

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Fourth Assembly
Legacy Report

March 2016

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Committee remit:

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Committee membership:

Committee member	Party	Constituency or Region
David Melding AM (Chair)	Welsh Conservative Party	South Wales Central
Alun Davies AM	Welsh Labour	Blaenau Gwent
Suzy Davies AM	Welsh Conservative Party	South Wales West
Dafydd Elis-Thomas AM	Plaid Cymru	Dwyfor Meirionnydd
William Powell AM	Welsh Liberal Democrats	Mid and West Wales

Previous members of the Committee:

Committee member	Party	Constituency or Region
Peter Black AM	Welsh Liberal Democrats	South Wales West
Julie James AM	Welsh Labour	Swansea West
Eluned Parrott AM	Welsh Liberal Democrats	South Wales Central
Simon Thomas AM	Plaid Cymru	Mid and West Wales

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Summary of recommendations

Recommendation 1. We recommend that our successor committee takes a particular interest in the extent to which subordinate legislation is consolidated, especially whether opportunities are taken to make the substantive legislation available bilingually.

Recommendation 2. We recommend that our successor committee pays particular attention to the adequacy of Explanatory Memoranda that accompany subordinate legislation, including the question of whether they should be published bilingually.

Recommendation 3. We recommend that our successor committee seeks a commitment from the Welsh Government to provide Transposition Notes for subordinate legislation that implements EU laws.

Recommendation 4. We recommend that our successor committee continues to monitor the procedure attached to subordinate legislation contained in Bills that provides powers for the Welsh Ministers to amend primary legislation.

Recommendation 5. We recommend that our successor committee considers reporting to the Assembly under Standing Order 21.3 on subordinate legislation that amends primary legislation using no procedure or the negative procedure.

Recommendation 6. We recommend that our successor committee scrutinises incidental, supplementary, consequential, transitory or transitional provisions contained within commencement orders and writes to the relevant Welsh Minister where it identifies issues of concern.

Recommendation 7. We recommend that our successor committee continues to assess the quality of legislation introduced in the Fifth Assembly and that the plenary resolution establishing the successor committee makes specific reference to this aspect of its work.

Recommendation 8. We recommend that our successor committee explores the best of way scrutinising and reporting on amendments to Bills that provide powers for Welsh Ministers to make subordinate legislation and on the procedures attached to those powers.

Recommendation 9. We recommend that a future committee continues to monitor relevant EU legislative proposals to ensure that they comply with the principles of subsidiarity and proportionality, and undertakes any other relevant functions that may in future be required in relation to these issues.

Recommendation 10. We recommend that our successor committee monitors the impact of our report on Making Laws in Wales.

Recommendation 11. We recommend that our successor committee, based on its scrutiny of Bills in the Fifth Assembly, pursues and promotes changes to procedures and practices which benefit the quality of law made by the Assembly.

Recommendation 12. If the UK votes to remain in the EU, we believe that a small committee should be established with responsibility for the oversight of European work in the Assembly and to perform an ‘ambassadorial’ role.

Recommendation 13. If the UK votes to leave the EU, we believe that there would be a significant benefit to the Assembly establishing a committee dedicated to exploring the implications for Wales of leaving the European Union, including the detailed legal and administrative issues involved.



HEADLINES

 **30**
BILLS SCRUTINISED

11
POLICY
INQUIRIES
UNDERTAKEN

9
LEGISLATIVE CONSENT
MEMORANDA
REPORTED ON
BY THE COMMITTEE

 **699**

ITEMS OF SUBORDINATE
LEGISLATION SCRUTINISED

STATUTORY INSTRUMENTS

NEGATIVE: **535** | AFFIRMATIVE: **125** | SUPER-AFFIRMATIVE: **3**

COMPOSITE NEGATIVE: **18** | COMPOSITE AFFIRMATIVE: **2**

WITHDRAWN: **2** | NO PROCEDURE: **5** | **TOTAL: 690**

WITH REPORTING POINTS

TECHNICAL: **50** | MERITS: **60** | BOTH: **25** | **TOTAL: 135**

 **12**

RESULTED IN MINISTERIAL
CORRESPONDENCE



Introduction

Over the last five years, we have covered a wide range of important constitutional and legislative issues. From the Church in Wales to the draft Wales Bill to secondary legislation, our work has ranged across the full spectrum of the Assembly's interests. This report aims to capture a flavour of this work, and to look ahead to suggest some of the key issues for our successor committee.

The Committee's remit as agreed by Plenary is:

"... to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers."

This remit contains both compulsory duties and discretionary powers. In very broad terms our functions involve:

- the scrutiny of **subordinate legislation** in accordance with Standing Orders 21.2, 21.3 and 21.7(i);
- the scrutiny of **Assembly and UK Bills** in accordance with Standing Order 21.7(ii) and 21.7(v);
- the scrutiny of **legislative consent memoranda** in accordance with Standing Order 29.4(i) and **statutory instrument consent memoranda** in accordance with Standing Order 21.7(iii);
- the scrutiny of draft European legislation and its compliance with the principle of **subsidiarity** in accordance with Standing Order 21.8 – 21.11;
- **policy inquiries** in accordance with the committee remit agreed by plenary.

The following chapters of this report look at each of these issues in turn, as well as highlighting lessons learnt in terms of good practice and looking ahead to the Fifth Assembly.

What is subordinate legislation?

Subordinate legislation is legislation usually made by the Welsh Ministers under powers conferred by primary legislation such as an Assembly Act or Measure or an Act of the UK Parliament. Subordinate legislation is often referred to as secondary or delegated legislation.

In Wales, Welsh statutory instruments (SIs) are the most common form of subordinate legislation and usually take the form of regulations or orders. Other forms of subordinate legislation can include codes of practice, rules, schemes or guidance.



Legislative Scrutiny

Subordinate legislation

Standing Order 21.2 prescribes that we must consider all relevant subordinate legislation laid by the Welsh Government, test it against the specific grounds listed in the Standing Order and report to the Assembly within 20 days. **Standing Order 21** sets out the specific reporting grounds.

Generally, the grounds for reporting under Standing Order 21.2 are matters that might call into question the legality or legal correctness of the legislation concerned. For this reason, they are often referred to as **technical reporting points**, although they sometimes relate to issues of legal principle as well as more mundane drafting issues.

Standing Order 21.3 provides a discretionary power enabling us to draw the Assembly's attention to subordinate legislation that, while it may not give concern on technical grounds, raises other matters that are likely to be of interest. They often draw the attention of the Assembly to a particularly noteworthy aspect of the legislation. For example, relating to subordinate legislation that does not implement policy in the way claimed or that we consider to be politically contentious or significant. These matters are referred to as **merits reporting points**.

Commission lawyers assist us with our scrutiny role by analysing all relevant subordinate legislation and preparing draft reports for the committee.

By the end of this Assembly, we will have reported on nearly 700 items of subordinate legislation (see infographic).

Most of the subordinate legislation considered has been in the form of orders and regulations, but we have also considered other, less formal, government publications (such as codes of practice and guidance) that are intended to have legal effect or that are subject to an Assembly procedure.

The most notable development in the Fourth Assembly has been the amount of subordinate legislation made using powers contained in Acts (and Measures) of the Assembly.

Replacing pre-devolution regulations made for England and Wales, with consolidating, Wales only, regulations has been beneficial and has had the added advantage of making the legislation available in Welsh as well as English.

We commend the Welsh Government for this approach, which has been seen most recently in relation to social care and planning law.

Recommendation 1. We recommend that our successor committee takes a particular interest in the extent to which subordinate legislation is consolidated, especially whether opportunities are taken to make the substantive legislation available bilingually.

