

Jeremy Miles AC/AM
Y Darpar Gwnsler Cyffredinol a Gweinidog Brexit
Counsel General Designate and Brexit Minister



Llywodraeth Cymru
Welsh Government

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Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales

09 January 2019

Dear Mick,

LEGISLATION (WALES) BILL

Thank you for your letter of 11 December asking for information on the matters which we did not reach during the Committee's scrutiny session on the Bill. I have responded to these in Annex A attached.

During my evidence session I outlined the opportunity the Bill may present to make provision about the interpretation of bilingual legislation. Further information on my initial thinking on these points is set out in Annex B.

Finally, having now had the opportunity to review the transcript from my evidence session I wanted to ensure the record was clear on a couple of matters:

- a. I was asked if the Government intended to consult on programmes prepared under section 2 of the Bill, and I was happy to confirm the intention is that the Government will consult. I want to make clear that the consultation will take place within the period of six months from the appointment of the First Minister after a new Assembly is elected. The length of the consultation will depend on the time available, but will need to be sufficient to enable users of legislation to comment on the proposals.
- b. In asking a question on costings for the Bill, I note you indicated that the estimated budget was £0.5m. For the avoidance of doubt, the estimated cost of Part 1 is £0.58m per year or £2.9m per Assembly term, as set out in the Regulatory Impact Assessment to the Bill.
- c. Further, I explained that I anticipated having resources in place at the "beginning of next year" to start to deal with consolidation before the statutory duty is in place. I should have said the beginning of the next financial year.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
YPCCGB@llyw.cymru / PSCGBM@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.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jeremy Miles', with a stylized, cursive script.

Jeremy Miles AM

Y Darpar Gwnsler Cyffredinol a'r Gweinidog Brexit
Counsel General Designate and Brexit Minister

Annex A – response to questions raised by the Committee

1. Are you content with the balance of powers, in terms of the detail on the face of the Bill and what is left to regulations and the programme under Part 1?

I am content that the Bill strikes the right balance between what is set out on its face and what is left to regulations and the programme.

The Bill contains only four powers for the Welsh Ministers to make subordinate legislation. In Parts 1 and 2, the duties of the Counsel General and the Welsh Ministers, and the interpretation provisions for future Welsh legislation, are set out in full on the face of the provisions.

Three of the powers to make subordinate legislation in the Bill provide the mechanics for ensuring that the Bill works properly in the future. These are the powers to amend Schedule 1 to keep it up-to-date (section 4), to make consequential etc. provision in connection with the Bill (section 40), and to bring Part 2 fully into force by order (section 42).

In Part 3, section 36 confers the power to amend legislation to spell out dates and times. This power could be used to amend not only existing legislation but also future legislation. It would therefore be impossible to set out all of the relevant amendments on the face of the Bill.

The programmes prepared under section 2 will set out the detailed steps that the Welsh Government intends to take in each Assembly term to improve accessibility. That is entirely appropriate because the duty will be ongoing. It would be impossible for the Bill to specify all of the detailed steps that should be taken to improve accessibility in all future Assembly terms.

2. Many pieces of legislation seem to be in force, but when you dig a little deeper, they are often only in force for some purposes. This is a potential serious trap for the unwary. How would Part 1 of the Bill address this lack of transparency of legislation?

The Government agrees that it is important that users of legislation should be able to find out easily which legislation is in force and for which purposes.

Clear information about commencement should be made available with the published legislation, and in fact legislation.gov.uk does provide detailed information identifying provisions which are not yet in force or which come into force in stages. The status of a provision which is not yet in force for any purpose is identified as “prospective”. Where the coming into force of any other provision is not straightforward, information is provided in notes to the provision. The notes will usually state whether the provision is wholly or partly in force, give the date or dates on which it came into force, and identify the relevant commencement provisions or orders.

The information which is provided on legislation.gov.uk deals with commencement issues as fully as possible, and there would be little point in the Government duplicating those efforts. However, there are other steps that the Government might take to reduce the amount of legislation that is not fully in force.

Where the Welsh Ministers have powers to bring provisions of Assembly Acts into force, they have a responsibility for bringing the provisions into force in a timely and orderly way, so that the volume of legislation which is not in force or is only partly in force is kept to a minimum. The activities that are included in a programme under Part 1 of the Bill might also include other steps to reduce the number of provisions that are redundant or not in force, for

example by taking the opportunity to bring those provisions into force or remove them from the statute book at the same time as consolidating the law.

