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Llywydd
Presiding Officer


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National Assembly for Wales
Cardiff Bay
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Dear David

Written evidence about Making Laws in the Fourth Assembly

Thank you for the opportunity to submit evidence to your inquiry on making laws in the Fourth Assembly. As the Assembly Commission provides services to support scrutiny of legislation, and to a lesser extent to develop and draft Bills, it is appropriate for me to share our observations about the processes involved.

I have addressed each of your general consultation questions, using the more detailed questions to inform these wider responses (rather than responding to each of the latter set of questions individually).

1. What constitutes good practice in the drafting of a Bill?

Although there is no definitive model of best modern practice in our view (and, even if there were, it would be constantly evolving), we consider that, as a general principle, legislation should be clear for the target audience and, wherever possible, for all citizens, as it is an essential pillar of democracy that citizens can understand the laws to which they are subject. In our opinion, there is very rarely a justification for drafting legislation – especially primary legislation – in a way that is so complex and technical that it is, in practical terms, incomprehensible except to specialists in the field.

On the whole, it is our view that the Welsh Government-drafted primary legislation meets this standard, although there remains room for improvement in some respects.

Croesewir gohebiaeth yn y Gymraeg a'r Saesneg/We welcome correspondence in both English and Welsh

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Points of concern and poor practice arising from Government drafting considered during the Fourth Assembly include the following:

- Unfortunate terminology. For example, the use of the terms “half-blood” and “illegitimate” in relation to family members in the Mobile Homes (Wales) Act 2013. This was technically a Member’s Bill but was redrafted wholesale by the Government, who supported the principle of the Bill, by way of Stage 2 amendments; the terms referred to appeared in the Bill by virtue of those amendments. These terms were subsequently deleted from the Bill by amendment, after Members expressed grave concern about them;
- Definition of terms by reference to UK legislation. This forces the reader to refer to more than one document, and – depending on the exact wording – will either make the definition subject to any changes to the UK legislation (which might not be welcome to the Assembly) or oblige the reader to check what definition applied, in the UK legislation, at the time the Act received Royal Assent – an onerous task for members of the public;
- Reliance on previous UK legislation as a model. For example the Agricultural Sector (Wales) Bill was very closely based on a 60-year-old Act and imported weaknesses from that legislation including problematic definitions;
- Lack of consistency between English and Welsh versions, and within Welsh versions, of Bills (for example the Social Services and Well-being (Wales) Bill and the Housing (Wales) Bill) on introduction. This can result in a significant amount of Committee and/or Plenary time being used for corrections which could have been made during drafting;
- A Bill being introduced with errors (in drafting and/or policy), which require substantial amendment and therefore impede scrutiny by undermining Stage 1 (because the Bill changes), preventing Members from tabling amendments to an up-to-date version of the Bill (because it is simultaneously being amended heavily by the Government), and reducing the time available to debate other, more substantive issues. It is important to distinguish this kind of amendment from other types of amendment which are to be welcomed, for example those which give effect to Committee recommendations or commitments made during Stage 1, or those tabled as a result of reaching political consensus on particular points of policy or principle;



- Errors in amendments tabled by the Government, which then require correction by printing changes (if they fit the criteria for doing so), or further amendments if amending stages are available, or other legislative procedures (secondary legislation or amendment by means of another Bill);
- Imbalances between primary and secondary legislation, and between use in the latter of the negative, affirmative and super-affirmative procedures. Committees have expressed concern about the framework nature of some Bills (Education, Social Services and Well-being). They have also made recommendations about decisions on which procedures to use for secondary legislation, with some success. It would be helpful to understand more about the Government's approach to its own decisions about this. Concerns about secondary legislation are particularly important given the lack of Assembly scrutiny and public engagement, your Committee's criticisms of particular regulations (for example recently on Council Tax Reduction Schemes), and the way in which secondary legislation is sometimes used as a substitute for primary legislation (for example to facilitate the creation of Natural Resources Wales – an extremely important decision which would in my view have benefited from the much fuller scrutiny which our Bill process allows).