Earlier in the Fourth Assembly, difficulties were encountered with the scrutiny of lengthy and complex subordinate legislation relating to **council tax** within a very tight timescale. We undertook a short inquiry into the making of this subordinate legislation and **reported in May 2013**.

Since publication of our report and in line with our findings, government lawyers have more routinely shared draft subordinate legislation with our lawyers on an informal basis. This has been beneficial in two respects. First, it has enabled our lawyers to even out for us the workload involved in scrutinising

subordinate legislation in order to meet the very tight 20 day reporting deadline involved. Secondly, it has also resulted in fewer adverse reports being made by us as issues can be resolved before the legislation is formally laid before the Assembly.

It is noteworthy that the most common reporting point now contained in our reports is that subordinate legislation has been made in English only because it is subject to scrutiny at Westminster as well as in the Assembly (referred to as joint or composite legislation). This issue is dealt with in more detail in our consideration of legislating bilingually later in the report.

Indeed, it is now more common for us to report that attention should be paid to the merits of subordinate legislation rather than to technical points of concern.

Explanatory Memoranda

One aspect, however, that does cause us concern, is the adequacy of the Explanatory Memoranda laid with the legislation. On a few occasions the Memoranda have contradicted the legislation; on others they have been inadequately explanatory. The most recent example was the Memorandum in relation to the Welsh Language (Wales) Measure 2011 (Amendment of Schedule 6) Order 2016, following which the Government provided additional information. Furthermore, Explanatory Memoranda are normally laid by the Government in English only.

Recommendation 2. We recommend that our successor committee pays particular attention to the adequacy of Explanatory Memoranda that accompany subordinate legislation, including the question of whether they should be published bilingually.

The scrutiny of certain subordinate legislation could be facilitated by the Welsh Government producing Transposition Notes as part of the Explanatory Memoranda for regulations made to implement EU law. Such Notes are routinely provided by the UK Government at Westminster, and we would expect the Welsh Government to replicate the UK Government's approach. As a first step, Transposition Notes should always be provided for regulations made together with the UK Government, or where Welsh regulations are based on a draft prepared for England and therefore follow the same approach to transposition.

Recommendation 3. We recommend that our successor committee seeks a commitment from the Welsh Government to provide Transposition Notes for subordinate legislation that implements EU laws.

We have also become aware that Explanatory Memoranda that accompany SIs do not appear to be published on the legislation.gov.uk website, while they are published for UK SIs. This is an issue that our successor committee may wish to pursue.



Analysis of recommendations made in respect of Bills

We have made 203 recommendations in relation to the 30 Bills we have considered. They can be split into the following categories:

Recommending:

- more detail on the face of the Bill or significant changes to the text: **49 (24%)**
- drafting changes to improve clarity: **19 (9%)**
- clarification on certain provisions is provided during the Stage 1 debate: **15 (7%)**
- use of the affirmative procedure: **58 (29%)**
- use of the negative procedure: **9 (4%)**
- use of the affirmative procedure in the first instance: **10 (5%)**
- use of the superaffirmative procedure: **14 (7%)**
- the use of the negative procedure for certain commencement orders: **13 (6%)**
- other matters (for example, in relation to use of explanatory memoranda, procedural issues): **16 (8%)**

Bills

General

Under Standing Order 21.7(ii), we are empowered to report on the appropriateness of powers granted by Bills to permit the Welsh Ministers to make subordinate legislation. We have done so in relation to 30 Bills introduced into the Assembly (25 by the Welsh Government and 5 by Members).

The scrutiny can be broken down into two aspects. First, is the power needed at all? Secondly, if the power is appropriate, is the procedure proposed in the Bill appropriate?

As a general rule, we have taken the view that the way in which the Bill is intended to work should be clear from reading the Bill. Therefore principles and definitions should be included on the face of the Bill. Our **recommendations** on the Public Health (Wales) Bill provide an example of where we have reported to that effect.

We take very seriously the adequacy of the procedure applied to the Assembly's scrutiny of any subordinate legislation. We therefore regularly make recommendations that a negative procedure be replaced with an affirmative procedure. Our **recommendations** on the Higher Education (Wales) Bill provide an example of where we have reported to that effect.

Occasionally, a power may be sought to make a particularly significant provision by subordinate legislation. In such cases we have considered, and sometimes recommended, the use of a super-affirmative procedure to ensure adequate scrutiny. We have also recommended one procedure for the first set of regulations made using a power, and a less rigorous procedure thereafter. Our **recommendations** on the Social Services and Well-being (Wales) Bill provide an example where we have reported to that effect on both issues.

An analysis of recommendations made in respect of Bills we have scrutinised is shown in an infographic.

Our scrutiny of Bills was referred to by the Learned Society of Wales in its response to the Making Laws in Wales inquiry and we very much welcome the value it placed on our work. It said:

"The same would appear by now to have occurred in the Welsh Assembly with a clearer understanding developing of what may appropriately be left to secondary legislation, what properly requires the full scrutiny accorded primary law-making, and what is the appropriate level of scrutiny – affirmative, negative, super-affirmative and, recently, enhanced negative – to be employed for the making of subordinate legislation. The rôle of the Constitutional and Legislative Affairs Committee in nurturing that awareness by means of its scrutiny activity and its reports has been key to that development taking place and deserves to be commended."

Amending primary legislation

It is a clear principle that subordinate legislation that permits the amending of primary legislation (so called “Henry VIII powers”) must be subject to the affirmative procedure at the very least.

However, while some Welsh Government Bills and accompanying Explanatory Memoranda have recognised this important constitutional point, others have not. This has led us to make recommendations in seven Bill reports seeking a change of procedure from negative to affirmative. It is regrettable that the Welsh Government has not accepted all our recommendations on this important point of principle.

In October 2015, we **wrote** to the First Minister explaining why this issue was so important:

“In our view, any proposed change to an Act (however trivial it is perceived to be), which has been subject to a four stage scrutiny process by the legislature, deserves to be approved by the legislature. If a matter is purely technical or administrative in nature, it will not be delayed by applying the affirmative procedure.”

We also highlighted that it is important to take into account how powers to make subordinate legislation could be used by a future administration, not just how they are intended to be used by a Minister who introduces the Bill. The affirmative procedure therefore provides added protection to ensure the rights of the legislature are respected.

The First Minister **replied** and during a scrutiny session on the 22 February 2016 told us that using the affirmative procedure would be the “norm” and “usually used” before adding:

I can’t imagine a situation where it wouldn’t be, if I can make that clearer.

Recommendation 4. We recommend that our successor committee continues to monitor the procedure attached to subordinate legislation contained in Bills that provides powers for the Welsh Ministers to amend primary legislation.

Recommendation 5. We recommend that our successor committee considers reporting to the Assembly under Standing Order 21.3 on subordinate legislation that amends primary legislation using no procedure or the negative procedure.

Commencement orders

It is standard practice that no procedure is prescribed for commencement orders. Such orders commence provisions within Assembly Acts (or Measures).

However, in the course of our work scrutinising Bills we have become increasingly concerned that some commencement powers permit incidental, supplementary, consequential, transitory or transitional provisions. We have taken the view that such orders should be subject to the negative procedure as they do more than simply announce a date for the commencement of a particular provision. We do not consider the absence of a procedure to be satisfactory. In our view, it would be sensible to consider whether there are any technical reporting points or, from the perspective of merits reporting points, they do not go beyond what is expected of incidental, supplementary, consequential, transitory or transitional provisions.

We have raised our concerns with the First Minister and this correspondence is available on our [website](#).

We have made numerous recommendations suggesting the application of the negative procedure to such commencement orders but the Welsh Government has rejected them.

