

**National Assembly for Wales**  
Constitutional and Legislative Affairs  
Committee

## Making Laws in Wales

October 2015

Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



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# Constitutional and Legislative Affairs Committee

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.

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## Current Committee membership:



**David Melding (Chair)**  
Welsh Conservatives  
South Wales Central



**Alun Davies**  
Welsh Labour  
Blaenau Gwent



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**William Powell**  
Welsh Liberal Democrats  
Mid and West Wales



**Dafydd Elis-Thomas**  
Plaid Cymru  
Dwyfor Meirionnydd

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The following Member was also a Member of the Committee during this inquiry:



**Simon Thomas**  
Plaid Cymru  
Mid and West Wales

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## Foreword

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Good law is relevant and coherent. While the government has a general mandate for its policy platforms, not all proposals are fully relevant and coherent. It is the job of the legislature to improve the quality of legislative proposals through rigorous scrutiny.

We were not conscious of any serious dissatisfaction with the performance of the Assembly in relation to the passage of legislation overall. This is not surprising as the Assembly has shown itself to be fit for purpose as a modern legislature, and it deserves to be largely proud of its role in the making of changes for the benefit of the people of Wales. And on the basis of the evidence received from a wide range of stakeholders this self-assessment holds true.

However, it is also true that the task of keeping a legislative process effective and responsive is unremitting. Best practice must be maintained and new challenges met with a spirit of innovation. The recommendations we make in this report are aimed at delivering continuous improvement in the quality of law made by the National Assembly for the benefit of citizens in Wales.

We have particularly welcomed the full participation in the inquiry by the Welsh Government. Primary legislation involves what can at times be a slightly uncomfortable partnership between executive and legislature. The executive feels both the need and the right to secure the business for which it holds a democratic mandate; and the legislature feels the duty to subject legislation to a sufficiently searching scrutinising and revising process to ensure that it adds value, as part of the democratic process, to what could otherwise be done by Ministerial action alone. The potential for actual or perceived tension between these two perspectives has surfaced from time to time in our discussions, and it provides a connecting theme to a number of our recommendations.

In particular, we have exposed a number of issues where we feel the balance between the Assembly and the Welsh Government has not yet been struck: most notably, in relation to the division between primary and subordinate legislation, and in pressures to increase the volume of legislation overall. But we have not uncovered any deep-seated flaws in

the way in which the relationship works – and it may be that a certain element of creative tension is vital to keeping the Assembly a vibrant and effective part of Welsh governance. We hope that the Welsh Government will approach in that spirit those of our recommendations regarding enhanced clarity in relation to its internal procedures and responsibilities for legislative policy development.

We were greatly encouraged to find general agreement that legislation should be regarded as belonging to the citizen, and we appreciated the active involvement of a number of civil society groups in our inquiry. Again, we sensed no serious dissatisfaction with the Assembly’s legislative work – but some genuine concerns, to which both the Assembly and the Welsh Government need to listen, and reflect in our developing practice.

Respect for the legislative process is key to the effective rule of law. Suggestions that stakeholders feel the need to be more closely involved, and have their views and concerns more accurately reflected, should be responded to with particular care. The fact that consultation forms such a prominent part of modern government does not necessarily mean that it is seen, as has been made clear to us in evidence, as an effective method of influencing developing legislative policy.

We certainly found some reason to believe that we can do more to ensure a smooth process of engagement between the citizen, the Welsh Government and the Assembly in the production of legislation, and this forms another theme connecting a number of our recommendations. For example, pre-legislative scrutiny is not only an opportunity for the Welsh Government to satisfy the Assembly that a proposal is ready to be introduced as a Bill; it is also an opportunity for the Assembly to satisfy itself that the interests and concerns of stakeholders have been identified and reflected in the policy development. Similarly, our recommendations around consolidation of the Welsh statute book, and about improving the content of Explanatory Memoranda, are aimed at improving access to the law for the people of Wales.

At a technical level, there has been general admiration for the drafting of our legislation, and the few relatively modest recommendations that we have made in relation to aspects of the drafting process will

hopefully be seen in that context. Again, we have tended to focus less on purely stylistic issues and more on issues that reflect the underlying themes of our report. So, for example, in relation to the issue of the balance of power between the Welsh Government and the Assembly, we make recommendations about the use of wide powers to make supplemental and consequential provision and the use of relatively constrained or qualified forms of enabling provision; and in relation to underlying issues about citizen engagement and access, we make recommendations about plain language, the standardisation of terminology and the relationship between the English and Welsh texts.

We also make recommendations about the drafting and amendment processes which address both themes, being designed to increase Assembly and public confidence in the readiness of Bills for introduction and in the opportunities given to the Assembly for effective scrutiny. In particular, on this latter point, we have been mindful that the Assembly is a unicameral legislature and believe that the addition of a compulsory Report Stage would add value to the scrutiny process and lead to improvements in the quality of law the Assembly produces.

The process of conducting this inquiry has taken longer than we expected, and uncovered a wider range of specific issues than we might have predicted. But the one clear theme that dominated all our evidence-taking and deliberating sessions, and was clearly important to all of the wide range of public and private bodies and people who participated in the inquiry, was a shared commitment to constant improvement in the efficiency and effectiveness of the legislative process to work for the benefit of the people of Wales. We hope that the recommendations in our report will be treated in this spirit, and that their implementation will take a generally good process and make it even better.