Although the principles behind these points apply as much to legislation introduced by other Members as they do to the Government, it is nevertheless particularly important that the Government applies good practice. This is because the Government drafts the vast majority of Bills and amendments, and the quality and consistency of their drafting could be argued to be more important than the amendments tabled by Members, which frequently are probing in nature. In addition, as the Government drafts the majority of Bills, their initial drafting creates the groundwork on which Members can build through their amendments. Government Bills also tend to be both broader and more technical in nature than other legislation which usually focuses on issues which are narrower in policy terms and do not require in-depth technical knowledge. The obvious reason for this is that the Government has much greater policy development and technical resources than any Member or even the Commission.

2. What impact has the Assembly's conferred powers model of legislative competence had on the drafting of Bills? What would be different if the Assembly has a reserved powers model?

The Assembly's conferred powers model contains many overlaps within subject areas, making problems inevitable during policy and legislation development.

The full extent of the weakness of the current settlement can be seen through our experience of operating as a legislature since 2011.

Since their establishment in 1999, there has been no referral of a Scottish or Northern Irish Bill to the Supreme Court by a UK Law Officer. By contrast, three Bills of the National Assembly have been referred to the Supreme Court since 2011.

While no settlement is ever crystal clear, a reserved powers model would certainly provide greater legal clarity than our current system. The reserved powers model proposed by the Silk Commission in its second report would put us on a similar legislative footing as the Scottish Parliament, and should allow the Assembly to legislate more effectively and with greater confidence, focusing wholly on delivering better outcomes for the people of Wales without the distractions of an ambiguous constitutional settlement.

Within the parameters of the current settlement, it would be helpful for the Assembly to have the automatic right to represent itself in Supreme Court proceedings (which would require a change to the 2006 Government of Wales Act and/or to the Supreme Court Rules). Relying on the Welsh Government's participation in such proceedings may not be appropriate in cases where the Government does not support the relevant provisions (for example, a Member's Bill, or a provision of a Government Bill which was inserted by non-Government amendment), or where the Counsel General has made the reference.

Specific examples of difficulties experienced with individual Acts include the following:

- There is some evidence from scrutiny of Welsh Government Bills that wider competence would enable issues to be dealt with in a more holistic way. For example, duties cannot normally be imposed on local partnership boards because they include probation services and police, in relation to which the Assembly has very limited competence. (See the Social Services and Well-being (Wales) Act);

- Concerns about the Assembly's competence to legislate for the English language hampered the development of the Official Languages (Wales) Bill.

3. *What is your view of the content of the Explanatory Memoranda which accompany Bills and how useful are they in explaining the purposes of Bills?*

It would be helpful to identify whether comments are made in general or in relation to specific examples, when responding to this question.

Well-drafted and comprehensive Explanatory Memoranda are essential for effective scrutiny of legislation. In supporting the development of a Member's Bill, Commission staff pay particular attention to the information prepared for the Explanatory Memorandum (EM), as can be seen for the recently introduced Holiday Caravan Sites (Wales) Bill where Commission staff provided support for the Member in drafting the Bill and the EM.

The quality of Explanatory Memoranda laid before the Assembly has been variable and some have attracted criticism from Assembly Committees. Financial information is often lacking or is not persuasive. For example, the EM for the Social Services and Well-being (Wales) Bill suggested that the Bill would be cost neutral, and this was queried by the Health and Social Care Committee in its Stage 1 report. However, there are also good examples, including the Higher Education (Wales) Bill, the Regulatory Impact Assessment (as part of the EM) of which was commended by the Finance Committee.

The availability of information relating to Children's Rights Impact Assessments (CRIAs) has been raised by the Children, Young People and Education Committee in response to evidence from the Children's Commissioner and the UNCRC Monitoring Group. CRIAs are internal Welsh Government documents which inform the preparation of Explanatory Memoranda. The Government's commitment, in response to stakeholder feedback, routinely to publish these documents, is welcome.

There are some other examples of information not being available in a timely fashion for Committee scrutiny. The table of repeals provided during Stage 1 of the Social Services and Well-being (Wales) Bill, for example, could usefully have been included in the EM at the very start of the process.

4. *In a single chamber legislative system, what value do you place on the use of:*

(a) draft Bills for consideration before a Bill is formally introduced;

(b) more time for Stage 1 scrutiny;

(c) the optional Report stage at the end of Stage 3 proceedings (as for example in the Mobile Homes (Wales) Bill and the Social Services and Well-being (Wales) Bill.

