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Y Pwyllgor Materion Cyfansoddiadol
a Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW10
Ymateb gan Geldards

Evidence from Geldards

This is a submission in response to the Constitutional and Legislative Affairs Committee's call for evidence on the Legislation (Wales) Bill. This response has been prepared by Huw Williams¹ of this firm and represents his personal views on the provisions of the Bill.

The Committee has asked respondents to consider:

- 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)

This submission responds to these questions but focuses on four aspects of the Bill, namely (1) the activities to be included in programme to improve accessibility of Welsh law, (2) the form and status of the proposed codes, (3) the definition of "Wales" and (4) the powers proposed in Part 3 and particularly clauses 37 and 38 of the Bill relating to timing and the making of subordinate legislation and some aspects of the Regulatory Impact Assessment.

¹ Huw Williams is the Vice-chair of Geldards LLP and the Lead Partner, Public Law at Geldards. Prior to joining Edwards Geldard as it then was in 1987, he worked as an in-house lawyer in local government. His main areas of practice are planning, compulsory purchase and local government law and related subjects such as environmental law and highways. He has served on the Planning and Environment Committee of the Law Society from 2003 to 2016 and on the Wales Committee from 2003 to 2011 and from 2016 to date. He has served on the Board of the Legal Wales Foundation and the Legal Wales Conference Committee since 2002 becoming Chair in 2018. He was a member of the Welsh Minister's Independent Advisory Group on Planning in Wales 2011-12. He has served as a Trustee of the both the National Museum of Wales and the National Library of Wales and has been Company Secretary of the Wales Millennium Centre since 1998.

1. Programme to improve the accessibility of Welsh law

The provisions of Part 1 of the Bill and their legislative intent are to be welcomed and the commitment of the Government to pursue an active programme of consolidation and codification is to be applauded.

My only reservation that the nature of and ambition for, what might be encompassed within a codification or consolidation programme.

The Law Commission's Report on the Form and Accessibility of the Law Applicable in Wales² discussed the extent to which the type of streamlined legislative procedures recommended for consolidating bills could also encompass an element of reform. I note that at Westminster the availability of the special procedure for consolidation bill, which may include an element of reform, is expressly linked to bills linked to reports of the Law Commission and that the work of the Commission, in effect, determines the extent of reform thought suitable for the special procedure.

It isn't clear if similar considerations lie, at least in part, behind the inclusion of the permissive power in the Bill for a programme to include activities undertaken in collaboration with the Law Commission, on the basis that the Commission's work would then indicate and guide the extent of reform thought permissible within the overall purpose of consolidation and codification.

In view of this, I think it would be helpful if reforms to the law intended to further the purposes of accessibility through consolidation and codification were added to the activities listed in sub-section (4).

I also think that while it does not require a legislative provision, there is a strong case for a degree of co-ordination of the accessibility programme with the legislative programme, so that one could see a substantive reforming bill being passed and then immediately consolidated and codified with the reforms being commended at the same time as the Code is passed into law.

2. The Form and status of the proposed codes

While I do not underestimate the task involved in adopting a largely codified statute book for Wales, I share the concern voiced by Professor Thomas Watkin QC³ that the Explanatory Memorandum "appears to roll back on the broader vision" by explicitly discounting in most cases an approach where the Code itself is a legal instrument.

² See paragraphs 3.5 – 3.15 discussing Legislative Procedures

³ See paragraph 9 of his written evidence

While I can now see that such an approach would explain the Welsh Government's response to the Recommendations 8 and 9 in the Law Commission's Report on the Form and Accessibility of the Law Applicable in Wales,⁴ which stated that the Welsh Ministers envisaged secondary legislation and quasi legal material, such as statutory guidance should also stand as part of the Welsh Law Codes, I question whether such an approach will in the long term impose the degree of discipline required to maintain and orderly and thus accessible series of Codes.

The notion that a Code once assembled should enjoy a protected status that ensures that amendments to topic within the purview of a Code should be subject to a presumption that the law will only be changed through amendments to the Code, seems to me to be essential if codification is to be seen over the longer term to have been worth effort involved. Protecting the status of the Codes in this way requires the executive and legislature to collaborate and it is disappointing that the Bill is before your Committee for consideration, without any indication of the type of Standing Orders that might be adopted by the legislature to facilitate consolidation and to maintain the Codes, although I note that in its response to Law Commission the Government noted that the Business Committee of the Assembly's decision to develop standing orders for consolidation bills.