## The Committee's Recommendations

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**Recommendation 1.** We recommend that the Welsh Government:

- (i) undertakes a thorough review and overhaul of its processes for the development and internal co-ordination of its legislative programme;
- (ii) ensures that effective strategic planning, monitoring, delivery and quality control mechanisms are in place to ensure fully thought through and complete Bills are introduced for scrutiny by the Assembly;
- (iii) publishes the revised governance framework for its legislative programme including the lines of accountability and decision-making processes for the preparation and sign-off of its Bills. (Page 28)

**Recommendation 2.** We recommend that the Welsh Government should:

- (i) adopt more robust policy development criteria based around those highlighted by the Law Commission;
- (ii) commit to providing earlier and appropriate consultation periods to ensure that a sufficient period is allowed to reflect the complexity and scope of each piece of proposed legislation and the need for representative consultees to seek the views of stakeholders;
- (iii) commit to explaining clearly to stakeholders how their feedback has influenced its legislative proposals, including the reasons why their views are or are not being reflected in legislative proposals;
- (iv) incorporate points (i) to (iii) above into internal guidance for use across all Welsh Government departments as an integral tool for developing legislative proposals. (Page 32)

**Recommendation 3.** We recommend that there should be a presumption in favour of publishing draft Bills. This recommendation applies to the Welsh Government and Assembly Members given leave to introduce Bills. (Page 35)

**Recommendation 4.** We recommend that the Business Committee should prepare proposals to amend Standing Order 26.6 to require Explanatory Memoranda to:

- (i) state whether a Bill was published as a draft in full or in part, and if in part, which parts;
- (ii) a detailed synopsis of how a Bill introduced has been amended from a draft Bill, and the reasons for any changes adopted;
- (iii) the reasons, if relevant, for not publishing a Bill in draft.

(Page 35)

**Recommendation 5.** We recommend that a financial memorandum is published alongside all draft Bills, containing information about the costs of the current policy and legislative position and the costs after legislation. This recommendation applies to the Welsh Government and Assembly Members given leave to introduce Bills. (Page 36)

**Recommendation 6.** We recommend that the Welsh Government:

- (i) reviews its approach to the balance it adopts between what is contained on the face of a Bill and what is left to subordinate legislation;
- (ii) publishes the outcome of that review, including the principles that it will apply to the future drafting of Bills to ensure that an appropriate balance is struck. (Page 41)

**Recommendation 7.** We recommend that the Welsh Government considers the available techniques for making the delegation of powers more acceptable, including the expression on the face of the Bill of the purposes of, and constraints on, delegated powers"

(Page 42)

**Recommendation 8.** We recommend that powers to make supplemental or consequential provision should not be included routinely in Bills, and should be reserved for cases where there are special reasons why the Welsh Government needs to deal with minor or consequential issues through delegated legislation. Such reasons must be clearly set out in the Explanatory Memorandum. (Page 42)

**Recommendation 9.** We recommend that the Welsh Government commits to improving the quality of legislation it introduces by:

- (i) adopting the principles advocated by the Law Commission and highlighted in paragraph 113 of this report;
- (ii) involving the Office of the Legislative Counsel as early in the policy development process as practicable in each case. (Page 45)

**Recommendation 10.** We recommend that the Welsh Government must introduce Bills that can be reasonably considered to be fully developed at the point of introduction. (Page 46)

**Recommendation 11.** We recommend that the Welsh Government, in collaboration with the Law Commission, develops a long-term plan for consolidating law in Wales. (Page 50)

**Recommendation 12.** We recommend that the Business Committee commits to preparing a Standing Order on consolidation Bills, ideally in time for the Fifth Assembly. The aim of the Standing Order should be to provide expedited passage for Bills which are certified by Legislative Counsel as not involving any substantive change of law (Page 50)

**Recommendation 13.** We recommend that the Business Committee explores the scope for a simplified procedure for law reform Bills implementing Law Commission reports. (Page 50)

**Recommendation 14.** We recommend that the Law Commission takes account of the views of stakeholders who have contributed to our inquiry as part of their project on the form and accessibility of the law applicable in Wales. (Page 52)

**Recommendation 15.** We recommend that the Welsh Government leads on the production of a standard terminology database, working closely with the Welsh Language Commissioner. (Page 53)

**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. (Page 55)

**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. (Page 59)

**Recommendation 18.** We recommend that the Welsh Government should review its approach to Explanatory Memoranda and publish the outcome of that review in readiness for the Fifth Assembly. (Page 65)

**Recommendation 19.** We recommend that the Business Committee reviews the requirements of Standing Order 26.6 before the Fifth Assembly and in particular considers:

- (i) including a requirement that the Member in charge signposts where precisely in the Explanatory Memorandum the Standing Order requirements can be found (for example, by means of an appropriate index);
- (ii) the suggestions made by the Auditor General for Wales about how Standing Order 26.6(vi) could be improved to provide clearer financial information;
- (iii) including a requirement that the Member in charge of a Bill explains how they have taken account of the human rights convention in preparing the Bill;
- (iv) including a requirement that the Member in charge of a Bill provides a table of derivations. (Page 66)

**Recommendation 20.** We recommend that the Business Committee prepares proposals to amend the Assembly's Standing Orders to require Keeling Schedules to accompany a Bill on introduction (where it proposes to amend existing primary legislation). (Page 66)

**Recommendation 21.** We recommend that the Business Committee, following an appropriate period of time in the Fifth Assembly, reviews the need for a minimum period to be included in Standing Orders for the scrutiny of Bills at Stage 1. (Page 73)

**Recommendation 22.** Given that the Assembly is a unicameral legislature, we recommend that the Business Committee prepares proposals to amend the Assembly's Standing Orders to provide a compulsory Report Stage for the scrutiny of every Bill, unless the Assembly, by resolution on a two-thirds majority, decides otherwise. (Page 80)

**Recommendation 23.** We recommend that the Assembly Commission and the Welsh Government explore the feasibility of putting in place arrangements for the secondment of staff from the Office of the Legislative Counsel to the Assembly Commission. (Page 82)

**Recommendation 24.** We recommend that further work is undertaken by the Business Committee to inform consideration of amending Standing Orders to require that all amendments tabled to a Bill (including Welsh Government amendments) are accompanied by text that explains their purpose and effect. (Page 83)