3. Section 4(1) of the Bill says that the Part 2 rules will apply unless “express provision is made to the contrary”. Section 4(1) does not say where that expression provision may be made, therefore where do you expect such expression provision to the contrary to be set out? (Compare this to section 26 which clearly says that any express provision to the contrary must be in the relevant Assembly Act or Welsh subordinate instrument.)

Section 3(3) of the Draft Legislation (Wales) Bill, which corresponded to section 4(1) of the Bill that has been introduced, referred to cases where the Assembly Act or Welsh subordinate instrument itself provided that any of the presumptions in Part 2 should not apply to it. On further consideration, we decided that the approach in the Draft Bill was too narrow in two respects.

First, there may be a provision in the Act or instrument which is clearly inconsistent with one of the presumptions in Part 2 of the Bill (for example a definition that is different from one in Schedule 1 to the Bill), but which does not state that the relevant presumption does not apply. The intention is that the inconsistent provision in the Act or instrument should prevail, whether or not it states that the relevant presumption is excluded. The reference in section 4(1)(a) of the Bill to “express provision ... to the contrary” is intended to cover both of these situations.

Secondly, the provision to the contrary might be contained either in the Assembly Act or Welsh subordinate instrument in question, or in another piece of legislation. For example, the Act under which a Welsh subordinate instrument is made might provide that subordinate legislation made under that Act is to operate in a different way from that set out in Part 2 of the Bill. Or another piece of legislation may make a change to the law which modifies a presumption in Part 2 generally or for certain purposes. Section 4(1) of the Bill therefore refers in general terms to whether “*provision is made*” to the contrary.

As noted in paragraph 85 of the consultation document accompanying the Draft Bill, this provision is not strictly necessary where the provision to the contrary is contained in another Act. However, section 4(1) mentions all of the ways in which a presumption in Part 2 could be displaced in order to make the position clear.

4. Schedule 1 to the Bill includes a long list of defined terms, such as “county court”, “land” and “person”. Whenever an Assembly Act that is passed after 1 January 2020 uses any of those defined terms, the meaning in Schedule 1 will, by default, apply to those terms (unless the Assembly Act says otherwise). Would it not be more transparent and accessible if all definitions were included on the face of each Assembly Act?

We considered carefully which general definitions to include in Schedule 1 to the Bill, and retained only those that were likely to be relevant and helpful in Welsh legislation. As a result, Schedule 1 to the Bill defines significantly fewer terms than Schedule 1 to the Interpretation Act 1978 (60 terms in the Bill, compared with over 90 in the 1978 Act following amendments made by the European Union (Withdrawal) Act 2018). In our view these definitions will promote several of the aims of Part 2 (see paragraphs 44 and 45 of the Explanatory Memorandum).

First, they will remove doubt about whether certain terms need to be defined, which will help to shorten Welsh legislation and improve consistency in its drafting. Where there is doubt about whether legislation can refer to a public body or concept without defining it, drafters of

different Acts and instruments may take different approaches. (For this reason, it is not necessarily the case that individual Acts and instruments would always include definitions of a term if it were not defined in Schedule 1 to the Bill.) For terms of this kind, having the definition in Schedule 1 avoids the question by dealing with the issue once and for all.

Secondly, the definitions in Schedule 1 will also remove doubt for certain readers of legislation while generally operating 'in the background'. Many of the definitions in Schedule 1 are intended to resolve minor or detailed questions of interpretation that would be unlikely to occur to the average reader. For example, most readers would not be troubled about the precise meaning of "*county court*" or "*Lord Chancellor*" but including definitions of those terms forestalls any arguments that might conceivably arise.

Thirdly, there are definitions in Schedule 1 that may be more significant, at least in some cases, such as "*land*" and "*person*". However, these terms are already defined in Schedule 1 to the 1978 Act. We have included them in Schedule 1 to the Bill, and kept changes to the minimum, in order to ensure continuity and consistency between the two Acts while also providing bilingual definitions of the terms for Welsh legislation. As with the other definitions, their inclusion in Schedule 1 will also help to shorten legislation and enable its drafting to be more consistent.

5. The Welsh Ministers have some powers to make subordinate legislation in reserved areas. For example, the Welsh Government recently made directions that required Local Health Boards in Wales to provide abortion services to women from Northern Ireland free of charge. Abortion is a reserved matter for the Assembly. If the Welsh Ministers make a Welsh subordinate instrument in a reserved area, how will Part 2 of the Bill affect the interpretation of that Welsh subordinate instrument?