As a unicameral legislature, it is essential that the Assembly has the time and resources it needs to undertake effective scrutiny of legislation. This increasingly includes pre-introduction scrutiny by Assembly Committees of Government legislation proposals and draft Bills, which provides more and earlier opportunities to influence the development of legislation.

Committees have recently undertaken **pre-legislative work** on proposals relating to the Qualifications (Wales) Bill, the Well-being of Future Generations (Wales) Bill and the Environment (Wales) Bill. Scrutiny has also been undertaken on the draft Planning (Wales) Bill, and the Health and Social Care Committee has received factual briefings, in public, in relation to draft Bills and White Papers within its remit.

This type of pre-legislative scrutiny, whether on draft Bills or ideally even before a draft is available, helps to prevent the scenario which arose during the passage of the Education (Wales) Bill. A whole Part of the Bill relating to Special Educational Needs was removed from the Bill at Stage 2 because the Children and Young People Committee found at Stage 1 that it was not appropriate to be included in this piece of legislation. If this had emerged and been reported during pre-legislative scrutiny, the Government would have had the option of removing the Part (or not drafting it) before introduction.

Notwithstanding the scope for the Assembly to add value to the drafting of Government Bills before introduction, **Stage 1** remains an important part of the scrutiny process. It enables Committees to consider and report on the extent to which consultation and any pre-legislative scrutiny has affected the content of the Bill, and to form a view on the general principles of the Bill before line-by-line scrutiny and the opportunity for Members to table amendments.

The time required for Stage 1 depends on a number of factors. For example, the Communities, Equality and Local Government Committee requested more time for Local Government Democracy (Wales) Bill as the timetable would have resulted in a consultation running over the Christmas period; experience from the scrutiny of the Local Government Byelaws (Wales) Bill showed that it is difficult to engage key stakeholders such as local authorities and town and community councils during this period. Similarly, committees have been criticised by stakeholders on the timing of their consultations, especially consulting on Education-related Bills over the summer period. The Health and Social Care Committee twice requested (and was granted) additional time for Stage 1 of the Social Services and Well-being (Wales) Bill, even though the original timetable, at 15 working weeks, was longer than the period allocated for the majority of Bills. The extensions were required to accommodate the Committee's other commitments, the breadth of the Bill's scope, the complexity of the issues and the range of evidence received.

Scrutiny of the Social Services and Well-being Bill also included a **Report Stage**, which allowed:

- more time for discussions between the Member in Charge and other Members about the areas in which Members wished to see amendments;
- Members to refine and develop their amendments across multiple amending stages and seek concessions from the Government;
- the Government to table amendments which were not ready in time for Stage 3; and
- the impact of the substantial volume of amendments made at Stage 3 to be considered, with further amendments tabled at Report Stage to respond to the updated text of the Bill.

The Member-proposed Mobile Homes (Wales) Bill also required a Report Stage, as a result of a large number of amendments tabled by the Government at Stage 3. The Mobile Homes (Wales) Bill was unusual in that the text of the Bill as it was introduced was removed and replaced at Stage 2. This meant that Stage 3 effectively fulfilled the role of what would usually be undertaken at Stage 2, so Report Stage was required to take the place of Stage 3. This experience suggests that it would be helpful for the Government to be involved at an earlier stage in the development of Members' Bills which they support. It also raises the question of whether a

Bill subject to such significant changes at an amending stage (and therefore not subject to the usual level of scrutiny by a Committee) should be referred back for Stage 1 scrutiny (although this is not currently allowed for in Standing Orders). Where significant changes are made after Stage 1, it is difficult for the Assembly to undertake detailed scrutiny of the financial impact, for example, of those amendments.

There is, of course, the potential for Further Stage 3 and Further Report Stage to be employed to resolve technical issues which cannot be accommodated within the more common amending stages. It is encouraging to see that the Government is increasingly timetabling a gap between Stages 3 and 4 of Bills to allow for arrangements to be made for further amending stages if required, and to reduce the risk of a heavily amended Bill being passed without an opportunity to identify and correct errors by further amendment.

