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Llywodraeth Cymru
Welsh Government

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

3 May 2019

Dear Mick

LEGISLATION (WALES) BILL

During the Stage 1 debate on 2 April, I said that I would write to the Committee responding in detail to your report on the Bill. This letter sets out the Government's response to those recommendations in the Committee's report that were for the Government.

Recommendation 1

The Committee recommended that I should update the National Assembly on the progress of discussions with the UK Government in relation to the National Assembly's ability to make the Bill. I provided an update in my opening remarks in support of the motion to approve the general principles of the Bill (see paragraphs 364 and 365 of the Record of Proceedings). Since then, the Committee will have received a copy of a letter I have been sent by the Solicitor General on the Bill. We are now considering this.

Recommendations 3 and 4

I accept both of these recommendations.

The "non-legislative measures" that the Government will bring forward under an accessibility programme will vary depending on the needs at the relevant time, and will be a matter for the Government of the day. As I have previously set out, we intend to consult with users of legislation on the actual projects which should form part of the accessibility programmes. I confirm I would expect the programmes to include measures in the three areas mentioned by the Committee in its report.

They would include digital accessibility projects, such as maintaining and improving the Law Wales/Cyfraith Cymru website, developing the subject organised database of devolved Welsh legislation, and working with The National Archives to ensure that Welsh legislation on the legislation.gov.uk website is available in an up-to-date form in both languages. Our initial focus will be on these digital projects leading up to the first programme.

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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.

We see a significant role for the Cyfraith Cymru/Law Wales website in helping the public to understand the law and in raising awareness of significant changes in the law. Our ambition is to publish explanatory material on key areas of Welsh law alongside easy-read versions of the law, and leaflets focussing on particular aspects of legislation of relevance to people's daily lives (for example, local authority responsibilities for school breakfast clubs).

We also wish to promote the Cyfraith Cymru/Law Wales website as a home for academic and practitioner commentary on Welsh law. My officials have had discussions with some legal practitioners and academics to encourage them to write for the site, but further work needs to be done to encourage content. This will form part of our work during the "user research" phase of the website redesign which is taking place this year, as well as our longer term strategy for ensuring the website remains up to date and relevant.

Programmes would also include activities to facilitate the use of the Welsh language, over and above the benefits for the language from consolidating the law bilingually and improving digital accessibility. These could include making more glossaries for legislation available and further initiatives to develop agreed terminology where this is helpful.

I note the comments of the Welsh Language Commissioner in her evidence to the Committee, and I am clear that developing Welsh language expertise needs to form part of wider workforce planning both within and outside the Government. The *Cymraeg 2050* strategy commits the Welsh Government to "lead by example" by promoting the use of Welsh within its own workforce. The Welsh Language Standards also place a duty on us to publish a policy on promoting the language in the workplace. Work on this is ongoing, and the Permanent Secretary has commissioned a further paper on best practice in other public sector organisations.

Recommendation 5

I accept this recommendation.

Discussions with academics in Wales have already begun about how they could contribute to the explanatory material that will be published on the Cyfraith Cymru/Law Wales website. We hope to strengthen these relationships in the coming months and years, and hope that academics will play a vital part in improving understanding of Welsh law.

HEFCW currently funds higher education and research in Wales. The Welsh Government has announced its intention for a new Tertiary Education and Research Commission, which is intended to include a statutory committee responsible for research and innovation. However, in our efforts to increase academic research on the law we must continue to respect and support academic independence.

Recommendations 6 and 10

Recommendation 6 of the Committee's report was that the Government should commit to a review of the legislation at the mid-way point of the first Assembly term in which the legislation takes effect, i.e. by the end of 2023. As I mentioned during the Stage 1 debate, I accept this recommendation.

We also accept recommendation 10 of the Committee and I have tabled an amendment to the Bill which, if accepted, would provide for annual reports on progress under a programme.

For the mid-way review the intention would be for the Counsel General's annual report in 2023 to be expanded to include a review of the effectiveness of Part 1 of the Bill itself. This report would also respond to recommendation 2 of the Finance Committee's report (and would therefore cover resourcing and financial implications).

The Government would also support the National Assembly reviewing the legislation at any time it considered it appropriate to do so.

Recommendation 7

The Committee recommended that I should, during the Stage 1 debate, provide a clear explanation of what is meant by "the accessibility of Welsh law". I was happy to accept that recommendation, and sought to provide an explanation in my opening remarks during the Stage 1 debate: see paragraphs 365 to 368 of the Record of Proceedings. I have also indicated that, subject to the Bill being passed, I intend to publish a position statement on consolidation and codification this summer, which will set out my thinking on these questions in more detail.

