

Office of the Legislative Counsel
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Our Ref: HRCW.CH
Your Ref:

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Direct: +44 (0)29 2039 1765
Fax: +44 (0)29 2023 7268
Email: huw.williams@geldards.com

Dear Sirs

Draft Legislation (Wales) Bill

Please find attached a response to the Welsh Government's consultation document on the draft Legislation (Wales) Bill. The authors are Huw Williams and Clare Hardy.

Huw Williams is Lead Partner, Public Law at Geldards LLP, a member of the Wales Committee of the Law Society of England and Wales and a former member of the Planning and Environment Law Committee. He was also a member of the Independent Advisory Group on Planning, whose report was a major part of the evidence base for the reforms in the Planning (Wales) Act 2015.

Clare Hardy is a Senior Associate, Public Law at Geldards LLP.

The views set out in the response are the authors' personal opinions.

Yours faithfully



Huw Williams
Partner
Geldards LLP

Draft Legislation (Wales) Bill

Consultation prepared by Huw Williams and Clare Hardy, Geldards LLP

Question 1

We agree with the creation of a statutory duty on future governments to improve accessibility to Welsh Law.

Question 2

We agree with the machinery proposed in clause 2 and we particularly welcome the references to codification on the face of the Bill.

However, 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.

A current example we have seen recently are the four sets of statutory instruments proposed to give effect to the Flood and Water Management Act 2010 Schedule 3 relating to sustainable urban drainage systems¹. These all relate to the same topic and would be more intelligible and useful to those required to operate these provisions, if there was a single secondary code describing the procedure being created under the primary powers.

We therefore question whether part 1 of the Bill should contain a general power to adjust and amend primary legislation specifying the mode of making secondary legislation where this is required or desirable to achieve a satisfactory codification.

Question 3

We agree with the approach to application of Part 2 of the draft Legislation (Wales) Bill.

¹ The Sustainable Drainage (Approval and Adoption) (Wales) Order; The Sustainable Drainage (Procedure) (Wales) Regulations; The Sustainable Drainage (Enforcement) (Wales) Regulations; and the The Sustainable Drainage (Appeals) (Wales) Regulations.

Question 4

We agree with the approach in section 3(3) of the draft Bill, which disapplies a particular rule if the context requires. We recognise the argument that this would give greater certainty over interpretation than the approach used in the Interpretation Act 1978.

Question 5

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:

1. Prepared by and with the advice of the Ordnance Survey to a specified scale.
2. 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.
3. Made available digitally on the same basis as legislation.

Seek 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.

Question 6

We have no comments on the specific suggested contents of Schedule 1 to the draft Bill. However, we suggest that a consistent approach should be applied as to whether or not particular types of references will be included. For example, we suggest that it might be confusing to readers of legislation if some definitions which are cross-references to other Acts are included but some are not.

Question 7

We agree with the approach in section 7 of the draft Bill. We also agree with the comment in the consultation document that drafters of legislation will need to continue to ensure that gender-neutral drafting, used alongside section 7 of the Draft Bill, does not lead to confusion in those instances where a provision is not intended to be gender neutral. We suggest that it may be appropriate to add some words at the end of section 7 to the effect of "unless the Assembly Act or Welsh subordinate instrument states otherwise".

Question 8

We have thought hard about the proposed approach to section 8 of the draft Bill, especially as the example of the definition of education shows the necessity of being explicit about which grammatical terms are within the scope of a definition. On balance we are in agreement due to argument that it facilitates more naturalistic drafting and as a fall-back (or even "backstop") approach, but we strike a note of caution as to the need for drafters to be alert

to situations where the policy being implemented may require a more specific or selective approach to grammatical variations and require a more traditional and compendious drafting approach.

Question 9

We agree with the inclusion of section 9 in the draft Bill.

Question 10

We agree with the approach taken on service of documents. It will be helpful to have express provision for service of documents electronically.

Question 11

We agree with the approach for deemed service, set out in section 14 of the draft Bill.

Question 12

We agree with the approach taken in section 16 of the draft Bill.

Question 13

We agree with the approach to section 18 of the draft Bill.

Question 14

We agree with the inclusion of section 19 in the draft Bill.

Question 15

We agree with the inclusion of section 20 in the draft Bill.

Question 16

We agree with the approach taken in section 22 of the draft Bill.

Question 17

In view of the Welsh Government's view on the importance of the rule to ensure that a person can only be punished once for the same offence, we agree that the draft Bill should make provision on duplication of offences.

Question 18

We think that individual pieces of legislation should, as a matter of policy continue to state expressly whether or not they bind the Crown, but we can see the usefulness of the proposed provision as a fall-back in any cases of doubt or ambiguity

Question 19

We agree with the approach taken in section 30 of the draft Bill, in respect of orders and regulations bringing legislation into force.

Question 20

We consider that section 35(2)(a) of the draft Bill provides an accurate reflection of the law.

Question 21

We agree with the approach taken in section 33 of the draft Bill,.

Question 22

Our understanding of the purpose of the long title is to set out the ambit of the Bill for restricting the amendments that can be proposed to the Bill while it is before the legislature.

Our only experience in practice of having to consider the effect of the long title was in relation to the Cardiff Bay Barrage Bill in circumstances that related specifically to the hybrid character of the Bill.

In our view the overview provisions of much greater assistance and we would support a practice of doing away with the long title for any Bill where there was an overview provision.

Question 23

We note the difficulties regarding the use of Welsh translations of enactments and bodies which do not have Welsh Language titles or names.

While recognising the subtleties of the question we think the use of the English language title with the Welsh language courtesy title in brackets is the most straightforward and honest approach.

Perhaps putting the English language title in italics and the showing the bracketed Welsh text in the same font as the remainder may ameliorate the effects of the English words on the flow of the Welsh text.

Question 24

We have no comments on the draft regulatory impact assessment for the draft Bill.

Question 25

We have no comments on the draft impact assessments for Welsh language, children's rights or equality and human rights.

Question 26

We have no comments in response to this question.

Question 27

We have no comments in response to this question.

Question 28

The intelligibility of the devolution settlement and the understanding of what constitutes “Welsh Law” would be made easier if a way could be found to rename the fixed number of Assembly Measures as Assembly Acts, without changing the date of the legislation.

12.05.2018