Part 2 of the Bill will apply to a Welsh subordinate instrument made by the Welsh Ministers in a reserved area in the same way that it applies to an instrument they make in a devolved area.

The definition of "*Welsh subordinate instrument*" in section 3(2) of the Bill reflects the Welsh Government's view of the Assembly's competence to legislate about statutory interpretation. However, the way in which Part 2 of the Bill applies to an individual Welsh subordinate instrument will not be affected by whether the subject-matter of the particular instrument is reserved or devolved. The aims of clarity and simplicity would be undermined if readers of Welsh subordinate instruments were required to apply the tests of legislative competence in the Government of Wales Act 2006 in order to work out how Part 2 of the Bill applied to them.

Part 2 of the Bill will not apply to Acts of the UK Parliament, whether their subject matter is devolved or reserved. Nor will it apply retrospectively to existing Acts or Measures of the Assembly, for the reasons set out in paragraph 69 of the Explanatory Memorandum. Part 2 will therefore apply to Welsh subordinate instruments even in cases where it does not apply to the primary legislation under which they are made, as explained in paragraphs 26 to 40 of the Explanatory Notes. That approach is intended to ensure that Part 2 applies to as much of the subordinate legislation that is made bilingually in Wales as possible.

We do not expect any difficulties to be caused by the fact that Part 2 of the Bill will apply to a Welsh subordinate instrument even though the Interpretation Act 1978 may continue to apply to the primary legislation under which it was made. It is already the case that the application of the 1978 Act to subordinate legislation is independent of its application to the Act under which the subordinate legislation is made (see section 23 of the 1978 Act). So there is nothing novel in the fact that Part 2 of the Bill will apply to a Welsh subordinate

instrument in its own right rather than by virtue of the instrument being made under an Act to which Part 2 applies.

The fact that Part 2 of the Bill applies to a Welsh subordinate instrument will not change the meaning of the primary legislation under which it is made, nor will it affect the scope of any powers conferred by the primary legislation. Part 2 simply creates presumptions about how the Welsh Ministers (or other devolved Welsh authority) intend the instrument to operate. Section 4 makes clear that those presumptions are subject to the provisions of the Welsh subordinate instrument itself and any other provisions to the contrary. This means there will not be any conflict between Part 2 of the Bill and the parent Act or Measure, because the presumptions in Part 2 will always give way wherever it is clear that something different is intended.

6. Section 19 says that a power to give directions also includes a power to vary and withdraw the directions. Why is there not a similar provision for varying and withdrawing guidance?

Section 19 deals specifically with powers to give directions because it is common for Acts which confer powers to give directions to state that the directions may be varied (or amended) and withdrawn (or revoked). Making general provision to this effect in section 19 removes doubt and avoids the need to make separate provision about the issue in every Assembly Act.

A direction will usually impose a requirement on a person to take or avoid certain steps, or will produce some other legal effect such as an exemption from a statutory requirement or entitlement. The variation or withdrawal of a direction may therefore have considerable legal significance for the persons affected by the direction, and questions may arise about whether a power to vary or withdraw it is intended. Although such a power might be implied in many cases, it will often be desirable to ensure that there is no doubt about that.

Section 19 does not deal with guidance because guidance is usually different in nature from directions. The variation or withdrawal of guidance will not generally give rise to the same questions because guidance does not usually have such significant legal effects for the persons to whom it is addressed. It is therefore much less common for statutory provisions about guidance to say anything about whether the guidance can be revised or withdrawn.

7. What practical arrangements will Crown bodies have to make as a result of section 26 of the Bill?

Crown bodies will not be required to take any practical steps as a result of section 26. The section does not have any immediate effect on Crown bodies, but simply creates a presumption that future Assembly Acts and Welsh subordinate instruments will bind the Crown. It will be those Acts and instruments that change the substantive law. If they impose new duties that affect the Crown, Crown bodies may need to make arrangements at that time.

It is also important to remember that, although the presumption will be that Welsh legislation should bind the Crown, there may be cases where it is not appropriate for it to do so. In those cases it will still be possible for an Act or instrument to provide that it does not bind the Crown.

8. Is it correct to say that the Counsel General could not be convicted of a criminal offence by virtue of legislation binding the Crown but Welsh Government officials could?

This is not correct. Where a piece of Welsh legislation creates a criminal offence and does not modify or disapply section 26 of the Bill, everyone “*in the service of the Crown*” will be open to criminal liability, including both civil servants and members of the Government.