**Recommendation 25.** we recommend that the Assembly Commission should ensure that it publishes summaries of amending Stages of all Bills within an appropriate period of time after the completion of that Stage's proceedings. (Page 86)

**Recommendation 26.** we recommend that the Business Committee reviews the adequacy of the procedure that permits the by-passing of Stage 1 scrutiny and the procedure that allows the use of Welsh Government Emergency Bills. In particular it should consider:

- (i) a requirement for the Business Committee to publish the reasons for its decision under Standing Order 26.9 to permit a Bill to bypass Stage 1 scrutiny in committee, within 2 working days of making that decision;

- (ii) a requirement that, in tabling a motion proposing that a government Bill be treated as a government Emergency Bill under Standing Order 26.95, the Member in charge must lay a statement explaining why it should be treated as such and the costs and other consequences of not doing so. (Page 90)

**Recommendation 27.** We recommend that committees aim to:

- (i) incorporate consideration of post-legislative scrutiny into their planning of the scrutiny of individual Bills referred to them by the Business Committee;
- (ii) re-visit their proposed approach after Stage 4 has been completed, taking into account issues raised during scrutiny. (Page 94)

**Recommendation 28.** We recommend that the Welsh Government and Assembly Commission review their approaches to public engagement on the legislative process and publish the outcome of their respective reviews in readiness for the Fifth Assembly. (Page 95)

**Recommendation 29.** We recommend that the Assembly Commission works closely with the National Archives and the Welsh Government to improve the accessibility of Welsh legislative texts. As part of this process, the Assembly Commission should report to this Committee on the action it is seeking to take before the end of the Fourth Assembly. (Page 99)

**Recommendation 30.** We recommend that the Business Committee reviews the process for Member Bills taking account of the evidence we have received from Assembly Members and their suggestions for improving the process. (Page 102)

**Recommendation 31.** We recommend that the Business Committee in considering the committee structure to be adopted in the Fifth Assembly should:

- (i) consider a range of options identifying the pros and cons of each;
- (ii) take account of the practical experiences of Assembly committees;

(iii) publish a report of its deliberations including its final recommendation. (Page 104)

**Recommendation 32.** We recommend that the Assembly Commission invests resources in capturing data relevant to the operation and function of scrutiny in the Assembly as a means of facilitating the decision-making process and ensuring the efficient use of time and resources in the delivery of services to Assembly Members. (Page 105)

**Recommendation 33.** We recommend that the Welsh Government works closely with the legislation software supplier and the Assembly Commission to ensure it finds a solution to the problems it has identified. (Page 106)

**Recommendation 34.** We recommend that the Welsh Government fully explores the practicalities and feasibility of the establishment of a Queen's Printer for Wales. (Page 107)

# **1. Remit, terms of reference and approach**

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## **The Committee's remit**

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21<sup>1</sup> and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers.
2. As part of this role, we consider and report on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

## **Terms of reference**

3. In Spring 2014, the Committee agreed to undertake an inquiry into the making of laws in the Fourth Assembly. The agreed terms of reference for the inquiry were to consider how laws are being made in the Fourth Assembly, in particular by:
  - considering the principles applied to the legislative drafting of Government Bills, and amendments, for the Assembly and identifying respects in which they conform with or depart from best practice in the United Kingdom and comparable jurisdictions;
  - considering the principles applied to the legislative drafting of Members’ Bills, and amendments, for the Assembly and identifying respects in which they conform with or depart from best practice in the United Kingdom and comparable jurisdictions;
  - considering the impact of legislative competence on the drafting of Bills (including the possible impact of alternative methods of defining legislative competence);
  - reviewing the purpose and effect of Explanatory Memoranda which accompany Bills, and other explanatory or background material;

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<sup>1</sup> Standing Orders are the Assembly’s procedural rules and are available on the Assembly’s [website](#).

- reviewing the effectiveness of the opportunities provided by Standing Orders for the scrutiny of Bills;
- considering the time allowed for the scrutiny of Bills, and other matters relating to Bill procedure;
- reviewing the scope and effectiveness of arrangements for “fast-tracking” Bills within the existing Assembly procedures;
- considering the capacity of the Welsh Government and National Assembly to legislate;
- considering issues relating to the management by the Welsh Government of its legislative programme;
- considering any other matters relating to the making of legislation;
- making recommendations.

### **Approach to the inquiry**

4. The Committee held an initial consultation exercise and issued a call for evidence asking both general and detailed questions relating to the above issues. The consultation ran from April until June 2014.

5. A list of those who responded to the consultation exercise is available at Annex 1.<sup>2</sup> Further details of the consultation and responses can be found on the [Committee pages](#) of the Assembly website.

6. Daniel Greenberg, a barrister specialising in legislation, advised the Committee on its work.

7. In October 2014, the Committee held a stakeholder event (attendees are listed at Annex 2) to consider the following topics:

- drafting techniques;
- policy development and explanation;
- the balance between primary and secondary legislation; and
- Assembly scrutiny.

8. The Committee held oral evidence sessions in the Spring and Summer 2015. Details are available at Annex 3.

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<sup>2</sup> In the report, written evidence is cited as ‘ML’ followed by the number attributed to the response. Full details are available at Annex 1.

9. Following the evidence gathering process, the Committee shared the draft report and initial findings with an expert panel:

- Marie Brousseau-Navarro;<sup>3</sup>
- Professor Thomas Glyn Watkin;<sup>4</sup> and
- Huw Williams.<sup>5</sup>

10. The panel considered the draft report and reflected on the evidence received using their expert knowledge and experience in the field. Their invaluable insight has informed the preparation of the final version of the Committee's report.