Recommendation 8

The Committee recommended that the Bill should be amended so that the Welsh Ministers and Counsel General are required to implement a programme of accessibility prepared under section 2(1).

As I mentioned in the Stage 1 debate, whether the accessibility of Welsh law has improved will inevitably be a matter of subjective judgment on which opinions may differ. A statutory duty to achieve improvements in accessibility would therefore be problematic. Rather, questions about whether enough progress has been made should be subject to a political process (for example, through reporting to the National Assembly) not a legal one.

The purpose of Part 1 is to ensure that the Government considers accessibility and sets out the steps that should be taken to improve it. We do not consider that a statutory obligation to then take all of those steps would be appropriate, for a number of reasons.

As things stand the Government is already taking a very unusual step in imposing a clear and transparent duty on itself and subjecting itself to criticism if it doesn't achieve it. Exposing itself to a legal process would be going beyond this for a purpose that is uncertain.

In my view a situation in which a court could be asked to determine what steps or how many steps have been taken – or how quickly they were taken – to tackle a multi dimensional and often subjective problem like the accessibility of the law should be avoided. It is probably inappropriate to ask a court to deal with what is ostensibly a political process and I question what suitable remedy could be sought or imposed. Is it intended that this should be a strict liability obligation such that a Court could require each step to be delivered to the letter? What if the programme sets out an ambition to deal with a particular problem or outcome but does not specify exactly how it will be undertaken – what would the court be asked to determine?

It should be borne in mind that the measures set out in a programme will, in the most part, be improvements that are not in the gift of the Government alone, because they require assistance or agreement from others. Most obviously the Government will be able to propose consolidation Bills but it will be for the National Assembly to decide whether to pass them. In evidence to the Committee I touched upon the approach that has been taken in New Zealand. Section 30 of their Legislation Act 2012 requires a draft programme that is

specific to “revision Bills” which consolidate the law. The draft revision programme laid before the New Zealand Parliament must set out what revisions are “proposed to be started” and “expected to be enacted”. The references to “proposed” and “expected” revisions reflect the constitutional position that it is the Parliament which decides whether to pass revision Bills.

In addition, to use a non-legislative example, any improvements in the publication of legislation will involve the Government working with The National Archives. Deciding on how publication should be improved is not something that the Welsh Government can do by itself.

In practice the most likely effect of imposing such a duty on the Government would be the opposite of what was intended. As the initial content of the programme would remain something that is within the Government’s discretion, a duty of this kind would inevitably lead to future governments acting cautiously and limiting their ambitions. Something that should be aspirational and challenging would be passive and easy, containing only those things the Government could be confident it could fulfil.

It is appropriate for the Government to be required to commit to a programme of activity and be held to account in that respect, including by the courts if it fails to do this. But the secondary, subjective question of *how well* that programme has been delivered should be a political question not a legal one.

Recommendation 9

The Committee recommended that section 2 of the Bill should be amended so that a programme must include proposed activities that are intended to promote awareness and understanding of Welsh law. I confirmed during the Stage 1 debate that the Government accepted this recommendation and I have now tabled amendments to the Bill in order to give effect to this (see amendments 1 and 2).

Recommendation 11

The Committee recommended that I should issue a statement clarifying my proposals and intentions for codifying Welsh law. I accept this recommendation. If the Assembly passes the Bill, I have committed to publishing a position statement on consolidation and codification, and further details on Codes of Welsh law, in the summer.

Recommendation 14

The Committee saw no reason to disagree with my proposal that the Bill should restate section 156(1) of the Government of Wales Act 2006 concerning the equal status of the Welsh and English language texts of legislation. However, it recommended that I should give more information about the proposal. I accept the recommendation.

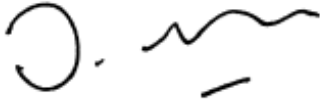
I have now tabled amendments which show how the Government proposes that the Bill should deal with this issue: see amendments 4, 5, 7 and 11 which I tabled on 4 April. The Minister for Finance and Trefnydd wrote to all Assembly Members on 5 April enclosing a detailed explanation of the purpose and effect of each of the Government’s amendments.

The Committee recommended that the information I provided should cover my intentions for guidance on the restated provision. I had mentioned in correspondence with the Committee that guidance might be given in the Explanatory Note to the restated section 156(1), and during the Stage 1 debate I committed to provide a draft Explanatory Note to accompany

the new provisions. Annex A to this letter sets out the text that I propose to add to the Explanatory Notes to the Bill, after Stage 2, if the Government's amendments are agreed.