There have been clear judicial statements that Ministers of the Crown are “*persons in the service of the Crown*” (see *Bank voor Handel en Scheepvaart NV v. Administrator of Hungarian Property* [1954] AC 584). Members of the Welsh Government would be in the same position, because section 57(2) of the Government of Wales Act 2006 provides that the functions of the Welsh Ministers, First Minister and Counsel General are exercised on behalf of Her Majesty.

Section 26(3) of the Bill reflects the constitutional principle that the Sovereign has personal immunity from prosecution for criminal offences, even where legislation binds the Crown. Setting out the position in section 26(3) removes the need to say this in every Act or instrument.

9. Section 38 of the Bill sets out the rules that would apply when combining two pieces of subordinate legislation that are subject to different Assembly procedures. For example, if Regulations A are subject to affirmative procedure, and Regulations B are subject to negative procedure, section 38 allows Regulations A and B to be made in a single instrument, subject to the stricter of the two procedures (i.e. subject to affirmative procedure). What if Regulations A were subject to the negative procedure and required consultation, and Regulations B were subject to affirmative procedure and did not require consultation. What procedure would apply?

Section 38 deals only with differences in the Assembly procedures that would otherwise apply to different types of subordinate legislation; it does not affect any requirements for the Welsh Ministers to undertake consultation before making subordinate legislation. The reason for this is that the application of multiple Assembly procedures can give rise to greater difficulties and uncertainties where Ministers wish to combine provisions in a single statutory instrument.

In the example given by the Committee, Regulations A will be subject to negative Assembly procedure and Regulations B will be subject to affirmative Assembly procedure. If they are combined in a single statutory instrument, section 38(1) of the Bill will mean that the combined instrument is subject only to affirmative procedure.

Before making the combined instrument, the Welsh Ministers will be required to consult on the proposal to make Regulations A. Section 38(1) will neither remove that requirement in relation to Regulations A, nor extend it so that it applies in relation to Regulations B. There is no need for it to do so. The fact that the Welsh Ministers are not required to consult anyone before making Regulations B does not conflict with their duty to consult before making Regulations A, and does not prevent them making Regulations B in the same instrument as Regulations A.

In practice, there might be cases where a statutory instrument was drafted in a way that made it difficult to distinguish the provisions made under power A from those made under power B. So if the Welsh Ministers were to consult by publishing a draft of the instrument, it might not be practicable to consult on a draft containing Regulations A alone. A single consultation on all of the provisions might make most sense, for both the Welsh Government and consultees. But that would not be because section 38(1) had changed the legal effect of the consultation duty.

The Welsh Ministers might well wish to consult before making the regulations in any event. In many cases there is no statutory duty to consult on proposals to make subordinate

legislation, but consultation is nevertheless carried out in order to obtain input from stakeholders with a view to improving policy development.

10. Given that Part 2 of the Bill will not apply to subordinate legislation made by the Welsh Ministers and UK Ministers on a composite basis, will we see fewer composite statutory instruments being laid before the Assembly in future?

The fact that Part 2 of the Bill will not apply to composite instruments will not necessarily mean that fewer composite instruments are made in future, because other considerations may affect that decision.

The Government considers carefully whether it would be appropriate to join with UK Ministers in making a joint or composite instrument in each case where the question arises. In making that decision, a number of factors will be taken into account, including:

- whether the Welsh Ministers are required by law to make a joint or composite instrument;
- whether the Welsh Ministers acting alone will be able to make all of provision that is required to implement the policy, considering the way powers have been devolved;
- which approach would be most convenient for the reader, for example where the requirements for the relevant industry are the same in each part of the UK;
- how best to ensure consistency in approach and timing where there are significant cross-border operational overlaps.

One of the disadvantages of making a joint or composite instrument is that it involves making legislation in English only, and in future this disadvantage will be compounded by the fact that the legislation will be subject to a slightly different set of interpretation rules which also exist in English only.

However, as at present, these disadvantages will have to be weighed against the comparative ease of having all the relevant provisions across territorial boundaries in a single instrument; and there will continue to be cases where the extent of devolved powers means that a stand-alone instrument for Wales is not a realistic option.

