GDL

Graduate Diploma in Law

RESPONSE TO CONSULTATION ON DRAFT LEGISLATION (WALES) BILL

11 JUNE 2018

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INTRODUCTION

We are students at Cardiff University School of Law and Politics. In the 2017/18 academic session we enrolled on the Graduate Diploma in Law (GDL) course, which is the conversion course that graduates in subjects other than law must take (and pass) before they can enrol on either the Legal Practice Course (for intending solicitors) or Bar Professional Training Course (for intending barristers).

We have studied law for one year. The modules we study on the GDL are the 7 subjects required for a qualifying law degree and an extended essay. One of the courses we have taken this year is Public Law. We have studied Welsh devolution as part of that course. This consultation was published towards the end of our Public Law course and we decided to form a working group to respond to the consultation. Our Public Law tutor acted as facilitator.

Since we have had very little time to draft our response as our final assessment took place only 10 days ago, we have conducted a scoping exercise and limited our response to the first three questions.

RESPONSE TO THE CONSULTATION

Question 1: Do you agree that it is necessary to impose a statutory obligation on future governments in Wales in order to improve accessibility of Welsh law?

Question 2: If so, do you agree with the approach taken in Part 1 of the Draft Bill to impose such an obligation?

This response addresses both question one and two.

As devolution grows, powers change and legislatures and executives, such as the Welsh Government, find their rhythm, keeping up with legislation is increasingly more challenging. On top of the complexity of statute books, legislation is now being accessed by more private citizens who find themselves having to look up the law and represent themselves in cases as legal aid has been heavily cut back.

With this in mind, the proposal to consolidate and codify Welsh law contained in Part 1 of the Draft Bill, has the potential to provide clear, accessible law, which goes to the heart of the rule of law proposed by Lord Bingham in his book *The Rule of Law*[1]. This project would provide both practitioners and citizens with improved access to Welsh law, and is an important element in making the law easier for citizens to locate, understand and use.

An ambitious project such as this would, of course, have its unique challenges. One of these is whether it is premature to impose a statutory obligation to consolidate and codify Welsh law now.

The proposals which the Draft Bill discusses would require a root-and-branch reform of the law to either consolidate a number of statutes in one subject area into one or bring common law and statute together; however, the document also states unequivocally that there is no intention for wholesale codification[2]. That there is no definitive suggestion of what

[1] T Bingham *The Rule of Law* (2010)
[2] Chapter 2 para 29

'codification' would look like causes us some concern as legislatures can be too quick to pass legislation without considering or understanding the implications and impact on other legislation.

It may be unnecessary to impose the statutory obligation on future Welsh governments to improve accessibility of Welsh law because a new system or culture of producing and drafting legislation which develops naturally may be a more effective means to produce accessible Welsh laws. However, as no such system has developed, we hope that the statutory duty will be the catalyst for such a change in culture and practice to develop.

Following discussion and debate we have agreed that while it would be more beneficial and effective if various approaches to create accessible Welsh law were explored before legislating to impose the obligation on future Welsh governments, the time to act has come. While we think it would be ideal to develop the legislation following trials within a particular policy area, such as housing or social care, we consider that unless such a duty was imposed on the Counsel General the initiative to make Welsh law more accessible is unlikely to develop further.

We note that while there are potential benefits to imposing a statutory obligation on the Counsel General, it will be necessary to take a flexible approach to the codification of Welsh law. It is inevitable that issues relating to the translation of English statutes into Welsh will arise since much of the legislation which affects Wales applies to both England and Wales and, like all Westminster legislation, was written only in English. For as long as Westminster legislation is produced only in English and Wales remains within the single jurisdiction of England and Wales, it is unlikely that all legislation which applies to Wales will be available in both English and Welsh.

We are disappointed that the Draft Bill lacks specific requirements for the process of codifying Welsh law and keeping its accessibility under review. Of particular concern is the lack of detail or commitment towards the provision of funding towards the project. While the duty to review the law will be imposed on the Counsel General, inevitably the work will fall to the civil service. The civil service is shrinking and as a fairly new legislature, there may be insufficient knowledge and skills within the Welsh civil service at the present time to re-draft such a vast amount of legislation. Factors such as these need to be acknowledged when planning and defining how this project will proceed and how long it will take.

Though legislatures are often far too quick to legislate and legislation is passed to change the law, this initiative is different because the legislation it produces will not change the law substantively (though it will change the law as the statutory authority will be different) and instead will bring the law together. The codification of Welsh law to make it more accessible to its citizens would be a ground-breaking and innovative initiative and Welsh legislation would improve if it was required to be accessible to the public. Imposing the duty to make Welsh law accessible would provide solid evidence of the Welsh Government's commitment to codification of Welsh law. However, it would have been remiss of us to whole-heartedly agree with the proposal without highlighting the potential difficulties. These issues are not small and will take a great deal of time, effort and enthusiasm from the current and successive Counsel Generals to ensure the project maintains its momentum.

