

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) LW03
Ymateb gan Yr Athro Thomas Glyn
Watkin

Evidence from Professor Thomas Glyn
Watkin

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1. I am grateful to the Constitutional and Legislative Affairs Committee for the invitation to make a written submission and participate in an oral evidence session in relation to this inquiry. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.
 2. The Inquiry's terms of reference state it will address:
 - the general principles of the Legislation (Wales) Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives;
 - any potential barriers to the implementation of the provisions and whether the Bill takes account of them;
 - whether there are any unintended consequences arising from the Bill;
 - the financial implications of the Bill (as set out in Part 4 of the Explanatory Memorandum);
 - 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).

The General Principles

3. The bill seeks to promote the accessibility of Welsh law, as defined in section 1(2). This it seeks to achieve by placing a duty upon the Counsel General to keep the accessibility of Welsh law under review (section 1(1)), and requiring the Welsh Ministers and the Counsel General to prepare programmes setting out what they intend to do to improve such accessibility (section 2(1)). Each programme must include proposals which are intended to contribute to an ongoing process of consolidating and codifying Welsh law, maintaining Welsh law in that form and facilitating the use of the Welsh language (section 2(3)). These purposes build upon recommendations made by this Assembly Committee in its report *Making Laws in Wales* (October 2015) and by the Law Commission in its report on the *Form and Accessibility of the Law Applicable in Wales* (Law Comm. No. 336, June 2016).
4. What is envisaged may be achieved is a highly laudable objective. Citizens of the United Kingdom, including those in Wales, suffer from having their lives regulated by laws which are not easy to access. This is, in part, the

consequence of how relevant legislation has been drafted and accumulated. Bills are rightly drafted to allow those who legislate on behalf of the citizen to scrutinize legislative proposals prior to deciding whether the proposals should become law. The structure of bills reflects their use in that context. They set out the changes which it is proposed should be made to the law in order to achieve a particular policy objective. Likewise, if the bill is enacted, the resulting Act or Statute records the changes to the law which it has been decided should be made. Neither a bill nor an Act is structured to set out for the benefit of the citizen what the resulting state of the law is on a particular topic. Nor does the so-called statute book do that. The statute book merely records in chronological order the various changes which have been made to the law over the centuries. It is not so much that it is not designed to be a statement of the law, but rather that it is not really designed at all. It is just a chronological collection.

5. Since at least the nineteenth century, serious attempts have been made to try to impose some order upon the accumulated mass of enactments, by for instance publishing editions, such as *The Statutes Revised*, which remove spent or repealed enactments and edit into the texts later amendments to them. The development of electronic sources of such texts is the latest most effective version of that endeavour. They do not however alter the basic problem which is that the collection remains chronological and is not designed to make the law – as opposed to individual pieces of law-making – accessible.
6. Over much the same period, attempts have also been made to restructure the accumulated mass of legislation based on its subject matter, in works such as *Halsbury's Statutes* and *Halsbury's Statutory Instruments*. In addition, *Halsbury's Laws of England* is a more ambitious, encyclopaedic work which sets out the relevant law on each subject and not simply legislation. Together, these works regroup the relevant legislation or law under appropriate subject headings arranged alphabetically. These works require continual updating as new laws are made, again a task which can be more effectively performed in a digital age.
7. Neither of these approaches delivers for the benefit of citizens a text which is an official, accessible statement of what the law is. In truth, the target audience for these works is mainly the legal professions, and access to them reflects that fact in terms of their cost. Their structure has led to the jibe that the English lawyer's idea of order is either chronological or alphabetical, in contrast to the rational order of the law codes of many other countries. However, even in those countries, the comprehensive nature of their codes of law is often compromised by the enactment of what is termed 'complementary legislation', that is free-standing enactments which are not inserted into the codes themselves. Such enactments, when frequent, undermine the accessibility which the codes are meant to achieve. Their existence highlights the importance of a sustained political will to maintain

a codified structure once adopted if accessibility is to be permanently achieved.

Consolidating and codifying Welsh law, and maintaining it in that form

8. The importance of maintenance is recognized in the Explanatory Memorandum to the Bill which states that:

only a sustained effort over the long term can solve the problems. What is required is a permanent change to our law making processes (¶ 14).