11. We are very grateful to all those who have contributed to our work.

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<sup>3</sup> A constitutional law expert and co-founder of the constitutional training and consultancy firm, YourLegalEyes, which provided written evidence to the inquiry,

<sup>4</sup> Honorary Professor of Law at Bangor University and Cardiff University; former First Welsh Legislative Counsel to the Welsh Government and a Fellow of the Learned Society of Wales, which provided written evidence to the inquiry.

<sup>5</sup> A solicitor and the Lead Partner, Public Law at the law firm Geldards LLP

## 2. Introduction

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### The need for an inquiry

12. We decided to undertake this inquiry for the following reasons:

- by December 2013, the Assembly's primary legislative powers, gained following a referendum in early 2011, had been in use for about two and a half years. During this time, trends started to emerge, some of which echoed the findings of a report by the Constitutional Affairs Committee during the Third Assembly.<sup>6</sup> These trends included the amount of detail being placed on the face of Bills and the procedures being used for the making of subordinate legislation. We expressed concerns on a number of occasions that the Welsh Ministers were bringing forward Bills before the policy had been fully developed and leaving important details to be brought forward by subordinate legislation at a later date.<sup>7</sup>
- we recognised that, following the acquisition of the new law-making powers for the Fourth Assembly, it would be sensible to review the way in which laws were being made in readiness for the Fifth Assembly.

13. We believe that the first Assembly of full law-making powers deserves a serious, thorough and reflective report.

14. We approached our work with the clear intention of identifying ways in which aspects of the law-making process could be improved.

### The Welsh Government's evidence

15. We welcome the openness of the Welsh Government's evidence and the positive way in which it has sought to engage with our work. We view this as a clear sign that the Welsh Government is willing to listen carefully to the outcome of our work and to give serious consideration to our recommendations.

16. We also believe this represents a commitment on behalf of the Welsh Government to work in partnership with the Assembly to

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<sup>6</sup> Constitutional Affairs Committee, *Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years*, February 2011

<sup>7</sup> For example, Constitutional and Legislative Affairs Committee, *Report on the Social Services and Well-being (Wales) Bill*, July 2013

improve the law-making process, and as a consequence, the quality of the laws made.

### **General observations**

17. We have heard evidence drawing attention to a number of ways in which the process of legislating for Wales is seen generally as appropriate and effective. And we have heard evidence on a number of aspects of the process where improvements appear both necessary and possible.

18. We note that positive comments have been made by many respondents, for example, regarding the quality of the Welsh Government's drafting skills,<sup>8</sup> the conduct of legislative scrutiny in the Assembly<sup>9</sup> and the Assembly's webpages about legislation.<sup>10</sup>

19. Nevertheless, as is to be expected from a relatively young system of law-making in its first full legislative Assembly, we believe that there is scope for improvement and development in many areas, building on the foundations already in place.

20. Our report addresses these issues by reference to six broad areas, although many of them overlap and are clearly interdependent:

- the Welsh Government's overall approach and management of the legislative programme;
- preparation and drafting of Bills;
- Explanatory Memoranda;
- legislative scrutiny;
- accessibility of legislation; and
- other issues.

21. Making the range of improvements we identify within these areas will, collectively, we believe, raise the overall quality of the Assembly's legislative output.

22. We are also aware that our work overlaps with projects currently being undertaken by the Law Commission, most notably regarding the

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<sup>8</sup> ML7; Constitutional and Legislative Affairs ("CLA") Committee, RoP paragraphs [122;139-140], 19 January 2015

<sup>9</sup> ML3

<sup>10</sup> ML12

form and accessibility of the law applicable in Wales.<sup>11</sup> This work includes looking at the benefits and drawbacks of different drafting styles and practices.<sup>12</sup> We hope our report will be considered as a useful contribution to that work.

23. The Law Commission indicated during its evidence session that it would like to develop closer links with the Committee and appear before us every six months to update us on its work.<sup>13</sup> We welcome this suggestion and believe our successor committee will benefit from forging a close-working relationship with the Law Commission.

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<sup>11</sup> Law Commission, Consultation Paper No 223, *Form and Accessibility of the Law Applicable in Wales: A Consultation Paper*, July 2015

<sup>12</sup> CLA Committee, RoP paragraph [175], 16 March 2015

<sup>13</sup> CLA Committee, RoP paragraph [251], 16 March 2015

### **3. The Welsh Government’s overall approach and management of the legislative programme**

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#### **Building on the current position**

24. We sensed from the Welsh Government’s evidence a recognition that it needs to reflect on its approach to law-making since May 2011 and that there is a desire on its part to improve the quality of legislation.<sup>14</sup>

25. If the Welsh Government is to improve, it must commit to listening to suggestions for improvement made or inspired by stakeholders who are affected by the legislation on a daily basis. Without this commitment, it is extremely unlikely that best practice can be achieved and advances can be made in the quality of the law that the Assembly produces.

26. We therefore welcome the Welsh Government’s acknowledgement of the need to improve and learn lessons.<sup>15</sup>

27. The Assembly is a young, unicameral<sup>16</sup> institution whose experience of law-making is very recent. The Welsh Government is itself developing its approach to drafting laws and, as the Learned Society of Wales has highlighted, is adjusting to enhanced legislative competence.<sup>17</sup>

28. There are particular challenges in making Welsh laws when so many existing laws are interwoven between England and Wales. The Presiding Officer noted the potential difficulties this could pose if weaknesses from existing laws are imported,<sup>18</sup> while another stakeholder spoke of how drafting Welsh laws is constrained “by being a prisoner of what has gone before”, which can hamper the development of our own way of thinking.<sup>19</sup> We discuss the specific issue of the consolidation of Welsh laws in Chapter 4 of the report.

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<sup>14</sup> CLA Committee, RoP paragraph [5], 17 November 2014; CLA Committee, RoP paragraph [54], 16 March 2015

<sup>15</sup> CLA Committee, RoP paragraphs [54 and 73], 16 March 2015

<sup>16</sup> A unicameral system is a parliamentary system consisting of a single legislative chamber. The UK Parliament is bicameral because both the House of Commons and the House of Lords are involved in the process of making new laws.