I would like to take this opportunity to reiterate my remarks in the Stage 1 debate, and thank the Committee for their scrutiny of the Bill and their helpful report, and the Committee's support staff.

Yours sincerely

A handwritten signature in black ink, consisting of a large 'J' followed by a series of wavy lines and a short horizontal stroke at the end.

Jeremy Miles AM

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister

Annex A – draft Explanatory Notes for restatement and amendment of section 156

After the existing paragraph 45 of the Explanatory Notes to the Bill:

Section [5] – Equal status of Welsh and English language texts

46. Section [5] provides that, where an Assembly Act or Welsh subordinate instrument is enacted in both Welsh and English, the two language texts have equal status for all purposes. This means that the full expression of the law is that contained in both texts, not merely one.
47. The practice of legislating bilingually for Wales is well established. In particular, Assembly Acts must be in both Welsh and English, and subordinate legislation made by the Welsh Ministers is, almost without exception, made in both languages¹.
48. Section 156(1) of the Government of Wales Act 2006 currently provides for the equal status of the Welsh and English language texts of bilingual legislation. Section [5] of the Bill restates that provision, so far as it applies to Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill applies.
49. Like section 156(1) of the 2006 Act, section [5] of the Bill applies for all purposes and not only for the purpose of interpretation. However, the equal status of the texts has a number of implications for the interpretation of bilingual legislation. These were considered by the Law Commission in its consultation paper and final report on *Form and Accessibility of the Law Applicable in Wales*². It is particularly important to appreciate that if there is any doubt about the meaning of Welsh legislation, it will be necessary to take both language versions into account to determine what the legislation means. This is something that affects all those concerned with the making, implementation, administration and interpretation of Welsh legislation.
50. The effect of section [5] is not subject to the exception in section 4(1) of the Bill. In other words, the Bill does not provide for the rule in section [5] to be excluded in cases where provision is made to the contrary or the context requires otherwise.
51. Section [5] restates section 156(1) of the 2006 Act only for legislation to which Part 2 of the Bill applies. Section 156(1) will continue to apply to Assembly Measures, and to Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill does not apply (principally those enacted before Part 2 is fully in force). Part 4 of the Bill amends section 156(1) of the 2006 Act to avoid any overlap with section [5] of the Bill.

Section 39 and Schedule 2 – Consequential amendments and repeals

In place of the existing paragraph 190:

¹ An Assembly Bill must be in both languages when it is introduced and when it is passed: see Standing Orders 26.5 and 26.50 of the National Assembly for Wales, and section 111(5) of the Government of Wales Act 2006. For statutory instruments which are laid before the Assembly, a failure to produce an instrument in both languages is a ground for drawing it to the attention of the Assembly: see Standing Order 21.2(ix).

² See chapter 12 of Law Commission Consultation Paper No 223 (July 2015), and chapter 12 of Law Commission Report Law Com No 336 (October 2016).

190. Paragraph 2 of Schedule 2 makes several amendments to the Government of Wales Act 2006.
191. The first amendment is consequential on section [5] of the Bill, which provides for the equal status of the texts of bilingual Welsh legislation. Section [5] restates section 156(1) of the 2006 Act in relation to legislation to which Part 2 of the Bill applies. Paragraph 2(2)(a) of Schedule 2 therefore amends section 156 of the 2006 Act so that subsection (1) does not apply to legislation to which Part 2 of the Bill applies. Section 156(1) will continue to apply to other bilingual Welsh legislation (principally legislation enacted before Part 2 comes fully into force).
192. Paragraph 2(2)(b) of Schedule 2 repeals section 156(2) to (5) of the 2006 Act. Those provisions enable the Welsh Ministers to make orders providing that, when particular Welsh words and phrases are used in Welsh legislation, they are to have the same meaning as the English words and phrases specified in the order. This power has never been used, and there are no plans to use it³. It could also be said that these provisions are inconsistent with the general proposition that precedes them – namely that both languages have equal status. Schedule 1 to the Bill now makes general provision about the meaning of various Welsh words and phrases in Welsh legislation, which can be amended if additional words and phrases need to be defined; and an individual Assembly Act or Welsh subordinate instrument can make its own provision about the meaning of words and phrases in the particular Act or instrument.
193. Paragraph 2(3) of Schedule 2 repeals a reference to section 156(2) to (5) of the 2006 Act which is spent as a result of the repeal of section 156(2) to (5).
194. Paragraph 2(4) of Schedule 2 repeals the provision of the 2006 Act which originally inserted section 23B into the 1978 Act, because paragraph 1 of Schedule 2 is replacing all of section 23B.

³ The power in section 156 was based on a previous power in section 122 of the Government of Wales Act 1998, which was also never used.