Annex B – interpreting bilingual legislation

1. The overall purpose of the Legislation (Wales) Bill is to make Welsh law more accessible, clear and straightforward to use. But a supplementary and complementary purpose is to facilitate more bilingual legislation and give greater effect to the equal status of our two languages in law.
2. Section 156(1) of the Government of Wales Act 2006 (GoWA 2006) makes clear that the English language and Welsh language versions of legislation passed by the National Assembly for Wales or made by the Welsh Ministers are equal. In other words one doesn't take precedence over the other, and any difference in meaning between the two texts cannot be reconciled by reference to one of the languages being more likely to be a proper reflection of the intended purpose of the legislator.
3. This is a widely known provision and there has been much focus, both within and outside the Welsh Government, on the need to ensure that the languages always have equivalent meaning. Much thought has been given within the Welsh Government in particular to the skills and processes we need, when promoting legislation, to ensure that the languages don't differ in legal meaning. It is also, of course, an issue scrutinised by the Constitutional and Legislative Affairs Committee.
4. The impression I am forming, however, is that less thought has been given to the implications of this after legislation has taken effect. Although the meaning of section 156(1) is relatively well understood in the abstract, the practical effect, in particular on the courts and on practitioners, may not be. If there is any doubt about the meaning of Welsh legislation you need to consider both languages – not just one – and some may be under the misapprehension that you can work with one language only.
5. The implications of the equal status of the English and Welsh languages have been considered in some detail by the Law Commission. Chapter 12 of its consultation paper, written personally by Lord Lloyd Jones, analyses the meaning and practical implications of section 156(1) of GoWA 2006 and considers how discrepancies between languages are dealt with in other jurisdictions. It is probably the first thorough analysis of the issue from a Welsh perspective.
6. The paper considers what is done elsewhere and whether anything similar should be adopted in Wales. Of most relevance is the Commission's assessment of custom and practice in Canada, and of a legislative provision on interpreting bilingual legislation in Hong Kong.
7. The Commission, rightly in my view, concludes that use of a "shared meaning rule" – under which any discrepancy between two languages is resolved by adopting an interpretation that is common to each language – is not helpful. Although intended to be a guide rather than a rule, this has the potential to lead the courts towards a narrow interpretation whenever there is inconsistency. A broader interpretation which could be construed from one but not the other of the languages may, however, have been the legislature's intention.
8. Statutory provisions contained in Hong Kong's Interpretation and General Clauses Ordinance go further than the corresponding provision in section 156(1) of GOWA. Section 10B begins by making a statement similar to that contained in section 156(1) by providing that the English language and Chinese language text of legislation is equally authentic. However, it goes on to also say, firstly, that both texts are presumed to have the same meaning (and guidance on this provides that this means the two texts are "but two expressions of the same intent and together constitute one law embodying a single

meaning”), and secondly, where there is a difference in meaning, the meaning which “best reconciles the texts, having regard to the object and purposes of the [legislation], shall be adopted”.

9. This last provision is of particular interest to us. This is because it makes clear that only a parallel reading of the two versions can reveal whether they are susceptible to different interpretations, and neither one of the versions should be preferred without considering the other. Although this may, to some at least, be self-evident, section 156(1) of GoWA 2006 does not contain an express obligation to consult and compare both texts, and as indicated above we are concerned that this is not fully understood.
10. The Law Commission for their part eventually concluded that this was an issue best left to the courts, determining that judges should not be fettered in their application of the ordinary rules of construction. This is something with which we agree in principle but wonder whether there is scope for retaining this discretion while at the same time clarifying certain fundamentals such as the need to understand both texts not merely one.
11. Guidance issued on the Hong Kong legislation suggests that this is what they consider their position to be. It is contended that the process of reconciliation of any differences in meaning must, ultimately, correspond with the legal meaning intended by the legislature. They conclude, on that basis, that a meaning shared “by both versions if one text is ambiguous and the other is plain and unequivocal, or if one text has a broader meaning than the other...may not be decisive.” The guidance goes on to say that the “process of reconciliation does not stop at extracting the highest common meaning in both texts, which may possibly be repugnant to the spirit of the legislation as a whole. It must still be related back to and tested against the backdrop of the overall objective of the legislation in question.” Perhaps for this reason, therefore, the view expressed is that section 10B “provides only broad guidelines for bilingual interpretation... Statutory interpretation is after all the province of the judiciary under the common law.”
12. Based on this, my thinking at present is that we should restate section 156(1) so that it can be found in our legislation on the interpretation of legislation, rather than in what is essentially our constitutional document. This would in turn facilitate the production of guidance, possibly in the explanatory note to the restated section 156(1), which would clarify the issues highlighted above. The aim would be to guide the courts and other users of legislation rather than attempting to be prescriptive. Going further than this, therefore, by legislating in a manner similar to Hong Kong, is in my view probably unnecessary.
13. I would be very grateful for any views you have on the best means of tackling this issue or indeed about whether you agree this is an issue that we should seek to address.