Crucial to the success of consolidating and codifying the law is that both continue over the long term and become an accepted part of the culture of law making in Wales. This means accepting that the law is constantly evolving and must, even after it has first been consolidated, be revisited periodically to ensure that it remains well ordered and accessible. It also means maintaining the overall structure – not the content, which will always change in accordance with policy and political wishes – of the statute book. Once the law is consolidated and codified we should only move away from the new structure in exceptional circumstances (¶ 31).

9. However, the Explanatory Notes which accompany the Bill are less clear in this regard. They state that:

Codifying the law is intended to bring order to the statute book. This involves organising and publishing the law by reference to its content (and not merely when it was made), and maintaining a system under which that law retains its structure rather than proliferating (¶ 17),

but then appears to roll back on the broader vision of the EM :

a Code would not (generally) be one legislative instrument but rather a collection of enactments under a unifying overarching title. Those enactments which make up the Code on any particular subject would be made available together. Similarly these enactments will remain the means by which the law is formally articulated. The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively (¶ 17).

10. The technical document on the Draft Taxonomy for Codes of Welsh Law repeats the latter two paragraphs (¶¶ 3 & 4), and the Annexes anticipate the collection of existing legislative sources under Proposed Codes and Topics. The approach is not dissimilar to that adopted in constructing the alphabetical, encyclopaedic works mentioned above (¶¶ 5-7), although it is

clearly intended that both primary and secondary legislation should be incorporated within each code, together with other relevant sources, such as guidance. It will also be the case that the sources will have been officially consolidated and will constitute an official statement of the legislation contained in each code. Nevertheless, if, as is stated, “The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively (EN ¶17)”, it is difficult to see how this can effect “a permanent change to our law making processes” (EM ¶14).

11. If the codes merely collate and publish primary and secondary legislation which continues to be enacted and made as at present, the only change to existing law-making processes that may be required may be the addition of an opportunity for the legislature to scrutinize how such legislation is being incorporated into the codes. Without such a stage, the exercise will be entirely the preserve of the executive and will be conducted, albeit more thoroughly and more regularly, in much the same way as legislation.gov.uk is currently revised and updated. However, unless some rôle is accorded to the legislature in this process, it is difficult to see how the content of non-government bills could be fairly accommodated. At the very least, an expedited legislative process might need to be introduced to deal with post-enactment revision of the codes. It might also be asked where the drafters producing those revisions should be located – in the government, the legislature or at arms length to both.
12. If, on the other hand, the code becomes the principal legal instrument in its field, the changes required to the existing law-making processes are likely to be much more extensive. Bills and draft statutory instruments (other than in exceptional circumstances – see EM ¶31) could be drafted so as to amend the text of the code. The legislature could control the structure of the statute book by ensuring that – other than in exceptional circumstances – bills and instruments conformed to the new requirements. Standing Orders and requirements as to Proper Form might reflect this.
13. Questions also arise regarding the amendment of the code by secondary legislation. Would all such amendments attract the affirmative resolution procedure, or could some amendments to the codes still be made by the negative procedure? With the advent of codes, might the existing procedures themselves need to be reconsidered and possibly even replaced?
14. Greater clarity is needed with regard to these issues. However, seeking greater clarity regarding the long-term vision should not hinder the essential first steps which are proposed in this bill. Almost certainly, the ongoing process of consolidation and codification will encounter fresh challenges in its path. Given the relative youth of its devolved legislature and the still manageable quantity of its statutory output, Wales is well-placed to take bold, first steps towards codifying its legislation as proposed by the bill’s provisions.

Potential barriers to Implementation and Unintended Consequences

Consolidation and the Equal Standing of Welsh and English Versions

15. As stated in the Explanatory Notes,

Section 2(3) also requires each programme to include activities intended to facilitate use of the Welsh language... A key aspect of this will be consolidating the law bilingually so that much more of the law for which the National Assembly and Welsh Government are responsible is made in Welsh (¶ 20).

Both the Explanatory Notes and the Draft Taxonomy state that:

Consolidating the law generally involves bringing all legislation on a particular topic together, better incorporating amendments made to legislation after it has been enacted and modernising the language, drafting style and structure. This involves no or only minor amendments to the substance of the law consolidated. In Wales consolidation of the law will involve for the most part re-enacting laws previously made by the UK Parliament, and doing so bilingually (EN ¶16; DT ¶12).