Recently, Members' Bills which do not appear to enjoy the support of the Government have nevertheless been given leave to proceed by resolution of the Assembly (these are the Holiday Caravan Parks (Wales) Bill, the Financial Education and Inclusion (Wales) Bill and the Minimum Nurse Staffing Levels (Wales) Bill). Whilst it is pleasing to see Members' proposals (as well as the Government's) developing into draft laws, it is important to assess the benefits of this against the time required of Members and stakeholders in engaging with the process, as well as the significant resource implications for Commission staff (in helping the Member in Charge to develop and support these Bills, as well as facilitating Committee scrutiny). There is also an opportunity cost in terms of Committees' capacity to scrutinise Bills which do have broad support, and to undertake inquiries on wider policy issues as part of their work to hold the Government to account. It may be appropriate before the Fifth Assembly to examine the Member Bill processes in the light of these considerations. For example, requiring additional information on policy intentions at these stages would enable Members, if successful, to focus on refinement and drafting in advance of introduction rather than attempting to do this as well as fundamental policy development.

5. What is your view of the need for, and impact of, curtailed scrutiny of Bills? In considering this issue you may wish to consider the scrutiny arrangements that applied to the following Bills in the 4th Assembly:

(a) the Agricultural Sector (Wales) Bill (procedures for Emergency Government Bills used);

(b) the Control of Horses (Wales) Bill (bypassed Stage 1 committee scrutiny);

(c) the National Health Service Budgets (Wales) Bill (bypassed Stage 1 committee scrutiny).

and

6. What is your view of the scope for “fast-tracking” Bills within the Assembly’s existing procedures?

There may be a range of situations in which it is constitutionally appropriate for the passage of a Bill to be accelerated, for example a reduced stage 2 or bypassing stage 1 (usually referred to as “fast-tracking”), or in extremis via emergency procedures to enable the quick enactment of urgent legal provisions. It is right that the Assembly has the flexibility to agree to this, either through Business Committee (for constrained timetabling) or by resolution in Plenary (for Emergency Bills).

It is clear in such situations that it is for the Member in Charge to justify their proposal to depart from normal procedures and persuade those Members involved in making the decision on whether or not to proceed according to his/her proposal. In particular, it is important that Members are informed of the reasons why an issue of longstanding public importance or administrative concern may suddenly become urgent to the degree that full scrutiny of the relevant legislation could put at risk the outcomes sought for the people of Wales.

It is important that the reputational risks and resource implications of using fast-track and emergency procedures, especially if these are subsequently found to be inappropriate, are fully considered when such decisions are made. It is hoped that the Environment and Sustainability Committee will undertake post-legislative scrutiny of the Agricultural Sector (Wales) Bill and the Control of Horses (Wales) Act to determine whether the accelerated passages of these pieces of legislation were justifiable in hindsight and/or effective in practice. Members have previously raised concerns, in Committee and in Plenary, about the procedures used for both Bills.

7. What is your view of the Welsh Government’s and the National Assembly’s capacity to legislate?

A core strength of the Assembly's Committee system as implemented at the start of the Fourth Assembly is that Committees are responsible for scrutinising both policy and legislation with their remits. This enables Members to use policy expertise to inform legislative scrutiny.

In terms of expertise, the capacity of both the Welsh Government and the Assembly (in terms of Members and staff) has improved over the course of the Fourth Assembly. At official level good practice and lessons learned are shared for mutual benefit, to complement the corpus of knowledge built up through Committee scrutiny and reports.

In terms of physical capacity, there are concerns at political and official levels. The Assembly has a relatively small cadre of non-Government Members to scrutinise a full programme of Bills in a unicameral system. An increase in the number of Members, as envisaged by the Silk Commission and others, would undoubtedly have a positive effect on the capacity of the Assembly to legislate, both in terms of distributing the workload more effectively, but also allowing Members greater opportunities to develop further their expertise and knowledge.

As the legislative process matures, demands upon Commission services – as well as Assembly Members' Support Staff, who have a key role to play – are increasing. For example, Members are tabling more amendments, and using more of the tabling periods available to do so; they are also including more explanatory text with amendments. These developments are to be welcomed, but do have a resource implication. Furthermore, the increase in the number of Bills being scrutinised by the Assembly at the same time (albeit at different stages) is putting increasing pressure on Commission services.