<sup>17</sup> ML3

<sup>18</sup> CLA Committee, RoP paragraph [29], 24 November 2014

<sup>19</sup> Stakeholder seminar, 13 October 2014

29. There is naturally a temptation to use the Westminster model as a default for both the process and the content of legislation without adapting to the circumstances of the Assembly and of Wales.

30. We have no particular issue with using models of legislating and drafting from elsewhere, and indeed would encourage looking to other jurisdictions for best practice as the Welsh Government is doing.<sup>20</sup> However, we believe there is greater scope to develop a distinctive model that reflects the circumstances that exist in Wales, in particular taking account of issues around the capacity to scrutinise. We believe that the recommendations we make will help in achieving this aim.

### **Volume of legislation**

31. The opening page of the Welsh Government's evidence says that it is "notable" that so far in the Fourth Assembly about 700 pages of primary legislation have been passed and that "on average the legislative output of the Government has doubled during the Assembly".<sup>21</sup> The Welsh Government also highlighted during its oral evidence sessions the volume of legislation it has produced.<sup>22</sup>

32. In our view the volume of legislation produced should not be regarded as a measure of success. The quality and effectiveness of the laws produced is more important. Indeed, for many citizens and businesses, the measure of a government's success is how much it manages to perform necessary functions without imposing new legislative burdens.

33. Improving the quality of legislation is likely, in part, to depend on reducing the pressure to produce volumes of new legislation for the sake of it or viewing volume as a measure of executive achievement.

34. Assessing the need for legislation with the intention of producing fewer items, but ensuring that each is clearer, fuller and completely thought-through before introduction will, we believe, be welcomed by stakeholders. It will ensure a more efficient use of Welsh Government and Assembly resources.

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<sup>20</sup> ML13; CLA Committee, RoP paragraph [40], 17 November 2014

<sup>21</sup> ML13

<sup>22</sup> CLA Committee, RoP paragraph [6], 17 November 2014; CLA Committee, RoP paragraph [37], 23 March 2015

35. We wish to stress that we are not seeking to downplay the Welsh Government’s achievements in bringing forward important legislation during the Fourth Assembly. We also recognise that concerns were raised about the lack of legislation in the first year. Getting the balance of legislative output right is going to take time. It is a process which should involve businesses and citizens in order to help identify the relevant costs and benefits of proposed new laws. This in turn can help determine when and how much to legislate.

36. We see this as an opportune time to highlight the importance of questioning the need for legislation, as well as ensuring that resources are used wisely to produce clearer and higher quality laws.

### **Internal Welsh Government approach and co-ordination**

37. The Learned Society of Wales has made some interesting observations about the Welsh Government’s approach to law-making, arguing that the pre-2007 context (in which legislative experience related to the making of subordinate legislation) has:

“... shaped the Government’s perspective on these matters with the experience of the working of Part 3 and Schedule 5 between 2007 and 2011 also playing a significant part.”<sup>23</sup>

38. In particular, the Society said the limited experience of law-making up until 2007:

“... may have engendered a view of primary legislation as the vehicle by which ministers obtained executive functions and the powers to make subordinate legislation, by both of which the work of government as administration could proceed. Working within that context might be termed, without any pejorative intent, the comfort zone for Welsh government.”<sup>24</sup>

39. It added that the advent of the acquisition of legislative powers through Legislative Competence Orders (LCOs) during the Third Assembly may have “exacerbated this problem and thereby entrenched

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<sup>23</sup> ML3

<sup>24</sup> ML3

this perspective<sup>25</sup> and:

“This may explain why, once powers to legislate had been conferred, the subsequent legislative proposals frequently fell back on providing ministers with a framework within which to produce subordinate legislation, insufficient time having been left to produce robust policy proposals for incorporation on the face of the primary enactment. Circumstances may therefore have conspired to increase the attractions of the historical comfort zone, and militate against moving on from it.”<sup>26</sup>

40. If this is a fair assessment of the culture that currently exists in the Welsh Government and how it has developed, it fits with our concerns about the balance between what is included on the face of the Bill and what is left to subordinate legislation. It may also explain some of the concerns raised by stakeholders that policy has not been fully developed prior to a Bill’s introduction.<sup>27</sup> We discuss both issues in Chapter 4 of the report.

41. The Welsh Government noted the “rigorous process involved in the development of effective policies, and where relevant supporting primary legislation”,<sup>28</sup> adding:

“This is one reason why the Welsh Government has developed a comprehensive legislative development training programme and adopted a flexible resourcing policy for key work areas.”<sup>29</sup>

42. The Counsel General,<sup>30</sup> the Minister for Finance and Government Business,<sup>31</sup> the First Minister<sup>32</sup> and the First Legislative Counsel<sup>33</sup> all explained how the internal processes operate in developing a Bill for introduction.

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<sup>25</sup> ML3

<sup>26</sup> ML3

<sup>27</sup> For example, ML17

<sup>28</sup> ML13

<sup>29</sup> ML13

<sup>30</sup> For example, CLA Committee, RoP paragraphs [12, 24, 26, 34 and 35], 17 November 2014

<sup>31</sup> For example, CLA Committee, RoP paragraphs [46-48; 58-68], 16 March 2015

<sup>32</sup> For example, CLA Committee, RoP paragraphs [37-48; 67-78], 23 March 2015

<sup>33</sup> For example, CLA Committee, RoP paragraphs [46-67], 9 March 2015

43. This would appear to have been an evolving process,<sup>34</sup> which has included the creation of a Legislation Programme Board and in the case of the Office of the Legislative Counsel, an increase in staffing.<sup>35</sup>

44. Considering and comparing this evidence appears to show a lack of clarity or transparency surrounding some of the processes involved in the life-cycle of preparing a Bill and the Ministerial clearance responsibilities for them. If, as appears, there are some uncertainties about internal responsibilities for parts of the legislative development and clearance processes, there may be a corresponding confusion about accountability.

