NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

Inquiry into Making Laws in the Fourth Assembly

Evidence submitted to the Committee

By

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Introduction

1. The author of this submission is a Barrister (Gray's Inn 1977) and was, between 2007 and 2012, Chief Legal Adviser to the National Assembly for Wales. Prior to that he had practised at the Bar from 1977 to 1999 and from 2006 to 2007 and had been a legal adviser to the Welsh Government (1999 to 2006). This included a period as Legislative Counsel, when he was responsible for instructing Parliamentary Counsel on a number of UK Parliament Bills, including the Bill which became the Government of Wales Act 2006 ("GOWA 2006"). He is currently Honorary Director of the Legal Wales Foundation, an Honorary Research Fellow of Swansea University College of Law, Part-time Senior Lecturer in Legislation at that University and a Recorder who sits regularly in the County Court. He is a member of the Law Commission's Advisory Committee for Wales.

2. This submission deals with a specific issue relevant to the quality of Assembly legislation.

Textual amendment versus consolidation

3. Prior to 1999 statute law relating to what are now the devolved fields of government consisted of England and Wales legislation with very limited separate provision in relation to Wales. Assembly legislation therefore inevitably has to amend the effect of the previous law of England and Wales as it applies to Wales.

4. There are two ways of achieving this. One is to introduce into existing England and Wales statutes new provisions which are limited in their application to Wales ("textual amendment"). The other ("consolidation") is to produce a new, free-standing Welsh statute, appliying only to Wales and containing all the statutory provisions relating to Wales (including those previously applying in common to England and Wales) and eliminating all provisions which apply only to England. So far, the Welsh Government has adopted textual amendment as its method of amending existing England and Wales legislation as it applies to Wales.

5. In terms of the simplicity and clarity of the legislation, consolidation wins hands down. Amending and re-amending a piece of legislation originally drafted as a unified England and Wales statute, adding ever more complex "opt-outs" in relation to Wales, inevitably makes the understanding and application of the legislation ever more difficult. An added advantage of consolidation is that it enables the encrustations caused by previous forms of devolution to be cleared away.

6. **By way of illustration, the text of** Section 569 of the Education Act 1996, as amended by the Education (Wales) Measure now reads as follows:

(1) Any power of the Secretary of State or the Welsh Ministers to make regulations under this Act shall be exercised by statutory instrument.

(2) A statutory instrument containing regulations under this Act made by the Secretary of State, other than one made under subsection (2A), shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(2A) A statutory instrument which contains (whether alone or with other provision) regulations under section 550ZA or 550ZC may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament."

(2B) A statutory instrument containing regulations under sections 332ZC, 332AA, 332BA, 332BB or 336 made by the Welsh Ministers is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(2C) Paragraphs 33 to 35 of Schedule 11 to the Government of Wales Act 2006 make provision about the National Assembly for Wales

procedures that apply to any statutory instrument containing regulations or an order made in exercise of functions conferred upon the Secretary of State or the National Assembly for Wales by this Act that have been transferred to the Welsh Ministers by virtue of paragraph 30 of that Schedule.".

(3) (Repealed)

(4) Regulations under this Act may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit or the Welsh Ministers think fit.

(5) Without prejudice to the generality of subsection (4), regulations under this Act may make in relation to Wales provision different from that made in relation to England.

(6) Subsection (5) does not apply to regulations under section 579(4).

7. On careful consideration it will be seen that, within a single section:

(a) subsections (1), (4), (5) and (6) apply in relation to both England and Wales (although the effect of subsection (6) in relation to Wales is unclear);

(b) subsections (2) and (2A) now apply only in relation to England; and

(c) subsections (2B) and (2C) only apply in relation to Wales.

8. Elsewhere in the Act we find, in section 316A:

(8) An authority must have regard to guidance about section 316 and this section issued—

(a) for England, by the Secretary of State,

(b) for Wales, by the National Assembly for Wales.

9. This reference to the Assembly pre-dates GOWA 2006 and should now read "*the Welsh Ministers".*

10. Similarly, most references in the Act to "*the Secretary of State*" actually mean "*the Secretary of State in relation to England and the Welsh Ministers in relation to Wales"* since almost all functions of the Secretary of State were transferred in 1999 to the then National Assembly for Wales in relation to Wales and further transferred by GOWA 2006 to the Welsh Ministers.

11. The most glaringly misleading provision in the Act is section 10, which reads:

"The Secretary of State shall promote the education of the people of England and Wales."

when what it actually means is:

"The Secretary of State shall promote the education of the people of England and the Welsh Ministers shall promote the education of the people of Wales."

12. By contrast, in the field of Health, the Westminster Parliament, when consolidating the statute law in relation to the National Health Service in 2006 took the opportunity to pass two parallel Acts, the National Health Service Act 2006 and the National Health Service (Wales) Act 2006 which apply only to England and to Wales, respectively and which refer to the Secretary of State and to the Welsh Ministers, respectively, so that anyone wishing to understand the law relating to each country need only look at a single comprehensive statute relating to that country.

13. The Government of Wales Act 2006 makes specific provision to facilitate the consolidation of the statute law relating to devolved fields by the Assembly. Section 111(3)(a) enables the Assembly to adopt streamlined procedures for considering "Bills which restate the law".

Conclusion

14. The approach to legislative drafting adopted by the Welsh Government, textual amendment. inevitably generates complexity, creating ever-more elaborately amended versions of England and Wales statutes.

15. This approach also fails to address the inherent lack of transparency already built into England and Wales statutes dealing with devolved subjects, including misleading historic references to "the Secretary of State" and "the National Assembly for Wales".

16. No greater contribution could be made to the clarity and simplicity of Assembly legislation than a programme of consolidation of statute law in relation to devolved fields such as Education, Local Government, Planning, the Environment etc..

17. Assembly Members called upon to scrutinise legislation in these fields would themselves, in common with the Welsh public generally, benefit from the

simplification of the “Welsh statute book” and its unscrambling from the body of England and Wales legislation which the Assembly has inherited.

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