Although we are content that no inappropriate use has been made of commencement orders, we remain of the opinion that there is a risk of them being used inappropriately. As a consequence, and given the Welsh Government's disagreement with our view, we suggest an alternative approach for our successor committee.

Recommendation 6. We recommend that our successor committee scrutinises incidental, supplementary, consequential, transitory or transitional provisions contained within commencement orders and writes to the relevant Welsh Minister where it identifies issues of concern.

Legislative competence

In scrutinising Bills we also consider the extent to which the Member in charge of the Bill (either a Welsh Government Minister, an Assembly Member, an Assembly committee or the Assembly Commission) has considered how the Bill is within the Assembly's legislative competence (see section 108 of the *Government of Wales Act 2006*). It is not our role to declare whether we believe a Bill is within or outside competence; rather we seek to identify issues of legislative competence that Assembly Members may wish to consider and take account of as the Bill passes through its remaining scrutiny stages.

An important part of our consideration of legislative competence relates to consideration of human rights issues (see section 108(6) of the *Government of Wales Act 2006*), particularly as a consequence of the remarks of members of the Supreme Court in their **judgment** on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. In our **report** on the Regulation and Inspection of Social Care (Wales) Bill we said:

23. ... we believe it would have been helpful for the Minister to have included clear information in the Explanatory Memorandum about how he had taken into account human rights issues when preparing the Bill, including the issues he considered and the analysis undertaken. We believe it would have been possible to provide an appropriate narrative, without disclosing the content of any legal advice received.

Our Making Laws in Wales **report** provided a recommendation to this effect (recommendation 19 (ii)). The Business Committee considered proposals to deliver this recommendation on **23 February 2016** and issued its **report** on proposed Standing Order changes on 9 March 2016. Unfortunately, the Business Committee was not able to agree changes to implement this recommendation.

Quality of legislation

We have also sought to provide an overview of the quality of the legislation being introduced into the Assembly and this has become a valuable part of our role.

In the first half of the Fourth Assembly, we expressed concerns on a number of occasions that the Welsh Ministers were bringing forward Bills before the policy had been fully developed or that left important details to be brought forward by subordinate legislation at a later date. Our reports on the Welsh Government's **Social Services and Well-being (Wales) Bill, Education (Wales) Bill** and **Planning (Wales) Bill** highlight our particular concerns. This issue was one of the drivers for undertaking our inquiry into law-making in Wales.

We have regularly considered the issue of consolidating legislation, most significantly in our report on **Making Laws in Wales**. We returned to the subject in our report on the **Historic Environment (Wales) Bill**, the subject matter of which would have benefitted considerably from a consolidating rather than an amending Bill. We note however that on 7 March 2016, the Welsh Government **published** a consolidated, draft Government and Laws in Wales Bill. If the Welsh Government is capable of producing a consolidated Bill on a complex subject matter that is outside the Assembly's legislative competence, we believe it should also, through appropriate planning, be able to produce more consolidated Bills that are within the Assembly's legislative competence.

We suggest that our successor committee takes account of the principle of consolidating legislation in its scrutiny of Bills in the Fifth Assembly.

On the other hand, we did welcome the publication of Keeling Schedules in relation to the Historic Environment (Wales) Bill. Such Schedules, which demonstrate how changes in a Bill would affect existing legislation, are of particular use during early stages of the scrutiny of legislation. In our report, Making Laws in Wales, we recommended that the Assembly's Standing Orders should be changed to make the publication of Keeling Schedules mandatory on introduction of a Bill, where appropriate. We consider the Welsh Government's response to this recommendation later in this report.

Recommendation 7. We recommend that our successor committee continues to assess the quality of legislation introduced in the Fifth Assembly and that the plenary resolution establishing the successor committee makes specific reference to this aspect of its work.

Other issues

In the course of our scrutiny of Bills, we have reported on a revised Bill following Stage 2 proceedings on one occasion: the Mobile Homes (Wales) Bill introduced by Peter Black AM. In **evidence** to our Making Laws in Wales inquiry, YourLegalEyes suggested that we report on amendments that contain significant powers to permit Welsh Ministers to make subordinate legislation. As we indicated in our subsequent report, we consider this to be a sensible suggestion.

Recommendation 8. We recommend that our successor committee explores the best of way scrutinising and reporting on amendments to Bills that provide powers for Welsh Ministers to make subordinate legislation and on the procedures attached to those powers.

Legislative Consent Memoranda

In line with our remit, we may scrutinise **Legislative Consent Memoranda** referred to us by the Business Committee, relating to UK Bills that seek to legislate in areas where the Assembly has competence (Standing Order 29).

Our 2012 report, *Inquiry into powers granted to Welsh Ministers in UK laws* recommended that the Welsh Government should ask the Assembly to consider a **declaratory resolution** setting out the Assembly's understanding of the process in Wales. We reported on progress in our follow-up 2013 report, *Inquiry into powers granted to Welsh Ministers in UK laws: review of outcomes*. The Assembly subsequently noted the Welsh Government's Memorandum on the Legislative Consent Process on **18 February 2016**.

Since the start of the Fourth Assembly we have **reported** on nine Legislative Consent Memoranda. Of particular note are our two reports on the Deregulation Bill about amendments in relation to:

- **farriers and home-school arrangements;** and
- **dog provisions.**

Both reports expressed concern at the use of the Legislative Consent Memoranda process rather than Welsh Government Bills to deliver policy objectives.

We objected to one Legislative Consent Memorandum (in relation to the **Anti-Social Behaviour, Crime and Policing Bill**) and it was subsequently rejected by the Assembly. The UK Government disputed that the relevant provisions that were subject of the LCM were within the legislative competence of the Assembly and as such that an LCM was appropriate. Therefore they refused to remove the relevant provisions from the Bill.

We comment further on the Legislative Consent Motion process later in this report.

Statutory Instrument Consent Memoranda

We may also scrutinise subordinate legislation that requires the Assembly's consent before it can be made by UK Ministers, for example under the *Public Bodies Act 2011*.

Following a recommendation contained in our 2012 report, *Inquiry into powers granted to Welsh Ministers in UK laws*, the Business Committee agreed on 25 September 2013 to introduce Standing Order 30A to provide a procedure for the Assembly to provide its consent in relation to UK statutory instruments made by UK Ministers and requiring such consent. Standing Order 30A puts in place a procedure similar to that for Legislative Consent Memoranda under Standing Order 29, but in relation to statutory instruments rather than Bills and including a requirement to lay a Statutory Instrument Consent Memorandum and a Statutory Instrument Consent Motion.

We have considered and **reported** on nine statutory instruments requiring the Assembly's consent, four of which used the new procedure. The instruments have been routine and non-controversial, although we expressed concerns about the quality of two Memoranda.

European legislation

As well as considering Welsh and UK-wide legislation, we are responsible for considering draft EU legislation which relates to matters within the Assembly's legislative competence to identify whether it complies with the principles of subsidiarity and proportionality. If we have concerns we write on behalf of the Assembly to the relevant committee of the House of Commons or House of Lords with a

view to these views being incorporated into a reasoned opinion to be submitted to the relevant EU authority (this procedure is set out in the Assembly's Standing Orders (21.9)).

Subsidiarity

We have made two written representations:

- **on the proposals for a directive on public procurement (COM(2011)896).** The concerns raised were included in the Reasoned Opinion adopted by the House of Commons, and debated on the floor of the House on 6 March 2012;
- **on the proposals for a regulation on high-speed electronic communications networks (COM(2013)147).** We agreed with the subsidiarity concerns raised by the House of Commons in its Reasoned Opinion adopted on 13 May 2013.