Question 3: Do you agree with the approach to application of Part 2 of the Draft Bill?

In responding to this question we have borne in mind the three principle reasons given by the consultation as to why a new Interpretation Act for Wales is desirable. These were that

- Wales is lagging behind similar legislatures (such as Scotland and Northern Ireland) which have their own Interpretation Acts;
- the Interpretation Act 1978 is generally outdated and requires modernisation but especially so in regard to Wales as it predates Welsh devolution; and
- the need to provide a bilingual Interpretation Act and for that Act to reflect the distinctive English usage in Welsh legislation which arises from the equal status of English and Welsh within Wales.

We have also had regard to the results of the 2017 policy consultation, the six matters listed at paragraph 57 of the consultation document and the overarching aim of the Draft Bill to make law more accessible generally. Overall we agreed these were sensible considerations.

The structure of this response is split into three parts. We considered the proposed approach of the Draft Bill, the alternative approach rejected by the consultation and whether the Welsh Interpretation Act should contain a provision equivalent to s 11 Interpretation Act 1978.

The Proposed Approach

We agree with the Consultation Document that this is the more satisfactory approach. Providing that Part 2 of the Bill should come into force on 1 January of the appointed year, using that date as the dividing line between Welsh legislation to which the 1978 Act and the new Interpretation Act apply, is clear and sensible. We also thought it important that the date of Royal Assent for new Assembly Acts and the date subordinate legislation is made should be chosen to determine whether that Act or SI was subject to the new or old Interpretation Act; these dates apply to the entire piece of legislation and are printed at the front of the legislation, unlike commencement date(s) - there can be several commencement dates for a piece of legislation so these would be confusing as well as being difficult to find.

Although the proposed approach provides a clear rule for most legislation we thought the operation of two Interpretation Acts could still confuse the layperson. For example, we were concerned by the proposals in paragraphs 65 and 66 of the consultation which relate to subordinate legislation made under a UK Act of Parliament but not made by Welsh Ministers. We also discussed the merits of the signposting provisions (see paragraph 63 of the consultation). We decided that the most desirable approach would be a dual system using both explanatory notes to the legislation and hyperlinks to state which Interpretation Act applied to the piece of legislation. This would have the benefit of being accessible to all: we felt that some people would prefer to refer to the explanatory notes while others would be more likely to use the hyperlinks. Whilst we recognise that for most users of legislation the Interpretation Acts will simply be reference material which they might not use, in the interests of making the law accessible the Government must still make it clear which Interpretation Act applies to each piece of legislation.

The proposed approach deals poorly with the issue of bilingualism and we suggest that the Government looks at this issue in more detail. We viewed particularly dimly the statement in paragraph 67 of the consultation paper that the Government found no evidence of any practical issues arising from applying the monolingual 1978 Act to existing bilingual legislation. As bilingualism is one of the key aims of this Bill, the Government should not be retreating on it. The translation of Schedule 1 of the 1978 Act is a partial solution to the problem. We recognise the difficulties of persuading the Westminster government to approve a Welsh translation of a UK Act of Parliament but we believe that further efforts

must be made to persuade Westminster to approve this translation or produce their own given that it is the law of England and Wales that Welsh is an official language of Wales.

The Alternative Approach

Initially we were attracted by the alternative approach, especially since it is very clear and it deals effectively with bilingualism. We thought the shortcoming that the Welsh Interpretation Act would be 50% longer was manageable and the benefits of having virtually all Welsh legislation subject to one Welsh Interpretation Act outweighed the costs. Also, since the consultation document itself conceded that specific technical difficulties would not be insurmountable we did not find these difficulties were a concern.

However, we concluded that a fundamental problem with the alternative approach was the incompatibility between legislation made under the 1978 Act and the Bill. Forcing legislation made under the 1978 Act to fit uneasily under the Bill would offend the principles of clarity and simplicity as well as the desire to avoid conflict with the 1978 Act. Further, we were swayed by the notion of this project being a particularly long-term one. As such the benefits of the alternative approach will be gradually gained anyway by the proposed approach.

Interpretation Act 1978 s 11

We agree with the proposal not to include in the Bill a provision similar to s 11 Interpretation Act 1978. This would be convenient, as users of legislation would know that terms in subordinate legislation made under the Bill would be subject to the standard definitions, unless explicitly stated otherwise. This would remove the 'trap' alluded to in the consultation document and remove the need to constantly refer to enabling Acts.

We were concerned that as a matter of logic, words in subordinate legislation should mean the same as those in the enabling Act. Further, it is consistent with the aim of making Welsh legislation more accessible that this rule should be adopted. The onus should be on the drafting process to ensure that differently defined words are flagged in subordinate legislation, otherwise they will be defined by the Interpretation Act.

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