It is pleasing that within our current constraints, the Assembly has already seen the passing of a Commission Bill as well as Members' Bills in addition to Government Bills tackling high profile issues (such as Human Transplantation) and complex policy and delivery challenges (such as Social Services). Procedures also exist for Committees to introduce Bills, although this has not yet happened and may be problematic for capacity reasons.

Committees' efforts to undertake post-legislative scrutiny (for example that planned for the Autumn by the Health and Social Care Committee on the Mental Health Measure) should also be welcomed. It should remain a matter

for individual Committees to decide the level and nature of this scrutiny in the light of their own priorities and time pressures, but it may be helpful for them to consider their approach when they undertake Stage 1 scrutiny. They may wish to consider scrutinising Commencement Orders, for example, where these include provisions other than the date of commencement (e.g. transitional, saving or other provisions), especially since the inclusion of such provisions is not regarded as best practice.

8. What is your view of the Welsh Government's management of the legislative programme?

It would assist Committees in planning their scrutiny of Government Bills (and stakeholders in engaging) if more information was made publicly available (including on the Welsh Government website) earlier in the development process. We are also aware of examples of Bills slipping off the legislative programme or changing in terms of scope at a relatively late stage in the development process (including two which were split into what will eventually be four Bills, before the first two were introduced – Social Services and Well-being, and Further Education). It may be useful to involve Committees earlier, as discussed above, to assist in ensuring that such decisions are based upon clear evidence-based policy work as well as capacity issues.

The Assembly faces a large volume of Bills over the coming months, from a small number of policy areas. Inevitably this will mean a disproportionately high workload for some of our Committees, and will restrict their ability to discharge other scrutiny functions – in particular, holding the Government to account for the way in which it exercises its existing, and wide-ranging, powers. The peak also coincides with a period of budget scrutiny. This is perhaps an issue that the Government should consider as part of its strategic planning.

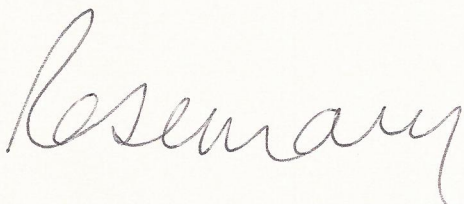
It would be helpful to investigate in due course how effective legislation is in achieving Welsh Government objectives (such as Programme for Government commitments and wider outcomes) compared with other policy levers. Policy areas falling within the remit of the Enterprise and Business Committee, for example (with notable exceptions such as Active Travel) are not generally the subjects of primary or indeed secondary legislation.

It is important that sufficient time is allowed for amendments tabled at Stage 3 or Report Stage to be debated in Plenary. Although the time required for such a debate is difficult to predict because it depends upon the groupings and Members' contributions, the volume of amendments and previous experience are useful indicators. For the Social Services and Well-being (Wales) Bill and the Housing (Wales) Bill, the large numbers of amendments tabled at Stage 3 (including many drafting corrections) resulted in the debates having to take place over more than one Plenary meeting. This could have been planned for further in advance, ie as it became clear during the tabling periods that significant volumes of amendments would be tabled. The Government should not assume that the Assembly will sit later into the evening to accommodate Stage 3 or Report Stage debates, unless there are exceptional circumstances.

9. If you have had experience of following plenary and committee proceedings on the scrutiny of Bills, or participating in the process, what are your views on this experience and what improvements, if any, could be made?

We collect and respond to anecdotal evidence of how stakeholders view their experiences of engaging with the legislative process. For example, as a result of feedback received during scrutiny of the Social Services and Well-being (Wales) Bill, we are exploring how we can produce more accessible documents, in particular to meet the requirements of groups with protected equality characteristics. Commission officials worked with stakeholders who had followed Stage 1 of that Bill, but found the amending stages harder to follow, to help them understand the procedures involved and learn more about ways they could engage with Members.

I hope that this evidence is of use to you in undertaking your inquiry, and I would be happy to provide further information and/or clarify any of the points I have made above in due course if that would be helpful.



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