16. There is a clear intention, therefore, in producing the codes to ‘repatriate’ laws currently to be found in UK legislation and to express them bilingually in the resulting codifications. This raises a question concerning the status of the two language versions in such circumstances. The Government of Wales Act 2006 provides that “The English and Welsh texts... [of Assembly Measures, Acts and any subordinate legislation] are to be treated for all purposes as being of equal standing” (GoWA 2006, s. 156(1)). Such equal standing, however, only applies to legislation “which is in both English and Welsh when it is enacted, or... when it is made”. Given that, as quoted above, consolidation “involves no or only minor amendments to the substance of the law consolidated”, the question arises as to when provisions which have been consolidated are to be treated as having been enacted or made. This is particularly important if, as the Law Commission stated in its report on the *Form and Accessibility of the Law Applicable in Wales*:

In order for the equal status of both versions of legislation under s. 156 of GoWA 2006 to have any meaning, it is necessary for the interpretation of bilingual legislation to take account of both language versions. We endorse the approach... [which] recognizes that the exact meaning to be given to legislation depends on the meaning of both language texts (¶¶ 12.17–12.18).

17. It would be convenient and preferable for the consolidated law to be treated as having been enacted or made when the consolidation was accomplished, but it could be argued that, if there was no intention to change the meaning of the provisions when consolidating, the Welsh version could not therefore be treated as of equal standing. In passing, one assumes that the English text would undergo such minor amendment as was appropriate to bring it into line with the Welsh interpretation provisions.
18. If the approach taken to the question of the relevance of the Welsh version to the interpretation of consolidated legislation was to deny its relevance, then there would be portions of a Code in which the two language versions were of equal standing and other portions in which they were not. This would be a potential pitfall when using the Welsh version and could discourage its use.

Section 8 and Grammatical Variations

19. Section 8 of the Bill introduces a provision of a kind which is not in the Interpretation Act 1978, but can be found, as noted in Annex A to the Explanatory Memorandum, in the interpretation provisions of other jurisdictions, citing Canada and Hong Kong as examples.

20. The Explanatory Notes state that the proposed section:

makes clear that, where an Assembly Act or Welsh subordinate instrument defines a word or expression, parts of speech relating to the word or expression also carry the definition. For example, if the word “walk” is defined, then the parts of speech relating to “walk”, such as “walking” and “walker”, are to be interpreted in the light of that definition (¶ 59).

21. They go on to say that:

It often goes without saying that a definition applies in these circumstances. In some cases though this needs to be put beyond doubt... Section 8 of the Bill makes general provision about the application of definitions, to avoid ambiguity and remove the need to make separate provision in individual Acts and instruments (¶ 60).

22. In his Gray Lectures, delivered at the University of Cambridge in 1966, the late Professor David Daube drew attention to the fact that agent nouns in particular, but also on occasion action nouns, have a narrower meaning than the verbs which correspond to them. Thus, while a *baker* undoubtedly bakes, not everyone who bakes is a *baker* (David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects*, Edinburgh, 1969, pp.1-63, example cited at p.2). Agent nouns and action nouns are often more than a modification or a grammatical form of a verb; they are frequently words with a different, more restricted even if connected, meaning.

23. Care needs to be taken regarding this provision, and it should not be assumed that any correspondence, for example, of verb and agent noun in one language will necessarily be replicated in another. As this provision is disapplied where 'the context requires otherwise', the problem may be resolved by interpretation, but it would be better avoided rather than resolved.
24. The usefulness of the provision with regard to dealing with mutational and other like changes in Welsh is not questioned.

Choice of Proposed Codes and Topics

25. Somewhat inevitably, the proposed codes and topics anticipated in the Draft Taxonomy reflect the subjects in relation to which the Assembly enjoyed legislative competence under the previous devolution settlements. While it is unavoidable that Welsh law to date will relate to those fields and headings, there is perhaps a danger that their conversion into Codes could, almost inadvertently, confine Welsh law-making within its former limits. To borrow and adapt F.W. Maitland's famous aphorism (*Equity*, p. 296), having buried the conferred powers model, we should not let it rule us from its grave.