We also wrote informally to the House of Commons' European Scrutiny Committee:

- **on 26 February 2013, about proposals for directives on tobacco and related products (COM(2012)0788);** and
- **on 20 March 2013, about alternative fuels infrastructure (COM(2013)0018).**

Additionally, we have **written** to the Welsh Government on European proposals to amend regulation 1829/2003 on genetically modified food and feed expressing concerns about a lack of clarity on whether decisions to permit these products could be made in Wales. The Welsh Government **advised** that at that time there was insufficient certainty about the detail of the finalised legislation to be clear about the position. It also noted, that in common with the UK Government and with several other EU assemblies, the Welsh Government was opposed to the proposed amendment.

On 30 June 2014, the Committee **wrote** to the Foreign and Commonwealth Office regarding the UK Government's review of the balance of competences.

Proportionality

On 16 July 2014, the Committee **wrote** to the European Commissioner for Maritime Affairs and Fisheries about a draft regulation on driftnets (COM(2014)265), raising issues of proportionality, followed by a further **exchange of correspondence**. We also **wrote** to the First Minister about this proposal.

Other activities

We have also **shared correspondence** with a range of European officials around issues relating to the role of sub-Member state parliaments.

Recommendation 9. We recommend that a future committee continues to monitor relevant EU legislative proposals to ensure that they comply with the principles of subsidiarity and proportionality, and undertakes any other relevant functions that may in future be required in relation to these issues.

We have undertaken inquiries in the following policy areas:

2015

- Draft Wales Bill
- Making Laws in Wales
- The UK Government's Proposals for Further Devolution to Wales

2014

- Disqualification of Membership from the National Assembly for Wales
- Wales' role in the EU decision making process

2013

- Powers granted to Welsh Ministers in UK Laws: Review of Outcomes
- Law Making and the Church in Wales
- Council Tax Reduction Scheme Regulations

2012

- The establishment of a separate Welsh jurisdiction
- The Granting of Powers to Welsh Ministers in UK Laws

2011



Policy inquiries

In the course of the Fourth Assembly, we have therefore considered a range of diverse policy areas and these are listed in (see text box). We questioned the First Minister on some of these issues at a scrutiny session on the **22 February 2016**.

We highlight below some specific aspects of the work we have undertaken.

Making Laws in Wales

In October 2015, we issued our report, ***Making Laws in Wales***. The report stemmed from early concerns about the approach being adopted in some Welsh Government Bills and a recognition that it would be sensible to review the approach to law-making in Wales, following the 2011 referendum and implementation of Part 4 of the *Government of Wales Act 2006*.

The recommendations in our report were aimed at delivering continuous improvement in the quality of law made by the Assembly for the benefit of citizens in Wales. Implementing the recommendations will, we believe, take a generally good process and make it even better.

Our Making Laws in Wales inquiry made 33 recommendations, most of which will have resonance in the Fifth Assembly, for example in relation to:

- changes to Standing Orders to help deliver changes in the quality of legislation made;
- the way in which the Assembly engages with stakeholders in the legislative process; and
- post-legislative scrutiny.

Of particular importance to us were:

- recommendation 3, a presumption in favour of publishing draft Bills given the strong evidence we heard in favour of pre-legislative scrutiny;
- recommendation 20, the amendment of Standing Orders to require Keeling Schedules (that set out how a Bill amends existing legislation) to accompany a Bill on introduction;
- recommendation 22, the amendment of Standing Orders to provide a compulsory Report Stage for the scrutiny of every Bill unless the Assembly by 2/3 majority, decides otherwise.

In its **response** to our report the Welsh Government rejected a presumption in favour of publishing draft Bills. In the debate on our report, the First Minister said:

I think it's right to say that draft Bills are appropriate where proposals are complex, where they're controversial, or where there are particular sensitivities around how something is given effect in law

While the purpose of draft Bills would also be to help improve the quality of legislation irrespective of their complexity or controversial nature, we welcome the First Minister's comments and believe they could form the basis for a new approach in the Fifth Assembly.

While the purpose of draft Bills would also be to help improve the quality of legislation irrespective of their complexity or controversial nature, we welcome the First Minister's comments and believe they could form the basis for a new approach in the Fifth Assembly.

The Welsh Government's response to our report also said:

"I should note that the Welsh Government response does not provide substantive comments at this stage to individual recommendations relating to other organisations, most notably those for the Assembly's Business Committee. However, I would like to highlight that these recommendations may have a significant cumulative impact on the length of the legislative process, on Assembly Members' time and Government Plenary time, and on available resources at a time of financial constraint. We would, therefore, want to consider proposed changes to Standing Orders as a whole."

The minutes of the Business Committee on 9 February 2016 state:

Business Managers considered a paper with proposed changes to Standing Order 26. The Minister suggested drafting changes to some of the proposals in the paper and stated that she did not agree in principle to other proposals, in particular the ones regarding Report Stage. The Minister agreed to send a note to Business Managers outlining her suggested changes. Business Managers agreed to return to the matter at the meeting of 23 February.

On **23 February 2016**, the Business Committee subsequently discussed the proposals further and reported on **9 March 2016**.

The Welsh Government agreed to a change which in part implements recommendation 20 of our report. We welcome this change. However, we are disappointed that it has rejected others. In rejecting proposals to implement recommendation 22 in relation to a compulsory Report Stage, it also rejected a number of options proposed as a compromise on the original recommendation. It is particularly disappointing that it rejected a proposal that any Member can move a motion to have a Report Stage, given its acknowledgement during the Making Laws in Wales inquiry that it is a matter for the Assembly to decide the level of scrutiny that should apply to a Bill. As we said in our report:

282. We do appreciate that a Report Stage may not always be appropriate; however that should be a matter for the Assembly to decide rather than the Welsh Government. This is consistent with our strong view that it is for the Assembly as the legislature to decide the level of scrutiny to be applied to a particular Bill, rather than the Welsh Government.

We are therefore disappointed that, following discussions in Business Committee, specific changes to Standing Orders to implement our recommendations will not be debated and voted on by the Assembly. In our view it is unfortunate that specific changes to the way in which the Welsh Government is scrutinised have been the subject of private consideration in Business Committee rather than public debate and decision on the floor of the Assembly.

Recommendation 10. We recommend that our successor committee monitors the impact of our report on Making Laws in Wales.

Recommendation 11. We recommend that our successor committee, based on its scrutiny of Bills in the Fifth Assembly, pursues and promotes changes to procedures and practices which benefit the quality of law made by the Assembly.

Draft Wales Bill

One of the implications of the devolution settlement following the March 2011 referendum is the existence of two legislatures, each with extensive law-making powers but within the framework of a single England-and-Wales jurisdiction. This was the impetus for an inquiry which culminated in the publication in September 2012 of our report, *Inquiry into a Separate Welsh Jurisdiction*.

We did not see it as our role to come forward with specific recommendations for and against the establishment of such a separate jurisdiction. That in our view is a political decision. However, we did conclude that a separate Welsh jurisdiction is constitutionally viable and more should be done within the current structures to develop legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, and to recognise and develop its emerging legal identity.

The issue of a Welsh jurisdiction has suddenly emerged into the constitutional spotlight following the publication of the **draft Wales Bill** by the Secretary of State in October 2015. The draft Wales Bill included a reserved powers model as proposed in the UK Government's **Powers for a Purpose: Towards a lasting devolution settlement for Wales**, (February 2015).

In **reporting** on *Powers for a Purpose* we said:

“Alongside subsidiarity, the other core principles in drafting the new model should be: Clarity; Simplicity; and Workability.”