For example, in my consultation response to the Law Commission's Report on the Form and Accessibility of the Law Applicable in Wales I commented:

I would support a solution that was based on the Standing Orders of the National Assembly. I envisage the Assembly by resolution declaring an enactment to be a "Code". The consequence of this could be that if a future Bill was presented and it was declared by the Presiding Officer to fall within the ambit of the "Code" then the Bill could only proceed by way of amendment to the Code unless the Assembly resolves to the contrary – possibly by way of a super majority, say 60%. The principle should surely be that once a subject is codified changes to the law should only be by means of amendments to the Code and that this principle is protected through the Standing Orders of the Assembly.⁵

To confine the projected codification to the bringing together of legislation and quasi legislation as a publication exercise and designating it as a Code seems to me to be of questionable value. For example, the legislation relating to compensation for the compulsory acquisition of land has, historically, been

⁴ See the Counsel General's final letter to the Law Commission <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/06/2017-07-19-Law-Commission-Final-Response.pdf>

⁵ Quoted at paragraph 4.16 of the Law Commission Report.

referred to as the “Land Compensation Code”, but there is scarcely another more striking example of an unsatisfactory, not to say chaotic, group of statutes that make up this Code starting as it does with the Lands Clauses Act 1845 (parts of which remain in force) with the most recent legislative interventions and amendments to be found in the Neighbourhood Planning Act 2017.

Turning to the Draft Taxonomy, I would comment that it represents a useful starting point, but I sense the ghost of executive devolution within the structure. Rather than see the accessibility programme wedded to an overall taxonomy from the outset, I would prefer to see further experience accumulated following the planning law pilot codification followed through with another major codification – Education law is the obvious example to my mind and a reform leading codification project, of which local government law is the clearest potential example. With three substantial codes in place then an overall taxonomy might then be suggested, with certain overarching and cross cutting topics such as administrative justice and lands powers sitting alongside but outside the major functional Codes.

Consequently, speaking from a practitioner’s perspective, I would like to see a system of codification with two components:

- (a) A “Code Act” for each of the major topic area with the individual Acts forming parts and chapters of the Code and “protected” by the legislature’s standing orders.
- (b) A co-ordinated publication process that would marshal the secondary legislation and the quasi legislative materials along the lines envisaged in the Government’s response to the Law Commission.

I also believe that such an approach will create a more robust model of codification with consequent advantages to the accessibility of the codes for the ordinary citizen.

3. The definition of “Wales”

While I note that, perhaps understandably, the Bill has elected to maintain a definition of “Wales” by reference to the aggregate of the principal councils in the same way that “England” is defined, the Government’s consultation on the proposals for the Bill invited ideas as to how “Wales” might otherwise be defined. The response prepared by me and my colleague, Clare Hardy made the following suggestion, which I draw to the attention of the Committee:

We do not consider it satisfactory any longer that the country of Wales should only exist in law by means of a definition that makes it an agglomeration of its local government units. We suggest that Wales should be defined by an official map which should be:

- (a) *Prepared by and with the advice of the Ordnance Survey to a specified scale.*
- (b) *Made in, say, three duplicates, each sealed with the Welsh Seal and deposited with the National Library of Wales, the National Assembly and the National Archives respectively.*
- (c) *Made available digitally on the same basis as legislation.*

In conjunction with this week an amendment of the Interpretation Act 1978 to define “Wales” for the purposes of UK and England and Wales legislation by reference to the official map.

4. Part 3 Miscellaneous

I am extremely pleased to see the provisions of Part 3 of the Bill.

The power to add in the actual date of commencement in to the text of the primary legislation when a provision is commenced will result in material savings of time effort (and thus cost to the client) on the part of practitioners in establishing if provisions are in force. It will be of even greater help to ordinary citizens who will no longer have to grapple with commencement order to find out if a specific provision is in force.

We are also pleased that clauses 37 and 38 will mean that secondary legislation can be prepared in a co-ordinated fashion that reflect the subject rather than the method by which the provisions must be made. In our consultation response to the Government we commented:

“... we recall the Welsh Government’s response to the Law Commission’s recommendations on codification which set out an aspiration for future Welsh Codes to contain, in addition to the primary legislation, the secondary legislation and quasi-legislation in the form of policy statements and statutory guidance. This approach, which we welcome in principle, does raise the question in our minds of whether specific powers may be required to bring secondary legislation into a codified format. Our reason for saying this is our concern about the way the format of secondary legislation is dictated by the procedure for its making with the resultant proliferation of instruments, orders, directions and so forth.

A striking example of this is the ten pieces of secondary legislation that were needed to introduce the system of nationally significant infrastructure permissions under the Planning (Wales) Act 2015 Part 5. The primary legislative provisions were framework powers and should, in our view, have given rise to a coherent secondary legislative code applying to these applications.”

5. Regulatory Impact Assessment

I note that a programme of consolidation and accessibility is estimated to cost approaching £3m pounds of an Assembly term. This is a not insubstantial sum and I recognise that the employment of additional lawyers to draft new versions of laws may not be viewed as a necessity especially when there so may other pressing calls on taxation income.

Nevertheless, the contribution that such accessibility programmes can make, over time, to the rule of law and the education of the citizen on the importance of clear well-drafted laws cannot be over-estimated and is literally beyond price.