pri-ld11927-em/pri-ld11927-em-e.pdf> (at page 68).

¹⁸ See footnote 7 above (at paras 72-74).

¹⁹ See footnote 20 above (at para 108 onwards).

²⁰ <https://www.bbc.co.uk/news/uk-politics-39266723>.

legislation, the Assembly will need to pass a resolution approving a draft of that subordinate legislation.

So, provided they are used correctly, these flexible powers allow the Bill to be malleable to any necessary change, without the need to soak up the costs and time associated with enacting primary law. Any minor amendments following Brexit, for example, may be better dealt with by this secondary process.

On a final side-note, the proposed “statutory book” objective of the Bill should also ensure that any subordinate legislation wouldn’t add to the current patchwork law – in other words, any such legislation would be tidily categorised by subject matter along with its parent legislation.