Our scrutiny of the draft Wales Bill was informed by these principles and culminated in publication of our **report** on the UK Government's Draft Wales Bill. A **summary version of the report** is also available.

We believe our report has helped frame and influence debate on these important matters. We believe it has provided an important point of focus and helped to articulate key areas that need to be resolved if the Secretary of State is to achieve the “stronger, clearer and fairer” devolution settlement he desires.

The **debate** on our report in the Assembly Chamber was organised in an innovative way. Instead of the usual motion for the Assembly to ‘take note’ of the Committee’s findings, a series of **motions** on our key recommendations were tabled, enabling a wider ranging and more in-depth debate on the draft Wales Bill and our report. It resulted in the Assembly giving unanimous support to the motions. The Presiding Officer called the debate ‘unprecedented’ in the Assembly’s history.

We welcome the Secretary of State for Wales’s decision on 29 February 2016 to delay the Wales Bill.

European policy work

Our major piece of work on Europe looked at **Wales' role in the EU decision-making process**, which was broadly positive about how the voice of Wales is heard at an EU level. While pleased that the Welsh Government responded positively to our recommendations, we are disappointed that two years on, we have not yet seen some of this work followed through.

We have undertaken further work looking at the **UK Government's EU Reform agenda**, and we have been concerned that the devolved administrations and legislatures have not been involved in this process, despite the fact that the result of the forthcoming EU referendum will have a significant impact on them.

Inquiry into a Separate Welsh Jurisdiction

"As a distinctive body of Welsh law continues to emerge and develop over the coming years, the divergence between laws that apply in Wales and those that apply in England will naturally increase, particularly as different legislative solutions on similar subjects are developed and enacted. Equally and just as important, divergence between Welsh and English laws does not rely solely on legislation made by the National Assembly, as the UK Parliament increasingly makes laws that apply to England only and that are different from those that apply in Wales.

This increasing divergence will place more practical and administrative challenges on the current unified England-and-Wales jurisdiction model. Nevertheless, we believe that these practical difficulties can be dealt with in the current structure.

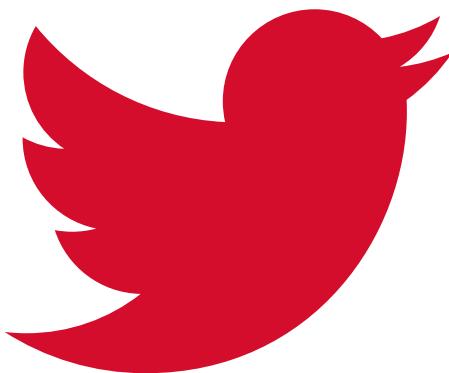
As a consequence, we made 5 recommendations intended to secure practical improvements to the current unified England and Wales jurisdiction, to ensure that it adapts to, and keeps pace with, the changing constitutional and legislative realities."

David Melding, Chair of Constitutional and Legislative Affairs Committee, The administration of justice in Wales, clickonWales, 21 October 2013



While acknowledging that the work we undertake is of specialist interest, we have embraced use of Twitter to try and communicate our work. In the last year, we have improved both our reach and engagement levels and would recommend that our successor committee builds on these successes.

Here we show some of our tweets which had the highest level of engagement or interest, it also shows how stakeholders have engaged with us with on Twitter.



12,964

TOTAL OF PROFILE VISITS IN
THE LAST 12 MONTHS:

25,258

AVERAGE TWEET
IMPRESSIONS A MONTH:

808

TWEETS SENT IN TOTAL
(ENGLISH AND WELSH ACCOUNTS)

 **Evan Paul Silk**
@LwynauMawr

Delighted that @CommonsWelshAff and @SeneddCLA are meeting jointly on draft #WalesBill - exactly type of joint working our Commission wanted

RETWEETS 14 LIKES 1 

10:40 PM - 22 Oct 2015

 **Christian Webb**
@MrChristianWebb

This visual report on #MakingLaws in #Wales is excellent. Perfect example of design and functionality working well
slate.adobe.com/cp/GrEQz/



Making better laws for Wales
A story told with Slate.
slate.adobe.com

3:32 AM - 21 Jan 2016

 **Senedd MCD**
@SeneddMCD

Diddordeb yn y modd y mae deddfau yn cael eu gwneud yn #Cymru? Darllenwch ein hadroddiad ow.ly/T9Tn7



RETWEETS 2 LIKES 1 

6:01 AM - 8 Oct 2015

 **Laura McAllister**
@LauraMcAllister

Important session for @SeneddCLA today with @walesoffice @scrabbmp giving evidence at 13.30. Live on Senedd.TV #nottobemissed

RETWEETS 6 LIKES 7 

1:02 AM - 23 Nov 2015



Comisiynydd Gymraeg
@ComyGymraeg

Ystyried y Gymraeg wrth lunio deddfau.
Gwyliwch dystiolaeth @ComyGymraeg i bwylgor
@SeneddMCD 15:30 heddiw [senedd.tv #cy](#)

RETWEET
1

LIKE
1



 **Aled Edwards**
@alededwardscym

Anyone wishing to understand the difficulties with the [#walesbill](#) should read this report [assembly.wales/laid%20documen...](#)

Draft Wales Bill

October 2015

Bil Cymru drafft

Hydref 2015

RETWEETS
4

LIKES
3



4:39 AM - 4 Dec 2015



Senedd CLA
@SeneddCLA

Our consultation on the draft [#WalesBill](#) will be open soon. Follow us for updates.



RETWEETS
10



3:00 AM - 20 Oct 2015



Welsh Affairs Cttee
@CommonsWelshAff

Thanks to [@AssemblyWales](#), [@SeneddCLA](#) and all our witnesses for today's joint meeting on the draft [#WalesBill](#).



RETWEETS
21

LIKES
11



10:22 AM - 9 Nov 2015



Welsh Affairs Cttee
@CommonsWelshAff

@SeneddMCD wedi cyhoeddi adroddiad ar fesur Drafft Cymru. Gallwch ei ddarllen fan hyn: bit.ly/1PDPPr1s

Cynlliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol

Adroddiad ar Fil Cymru Drafft
Llywodraeth y DU

Rhagfyr 2015

RETWEETS
5



3:57 AM - 4 Dec 2015



Diana S. Stirbu
@Diana_Stirbu

Comprehensive assessment draft [#WalesBill](#) by @SeneddCLA wt references 2our evidence @LauraMcAllister @LondonMetUni



Assembly Wales @AssemblyWales

Draft Bill 'made for Wales, not with Wales' – says @SeneddCLA - ow.ly/VtX4S

RETWEETS
2

LIKE
1



1:58 AM - 5 Dec 2015

Videos: Members' reflections of the committee's work

The five current members talk about the role and work of the Constitutional and Legislative Affairs Committee.



View online: <https://youtu.be/Bv33iHq70AU>



View online: <https://youtu.be/Pa0a7h9p2ug>



View online: <https://youtu.be/uN9MFbT46TI>



View online: <https://youtu.be/RwHp96WXv3k>



View online: <https://youtu.be/QjBKq04O88U>

Looking to the Fifth Assembly

Good practice

Remit

We believe that our broad remit has enabled us to undertake work on important constitutional issues, which may not have been considered previously. For example the **Church in Wales inquiry**, which, while outside the mainstream of the Assembly's responsibilities, was an important piece of work that generated a great deal of public interest.

This broad remit also meant that we were well-placed to undertake **pre-legislative scrutiny of the draft Wales Bill**. As the constitutional landscape for Wales and the UK continues to change and develop, we believe that there is a clear need for our successor committee to have a similarly broad constitutional remit.