45. In addition, our own scrutiny of the Welsh Government's legislation, notably in respect of the Well-being of Future Generations Bill,<sup>36</sup> and the number of Welsh Government amendments correcting drafting errors between Welsh and English texts,<sup>37</sup> suggests that some internal processes and quality controls have not been particularly effective.

46. Overall, the evidence we have considered leads us to the view that there is a clear need for a better, more rigorous and structured process of control for the Welsh Government's internal co-ordination of the preparation of the Bills it introduces. We also believe there is a need for the process to be published so as to help the citizen understand and influence it as appropriate.

47. As we discuss in Chapter 4, we consider more time should be spent on, and greater importance attached to, policy development (and the role of stakeholders in particular) to inform the content of Bills. In addition, we believe a greater emphasis should be placed on quality control, particularly prior to a Bill's introduction.

48. We recognise that preparing and drafting Bills is not easy and offers considerable challenges, particularly as it involves so many areas of expertise.

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<sup>34</sup> CLA Committee, RoP paragraph [59], 9 March 2015; CLA Committee, RoP paragraph [46], 16 March 2015, CLA Committee, RoP paragraphs [47-48], 23 March 2015

<sup>35</sup> ML13

<sup>36</sup> Constitutional and Legislative Affairs Committee, *Report on the Well-being of Future Generations (Wales) Bill*, November 2014

<sup>37</sup> ML17

49. It is imperative therefore that the Welsh Government adopts an efficient, organised and meticulously planned approach. Key players— Ministers, Bill managers, Legislative Counsel, instructing lawyers and policy officials— will need to be clear about their roles and responsibilities within the Bill preparation process. This should include a clear understanding of where accountability lies and the lines of communication needed between them all. Equally, all these functions need to be adequately staffed and resourced.

**Recommendation 1: We recommend that the Welsh Government:**

- (i) undertakes a thorough review and overhaul of its processes for the development and internal co-ordination of its legislative programme;**
- (ii) ensures that effective strategic planning, monitoring, delivery and quality control mechanisms are in place to ensure fully thought through and complete Bills are introduced for scrutiny by the Assembly;**
- (iii) publishes the revised governance framework for its legislative programme including the lines of accountability and decision-making processes for the preparation and sign-off of its Bills.**

50. We have found some of the arguments put forward by the Welsh Government during the inquiry to be surprising. In some cases it has suggested to us, on occasion, a lack of understanding about the differing roles of the executive and the legislature, and the boundaries between them. We believe that this issue needs to be addressed and that recommendation 1 could provide a possible mechanism for doing so.

51. Many of the other recommendations we make will contribute to the delivery of recommendation 1.

## 4. Preparation and drafting of Bills

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### Preparation

#### *Policy development*

52. Before starting to prepare a Bill, the Welsh Government highlighted the importance of having clearly defined policy objectives and a strong evidence base to underpin them.<sup>38</sup>

53. The Welsh Government explained its approach to policy development, acknowledging that an assessment of whether legislation is required at all is an essential part of the process.<sup>39</sup> It set out a five-stage policy development cycle involving:

“(1) evaluating the current position, (2) considering the case for change, (3) identifying options for change, (4) choosing a preferred option and (5) implementing the change.”<sup>40</sup>

54. It also set out its approach to consultation,<sup>41</sup> and provided a copy of its protocol<sup>42</sup> for consultations on White Papers<sup>43</sup> and draft Bills.

55. Ultimately, it is the execution of the Welsh Government’s approach that is important and views about its effectiveness were mixed.

56. While the Welsh Local Government Association said that the Welsh Government’s consultation on policy development was “pretty effective”, it did call for more consultation and “improved consistency across departments”.<sup>44</sup> In particular, it called for a 12-week consultation for policy and legislative proposals to allow informed engagement.<sup>45</sup> YourLegalEyes (a constitutional consultancy) suggested

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<sup>38</sup> ML13

<sup>39</sup> ML13

<sup>40</sup> ML13

<sup>41</sup> ML13; CLA Committee, RoP paragraph [11], 23 March 2015; CLA Committee, RoP paragraphs [18, 39 and 42], 16 March 2015

<sup>42</sup> Letter from Jane Hutt AM, Minister for Finance and Government Business to David Melding AM, Chair of the Constitutional and Legislative Affairs Committee, 16 April 2015

<sup>43</sup> White Papers are Government documents setting out details of future policy on a particular subject. A White Paper will often contain outline proposals for a Bill, allowing an opportunity to gather feedback to help inform the drafting of that Bill.

<sup>44</sup> CLA Committee, RoP paragraph [198], 19 January 2015

<sup>45</sup> ML12

a two to three month time period,<sup>46</sup> while Estyn called for early engagement with stakeholders.<sup>47</sup>

57. It was disconcerting to read the views of UCAC (Undeb Cenedlaethol Athrawon Cymru), who expressed frustration at the lack of influence in the process:

“In general, in the area of education, there is no lack of consultation when developing policies. However, it is fairly common for many stakeholders to have responded to a consultation, or even a series of consultations on a particular policy issue, and possibly to have voiced the same opinion in meetings with politicians and/or civil servants, and to have sent correspondence on that issue, only to discover that their efforts have had no influence. The problems foreseen and forewarned by the stakeholders come to light after passing the legislation and implementing the policies. An example of this was the deregulation of the further education sector (Further and Higher Education (Governance and Information) (Wales) Act 2014) ...”<sup>48</sup>

58. They also felt that there was a lack of consistency on when White Papers were produced, adding that they didn’t “know the logic for deciding to publish such a paper, or not”.<sup>49</sup>

59. YourLegalEyes highlighted a particular concern with one White Paper and it shows the kind of situation we believe the Welsh Government should avoid. They said:

“We wished that the consultation documents were sometimes more precise and intelligible, in particular in relation to the Environment Bill White Paper. We suggest that such documents should address more clearly what the current law says about a subject, why it is considered that it does not meet current requirements and how the Member in charge of a Bill (AM or government) seeks to remedy this. Sometimes it is difficult to

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<sup>46</sup> ML11

<sup>47</sup> ML2

<sup>48</sup> ML7

<sup>49</sup> ML7

understand from the policy documents why a present law needs changing (Environment Bill).”<sup>50</sup>

60. SOLACE Wales, the Welsh branch of the Society of Local Authority Chief Executives and Senior Managers, highlighted the need for better development of the financial implications of new legislation:

“The process for assessing the resource impacts of new legislation, both within the executive and the legislative functions, is in its infancy. The system of Regulatory Impact Assessments (RIAs) is under-developed and Solace would support a more forward planned system of assessing the resource requirements of intended legislation both at the publication of legislative programmes, and in the researching and drafting of individual pieces of legislation ... themselves. In informal discussions ... the need for a more robust and evidential approach to resource forecasting has been recognised.”<sup>51</sup>

61. The Welsh Language Commissioner raised concerns that the Welsh language does not seem to be considered as the Welsh Government develops its legislation,<sup>52</sup> in particular through the proposals it subjects to public consultation.<sup>53</sup> They outlined principles that they believe should be followed in developing legislation and in consulting on proposals.<sup>54</sup>

62. There may be scope for committees to help inform and shape the development of legislative proposals. For example, in 2012, the Communities, Equality and Local Government Committee undertook an inquiry<sup>55</sup> into the Welsh Government’s historic environment policy in anticipation of the introduction of a Heritage Bill, announced as part of the Welsh Government’s legislative programme.<sup>56</sup>

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<sup>50</sup> ML11

<sup>51</sup> ML15

<sup>52</sup> ML10; CLA Committee, RoP paragraph [115], 9 February 2015

<sup>53</sup> ML10

<sup>54</sup> ML10

<sup>55</sup> Communities, Equality and Local Government Committee, *Inquiry into the Welsh Government’s Historic Environment Policy*, March 2013

<sup>56</sup> Welsh Government Oral Statement, *Statement on Legislative Priorities*, Record of Proceedings, 14 June 2011

63. We believe that consultation documents should explain clearly why it is necessary to legislate, as well as the policy basis and evidence that underpins the legislative proposals.

64. In light of the views we heard, we are attracted to the more robust policy development criteria advocated by the Law Commission as a means of promoting better legislation. It stated:

“We consider that better legislation can be promoted by:

- identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;
- formulating well thought-through policy objectives, with transparent impact assessment;
- carefully assessing whether a legislative or non-legislative solution would be more appropriate; and
- setting aside adequate time and resources for pre-introduction public consultation and solution-testing.”<sup>57</sup>

**Recommendation 2: We recommend that the Welsh Government should:**

- (i) adopt more robust policy development criteria based around those highlighted by the Law Commission;**
- (ii) commit to providing earlier and appropriate consultation periods to ensure that a sufficient period is allowed to reflect the complexity and scope of each piece of proposed legislation and the need for representative consultees to seek the views of stakeholders;**
- (iii) commit to explaining clearly to stakeholders how their feedback has influenced its legislative proposals, including the reasons why their views are or are not being reflected in legislative proposals;**
- (iv) incorporate points (i) to (iii) above into internal guidance for use across all Welsh Government departments as an integral tool for developing legislative proposals.**

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<sup>57</sup> ML18

65. We believe that the Welsh Government’s protocol for consulting on White Papers and draft Bills should also be included in the internal guidance.

### *Pre-legislative scrutiny*

66. In the context of this report, we consider pre-legislative scrutiny to be the scrutiny of a draft Bill issued for consultation by the Welsh Government.<sup>58</sup>

67. We agree with the Presiding Officer that pre-legislative scrutiny is an absolutely vital part of the legislative process,<sup>59</sup> especially in a unicameral legislature.<sup>60</sup>

68. There were many other advocates of the use of draft Bills. Consultees welcomed them because they:

- indicate legislative intent;<sup>61</sup>
- allow earlier engagement in the legislative process;<sup>62</sup>
- highlight important or contentious issues early;<sup>63</sup> and
- provide more opportunity to influence.<sup>64</sup>

69. The Auditor General for Wales supported the use of draft Bills and felt that financial information should be available when pre-legislative scrutiny takes place.<sup>65</sup> He commented:

“If you’ve got a very clear pre-legislation stage, I think it aids the scrutiny process.”<sup>66</sup>

70. We have noted the Welsh Government’s view that draft Bills could be used where a bill is particularly complex<sup>67</sup> or in areas where there are known to be areas of disagreement or controversy.<sup>68</sup> The Law Commission also indicated that long, detailed and complex bills would

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<sup>58</sup> Or in the case of a Member Bill, the Member in charge (see footnote 213)

<sup>59</sup> CLA Committee, RoP paragraph [57], 24 November 2014

<sup>60</sup> ML17

<sup>61</sup> ML16

<sup>62</sup> ML12; ML17

<sup>63</sup> CLA Committee, RoP paragraph [240], 9 March 2015

<sup>64</sup> CLA Committee, RoP paragraph [31], 19 January 2015

<sup>65</sup> CLA Committee, RoP paragraphs [66, 70-71], 18 May 2015

<sup>66</sup> CLA Committee, RoP paragraph [76], 18 May 2015

<sup>67</sup> ML13

<sup>68</sup> CLA Committee, RoP paragraph [13], 23 March 2015

benefit from pre-legislative scrutiny while shorter Bills (an example cited was one with 12 sections) would not.<sup>69</sup>

71. There are differing opinions about what constitutes a complex bill. Higher Education Wales felt that the Higher Education (Wales) Bill, given its importance and complexity should have been published as a draft Bill; the consultation exercise that did take place, in its view, lacked sufficient clarity to comment on meaningfully.<sup>70</sup>

72. Similar arguments apply to the issue of whether a Bill is controversial or not. Controversial to whom and who makes that judgement? We remain unconvinced by the suggestion of the Welsh Government that for Bills with “uncontroversial provisions” or “where time is of the essence”, “further consultation or scrutiny would either be inappropriate, disproportionate or not possible.”<sup>71</sup> The prime driver should always be following a process that delivers the best quality law. Rushed legislation is rarely good legislation.