Working arrangements

We have operated on a consensual non-partisan basis throughout the Assembly. We appreciate that our small size helps with this collegiate approach and we believe that constitutional issues are best dealt with in this manner. We are pleased that we have never resorted to a vote on any issue, despite individual Members holding differing views. We would hope that our successor committee adopts a similar approach.

We undertook a **mid-term review** of our performance in 2014. It has helped us monitor our work as a committee as well as informing this report. We found it a particularly useful exercise and would recommend that our successor committee undertakes something similar.

Engagement

In the course of our inquiries on Making Laws in Wales and the draft Wales Bill we held stakeholder events to inform our work early in the process.

In the case of the draft Wales Bill, it enabled us to prepare stakeholders to give evidence as well as getting their views before the draft Bill was published. A second event held with legal experts following the draft Bill's publication enabled a more detailed, in-depth discussion of its practical implications to take place.

The workshop held as part of our Making Laws in Wales inquiry was an effective way of hearing at first hand those affected by laws made in the Assembly and helped to shape our thinking as the inquiry progressed. It was also the first Continuous Professional Development accredited event at the Assembly.

We benefited from the expertise and perspectives stakeholders brought to these events. We had very positive feedback for all events and would suggest that our successor committee considers the use of such events in the Fifth Assembly.

Also, we used an expert panel to consider a first draft of our report on Making Laws in Wales. Their input was extremely useful and, we believe, improved the quality of the report. We would recommend similar approaches are taken by our successor committee especially in work that is particularly technical, wide ranging or complex.

Suggestions for future committee inquiries

There are some policy areas that we would have liked to explore and some inquiries that we believe are worthy of follow-up work. We therefore list below (in no particular order) inquiry areas that our successor committee may wish to consider pursuing in the Fifth Assembly:

Appointment and accountability of commissioners

Wales currently has commissioners for children, older people, standards and the Welsh language, as well as its Public Service Ombudsman. In addition, the office of the Future Generations Commissioner will become operational at the beginning of April 2016.

Powers and governance arrangements vary between the commissioners: the Older People's, Welsh Language, Children's and Future Generations Commissioners are appointed by the Welsh Government and report to the Assembly through the Welsh Ministers. The Standards Commissioner, who is concerned with standards in the Assembly, is appointed by, and reports to, the Assembly. The Public Services Ombudsman for Wales (PSOW) is appointed by the Queen on the recommendation of the Assembly and he or she reports to the Assembly.

Doubts have been expressed about the appropriateness of appointments by the Welsh Government and whether this may compromise the independence of those commissioners. Both the former and current Children's Commissioners have argued that the holder of that post should be accountable to the National Assembly not the Welsh Government.

The Welsh Government commissioned an independent review of the role and functions of the Children's Commissioner for Wales in June 2014. We **responded** to a consultation exercise about the review. The **report**, published in December 2014, recommended that future appointments should be undertaken by the Assembly rather than the Welsh Government. However, the Welsh Government's response indicates it does not agree.

In addition to the recommendations concerning the Children's Commissioner for Wales, the report made recommendations about the four commissioners in Wales which included, amongst others: improving consistency of approach to Commissioners in Wales with regard to their purpose, funding, accountability and governance; and exploring the possibility of a single Act covering all Commissioners and the Ombudsman in Wales. The Presiding Officer expressed similar views in a letter to the Children, Young People and Education Committee on **29 January 2016**.

While some of these areas are more likely to be relevant for consideration by policy committees, we do believe that the appointment of commissioners and to whom they are or should be accountable is an important matter of constitutional principle. We therefore believe that our successor committee would be well-placed to explore these specific issues further.

Bilingual legislation

We have always appreciated the progress made in relation to bilingual legislation since statutory instruments were first made bilingually in 1999. To have progressed to bilingual primary legislation by 2007, with an increasing volume and complexity since then, has been a considerable achievement. Despite the considerable increase in the volume of legislation considered by the Assembly, it has always been able to do so in both languages: amendments are always tabled bilingually and debated in both languages. During the same period, the number of statutory instruments that are the subject of an adverse report by the Committee under Standing Order 21.2(vii), (that there appear to be inconsistencies between the meaning of the English and Welsh texts) has declined substantially.

Nevertheless, we are anxious that this progress is maintained and that complacency does not arise. We therefore addressed the issue of the drafting of bilingual legislation in our report on *Making Laws in Wales* in October 2015. We made the following recommendations on this subject:

"Recommendation 16: We recommend that the Welsh Government, working closely with the Welsh Language Commissioner:

- (i) puts in place a long term plan for increasing the proportion of Bills that are co-drafted in English and Welsh;*
- (ii) identifies criteria for prioritising resources for dual-language drafting to ensure allocation to the Bills most likely to benefit.*

Recommendation 17: We recommend that the Counsel General works towards producing a separate Welsh interpretation Act and keeps this Committee updated with progress and developments on this work."

The Government rejected Recommendation 16 and accepted Recommendation 17 in part, in the context of its work with the Law Commission. We recommend that our successor committee should continue to explore ways in which the bilingual drafting of legislation can be developed further.

One other specific issue relating to the making of legislation bilingually has troubled us. That is that statutory instruments made by the Welsh Ministers and the Secretary of State together are made in English only. The First Minister **told us** that this is because such legislation is to be scrutinised at Westminster as well as by the Assembly and that the UK Parliament will not scrutinise general statutory instruments in languages other than in English. We note however that legislation containing Welsh text is scrutinised by the UK Parliament in the context of prescribed forms. Our clerks have been exploring these issues with counterparts in the House of Commons.

Our successor committee may wish to pursue this matter further with a view to such legislation being made bilingually in the future. Alternatively, it may wish to examine the merits of decisions by the Welsh Ministers to make composite legislation with England where that is not a statutory requirement.

Draft Wales Bill

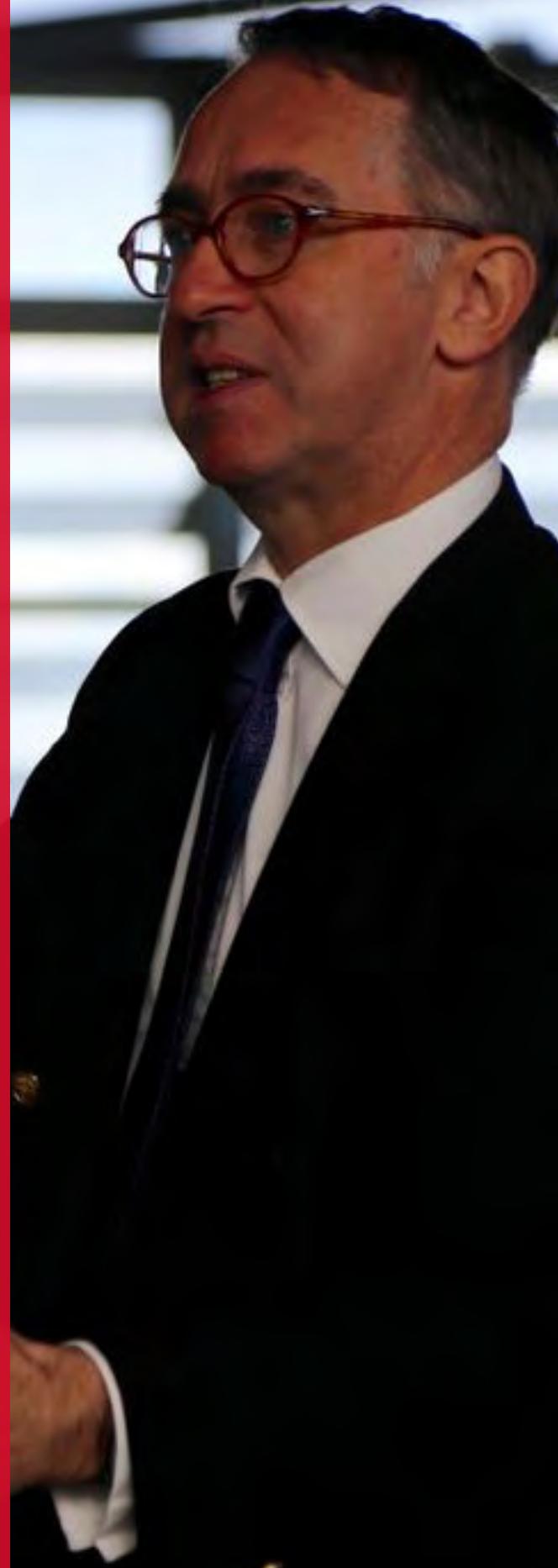
"The Wales Bill to be introduced into the UK Parliament next year will be of fundamental constitutional importance. However, it will also determine the Assembly's ability to legislate effectively and efficiently in policy areas such as health and education, areas that, as the Secretary of State rightly identifies, are of considerable concern to people in Wales."

That is why the need for a lasting settlement is paramount so that the Welsh Government and Assembly can move forward and deliver on these important issues. The last thing the Assembly needs is a fourth government of Wales Act so complex and impenetrable that it hinders the delivery of laws aimed at improving the quality of the lives of the people of Wales."

David Melding, Chair of Constitutional and Legislative Affairs Committee, Back to the drawing board for the draft Wales Bill? clickonWales, 14 December 2015

"...that what this may end up producing is laws that have to steer very carefully around all these restrictions unless they're going to be open to challenge, with the result that complex competence results in highly complex legislation. I think one can actually look at the legislative history of the Assembly and see that. If we go back to the third Assembly, and the previous settlement under Part 3 and Schedule 5, competence granted by the insertion of matters into Schedule 5 was often extremely complicated. Witness, for example, the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009. There is much criticism these days of the complexity of the Welsh Language (Wales) Measure 2011, but the complexity of that Measure is entirely the result of the complexity of the competence that was granted. It is steering its way round the very complicated detail and restrictions that were imposed when the powers were granted from Westminster. I worry, therefore, that, if we are moving into an area where there is again a complex set of rules about competence, the ultimate result is legislation that is difficult to understand, complex, and inaccessible to the citizen and possibly even to the citizen's legal advisers."

Professor Thomas Glyn Watkin, Oral evidence, 9 November 2015



Wales Bill

We have already undertaken two inquiries relating to further developments in the Welsh devolution settlement regarding proposals for new legislation and subsequently the draft Wales Bill. On 7 March 2016, the Welsh Government published an alternative draft Government and Laws in Wales Bill, which was the subject of an oral statement in plenary on **8 March 2016**. It seems sensible that our successor committee is involved in future scrutiny of the Welsh constitutional position, including issues relating to the electoral arrangements for the Assembly.

Our Making Laws in Wales report looks at aspects of drafting legislation and its importance in helping to make legislation accessible. As some of the witnesses told us, the way in which legislative competence is expressed (see text box) can impact on the way in which Welsh Bills are drafted, potentially increasing complexity and decreasing accessibility. Whichever committee is tasked with scrutiny of the UK Government's Wales Bill, we believe it should have regard to our Making Laws in Wales report when doing so.

The importance of post-legislative scrutiny

338. Post-legislative scrutiny plays an important role in assessing the effectiveness of legislation: whether it meets its objectives and delivers its intended benefits to citizens. However, this is not something that has been routinely done during the Fourth Assembly, perhaps for reasons of capacity.

339. The value of this work can be seen most recently, for example, in the Health and Social Care Committee's post-legislative scrutiny of the Mental Health (Wales) Measure 2010. We considered this to be an important, insightful and timely inquiry, which should act as a model of best practice in this area.
343. We have made our views on future-proofing within Bills clear. However, if the Welsh Government continues to future-proof Bills, it places an even greater onus on committees to undertake post-legislative scrutiny of Bills and subordinate legislation.

345. That said, and as we have already indicated, we are acutely aware of the work pressures that committees are under, trying to juggle legislative and general policy scrutiny. We also know that the volume of legislation is likely to increase during an Assembly, and therefore, that there may be more opportunities at the start of an Assembly for committees to undertake post-legislative scrutiny.

Extract from the Making Laws in Wales report.



Implementation of Welsh legislation

As we have indicated earlier in the report, we have been concerned at the use of framework Bills and the Welsh Government's over-reliance on subordinate legislation to deliver significant policy.

We believe that there may be scope for scrutiny of some of the statutory instruments arising from such Bills to assess their content and scope during the consultation phase or alternatively, once they have been made. In the latter case, and as we indicate in our *Making Laws in Wales* report, this could take the form of post-legislative scrutiny of a framework Bill that has become an Act and the statutory instruments made as a consequence of it. In our view, Fourth Assembly Acts that would benefit from such an approach include:

- the Social Services and Well-being (Wales) Act 2014
- the Education (Wales) Act 2014
- the Planning (Wales) Act 2015

In addition, following the publication of the House of Commons Public Administration and Constitutional Affairs Select Committee's report, ***The Future of the Union, part one: English Votes for English laws***, it will be important for our successor committee to consider the implications for Wales of the relationship between the Assembly's competence provided through the Wales Bill and its interpretation in the context of English Votes for English Laws.

Adjudicating on disputes relating to legislative consent

During this Assembly there have been occasions where the UK and Welsh Governments have disputed the need for a legislative consent motion. In one case, the Welsh Government introduced its own primary legislation to reverse the abolition of the Agricultural Wages Board in the UK Government's *Enterprise and Regulatory Reform Act 2013*. The UK Government did not accept that legislating in relation to the Agricultural Wages Board was within the Assembly's competence. This resulted in the UK Government referring the Agricultural Sector (Wales) Bill once passed by the National Assembly to the Supreme Court, who ruled that the Bill was within the Assembly's competence.

At the time of writing there was also a disagreement between the UK and Welsh Governments about the UK Government's Trade Union Bill, with the Assembly withholding consent for the UK Government to legislate, while the UK Government stated that the Assembly's consent was not required.

The draft Wales Bill proposes to place the convention about the UK Parliament legislating on devolved matters on a statutory footing but the practical implications of such a provision are unclear.

When discussing the Legislative Consent Motion process on 22 February 2016, the First Minister told us:

10.... *The difficulty is, of course, that where there is a dispute over whether something is within competence or not and so requires an LCM, there is no arbitration process to decide what the true position is ...*

38.... *'Arbitration' perhaps is the wrong word; 'adjudication' is probably a better word. The difficulty is that the issue of competence is only resolved at the end of the process.*

The First Minister and his officials went on to assert that a clear devolution settlement was key to minimising disputes on competence. We agree with this view, which links to themes emerging from our pre-legislative scrutiny of the draft Wales Bill.

We believe that there may be merit in our successor committee considering issues concerned with disputes about legislative consent, especially as it relates to the broader issue of effective inter-governmental relations. In particular we believe there is merit in exploring the feasibility of putting in place a process for adjudicating on legislative consent at an early stage in the process. Such a system should, in our view, be independent and external to the UK Government.

We received some evidence on this issue in our inquiry on the UK Government's draft Wales Bill (see text box).

Inquiry on the UK Government's draft Wales Bill

The UK Parliament legislating on devolved matters

Much the same might be said about the proposed insertion by clause 2 of the bill of a new subsection (6) into section 107 of the 2006 Act. This recognizes that the UK Parliament "will not normally legislate with regard to devolved matters without the consent of the Assembly". The key word is, of course, normally, although one can readily concede that there will be extraordinary circumstances, such as national emergencies, where the norm would not apply.

However, the key question is what can be done to ensure that the principle is adhered to in circumstances which are 'normal'. What, for instance, is to be done if the UK Parliament chooses to legislate upon an issue which it states relates to a reserved matter but the Assembly or the Welsh Government disagrees. When, for instance, under the current settlement a similar situation arose regarding the abolition of the Agricultural Wages Board, the Assembly had to pass emergency legislation which had then to be challenged before the Supreme Court before the issue could be resolved. Some quicker mechanism than having to pass challengeable primary legislation to repeal the UK provisions is needed. It might be desirable to allow the Welsh Ministers or the First Minister a power to lay a statutory instrument before the Assembly disapproving disputed provisions in Wales, which if approved by the Assembly (possibly with the requirement of an absolute and/or weighted majority) could then be challenged far more quickly to resolve the issue of competence. Provided the power to disapprove was a statutory power, it could be interpreted as being compatible with UK parliamentary sovereignty.

**Evidence from Professor Thomas Glyn Watkin,
DWB1**



Effective ways of working in the Fifth Assembly

Scrutiny of European Matters

European matters have been 'mainstreamed' in the Fourth Assembly, with no single committee responsible for them. We have considered issues of subsidiarity and proportionality, as well as the broader constitutional policy issues relating to Europe, which we have discussed earlier in the report.

Our Chair has been a member of the EC-UK Forum, which brings together the Chairs of the European and equivalent Committees in the UK Parliament (both Houses) and Devolved Legislatures, to discuss on-going and planned EU work, as well as relevant issues on the EU agenda that impact on the UK and devolved nations. Being part of this forum has been valuable and depending on decisions about the committee structure in the next Assembly and the result of the EU referendum, we believe that the Assembly should continue to be represented on the Forum.

As the UK's continued membership of the European Union is a matter for a referendum on June 23 2016, this will have an impact on the decision of the next Assembly as to whether to re-establish a European and External Affairs Committee. We note that another factor in such a decision will be the broader committee structure.

We believe that mainstreaming European issues has, in the main, worked effectively. The subject expertise that sits with the policy committees has enabled an in-depth consideration of important issues such as the Common Agricultural Policy, Common Fisheries Policy and Horizon 2020. We also believe that our work looking at issues of subsidiarity and proportionality has sat comfortably with the rest of our constitutional portfolio.

However, we are concerned that there is no committee with an oversight role to ensure that key European issues are addressed strategically. We are also aware that work by policy committees is subject to their broader scrutiny and legislative commitments, and that there is no guarantee that in the Fifth Assembly committees would be able to undertake the level of work that has been achieved in the Fourth Assembly.

There is also uncertainty about which committee should undertake some of the more representational work on behalf of the Assembly, such as regular meetings with MEPs or meeting key European officials and representatives when opportunities arise. We therefore feel there is merit in having a small committee which would have an oversight and representational role on European issues, as well as holding the Welsh Government to account for their overall EU strategy and the operation of their office in Brussels. This committee would not have to meet on a regular basis, but could operate in a manner similar to the Committee for the Scrutiny of the First Minister. Consideration of detailed European work could remain the responsibility of individual policy committees.

Recommendation 13. If the UK votes to remain in the EU, we believe that a small committee should be established with responsibility for the oversight of European work in the Assembly and to perform an 'ambassadorial' role.

Recommendation 14. If the UK votes to leave the EU, we believe that there would be a significant benefit to the Assembly establishing a committee dedicated to exploring the implications for Wales of leaving the European Union, including the detailed legal and administrative issues involved.

Working with other legislatures

Chapter 13 of Part II of the Silk Commission's report, **Empowerment and Responsibility: Legislative Powers to Strengthen Wales** highlighted the importance and benefits of strong inter-parliamentary relations and co-operation. The report recommended that:

"R.54 On the relationship between the National Assembly and UK Parliament, we recommend:

a. there should be improved inter-parliamentary cooperation to increase mutual understanding of the work of the National Assembly and both Houses of Parliament, especially in terms of committee-to-committee cooperation (including attendance by Ministers from each administration at Committees of the other legislature); information-sharing should be improved ..."

We support and welcome this recommendation.

In November 2015, we **met** concurrently with the House of Commons Welsh Affairs Committee for the first time to take evidence from academics and experts on the draft Wales Bill. We would strongly recommend that if such opportunities arise in the next Assembly for our successor committee to hold a concurrent session with the Welsh Affairs Committee, this should be fully considered. Both Committees found the sessions extremely useful.

Following this, we **shared** correspondence with the Chair of the Welsh Affairs Committee supporting his desire to explore further how the procedures at Westminster can be amended to facilitate more joint working between the two legislatures.

We responded positively to correspondence from Bruce Crawford MSP, Convenor of the Devolution (Further Powers) Committee in the Scottish Parliament and Bernard Jenkin MP, Chair of the Public Administration and Constitutional Affairs Committee in the House of Commons regarding working together on matters of common interest and believe that our successor committee should look to develop these important relationships further. This correspondence is available on our **website**.

Election of Chairs in the House of Commons

Elections to Committees were introduced in the House of Commons in June 2010 following recommendations by the Select Committee on Reform of the House of Commons set up in 2009 (the 'Wright reforms'). Since then, the chairs of departmental select committees and five other committees (Environmental Audit, Public Accounts, Public Administration, Political and Constitutional Reform and Procedure) have been elected by secret ballot of the House, using an additional vote system.

In 2011, the Procedures Committee held an inquiry into all the 2010 elections. It concluded that the move to elect candidates to key posts in the House had been right in principle as a sign of greater transparency, democracy and self-assertiveness on the part of backbenchers and had also worked well in practice.

In 2013, the Political and Constitutional Reform Committee published its report **Revisiting Rebuilding the House: the impact of the Wright reforms**. The Committee looked at the changes to Committee selection and reported that it had given them greater legitimacy and had strengthened their credibility and authority. It considered that elections for Public Bill Committees should be introduced.



Election of Assembly Committee Chairs

Under Standing Order 17, the Assembly must consider a motion tabled by the Business Committee to agree the membership and Chair of each Assembly Committee. The Chairs and membership of committees must reflect party balance in the Assembly. Party groups decide which members to allocate to committees and to Chairs where appropriate.

In October 2015, the Assembly Chair's Forum produced a **Legacy report** from Fourth Assembly Committees which set out its view that the independence of committees and committee Chairs should be strengthened in the Fifth Assembly by taking away from political groups the responsibility for their appointment and removal. In the report the Forum expressed support for the current system for allocating committee Chair positions according to party balance and agreed in principle with the election of Chairs to Assembly Committees. It recommended that:

A new process for electing committee Chairs would strengthen the independence and effectiveness of committees. Ensuring that committee Chairs cannot be removed by the political parties would also send a clear signal that scrutiny is the priority of the new Assembly.

Such an approach is used in Committees of the House of Commons (see text box).

We have noted with some disappointment that on 9 February 2016, the Business Committee, following a weighted vote, has rejected proposals for electing Chairs of Committees in the Fifth Assembly. The **minutes** state:

Business Managers considered a paper on proposed changes to the Assembly's procedure for electing Committee Chairs. By means of weighted voting, Plaid Cymru, the Welsh Conservatives and the Welsh Liberal Democrats agreed in principle to a new system of electing Committee Chairs, whereas the Minister for Government Business voted against any changes. There was therefore no majority in favour of a change of procedure.

A future committee may wish to examine the methods for appointing committee Chairs to assess the effectiveness of the current arrangements and to determine whether they could be improved.