73. As a general principle, the complexity or controversial nature of a Bill (either in draft or following introduction) is most appropriately judged by a committee having undertaken scrutiny (pre-legislative and / or Stage 1<sup>72</sup>), rather than by the proposer of the legislation.

74. In our view, draft Bills should be laid before the Assembly. They will enable formal scrutiny by a committee and provide an opportunity for Assembly Members to consider, take advice, offer comments and prepare for effective scrutiny of the Bill as introduced.

75. We therefore believe, given the support for pre-legislative scrutiny and the potential benefits to the quality of law produced, that there should be a presumption in favour of draft Bills being published (for government and non-government Bills). There should also be transparency about the reasons for not doing so. We believe that this transparency can be delivered by including appropriate information in Explanatory Memoranda.

76. Flintshire County Council observed that “sometimes the quality of legislation seems to bear no resemblance to the gestation period”, with Bills subject to standard legislative scrutiny procedures still

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<sup>69</sup> CLA Committee, RoP paragraph [295], 16 March 2015

<sup>70</sup> ML1

<sup>71</sup> ML13

<sup>72</sup> See Chapter 6 for a description of the stages involved in the legislative process.

containing drafting errors or poor drafting.<sup>73</sup> We believe that the use of draft Bills could contribute to alleviating this problem.

77. In making the recommendations below, we wish to make it clear that the use of draft Bills should never be given as a reason for bypassing Stage 1 scrutiny in committees. Consultation, led, on its terms, by the Welsh Government on a draft Bill is an *entirely different* process from consultation led by an Assembly Committee on a formally introduced Bill. Once a draft Bill has been considered, Stage 1 offers the opportunity for a committee to consider and report on the extent to which pre-legislative scrutiny has affected the Bill as introduced.

78. Our comments in Chapter 6 about Stage 1 of the legislative process and also about curtailed scrutiny provide further commentary on these issues.

**Recommendation 3: We recommend that there should be a presumption in favour of publishing draft Bills. This recommendation applies to the Welsh Government and Assembly Members given leave to introduce Bills.**

79. In view of this recommendation, the Business Committee will need to consider extending the time available for an Assembly Member to introduce a Bill having been given leave to proceed, which currently stands at nine months.<sup>74</sup>

**Recommendation 4: We recommend that the Business Committee should prepare proposals to amend Standing Order 26.6 to require Explanatory Memoranda to:**

- (i) state whether a Bill was published as a draft in full or in part, and if in part, which parts;**
- (ii) a detailed synopsis of how a Bill introduced has been amended from a draft Bill, and the reasons for any changes adopted;**
- (iii) the reasons, if relevant, for not publishing a Bill in draft.**

80. We note and agree with the comments of the Auditor General for Wales regarding the provision of financial information at the time of publication of a draft Bill. We do not consider this to be an onerous

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<sup>73</sup> ML6

<sup>74</sup> Standing Order 26.93

task as this information should be readily available given that it is integral to the development of policy and legislative proposals. We also believe that it will aid the financial scrutiny of a Bill, a concern for many consultees and which we discuss further in Chapter 6.

**Recommendation 5: We recommend that a financial memorandum is published alongside all draft Bills, containing information about the costs of the current policy and legislative position and the costs after legislation. This recommendation applies to the Welsh Government and Assembly Members given leave to introduce Bills.**

***Balance between primary and secondary legislation***

81. One of the principal concerns in our reports on Bills has been the level of detail provided on the face of Bills and the level left to subordinate legislation.

82. We have frequently reported that the balance is not right and too much detail is being left to subordinate legislation, creating what we have been calling framework Bills. We have not accepted some of the arguments used by the Welsh Government to justify such a practice, such as the need for future-proofing and flexibility, when reporting on such Bills.

83. As we have noted in Chapter 3, contributing factors to the cause of this practice may include the culture that has arisen in the Welsh Government and incomplete development of the policy underpinning the legislation, perhaps for reasons of timing.

84. In addition, we have noted that detail about the likely content of subordinate legislation has been included in the Welsh Government's Statements of Policy Intent that are published alongside Bills. In our view some of that detail could usefully appear on the face of the Bill and such Statements of Policy Intent should not be seen as a substitute for doing so.

85. The Welsh Government told us there is merit in keeping Bills clear, simple and as short as possible, "in other words keeping them less cluttered by detail".<sup>75</sup> It also said that it was mindful of the Committee's recommendations on the matter and "the importance of

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<sup>75</sup> ML13

moving away from framework Bills”.<sup>76</sup> However, in what seemed to us to be a contradiction, it later went on to say that:

“Generally speaking the Government considers that the correct balance has been struck during this Assembly, though remains conscious of the criticism it has received at times in this respect.”<sup>77</sup>

86. This view was re-iterated by the First Minister.<sup>78</sup> When considering what is going to appear on the face of the Bill, he said:

“In terms of deciding how we should move forward, then we have to take into account how much flexibility there should be in certain sections of a Bill. In certain part of any Bill, it’s important to get things down on paper to ensure that there will be something there and assurances provided on the face of the Bill over a period of years. Where there is a feeling that things won’t change for many years, therefore, it’s on the face of the Bill that those details should appear, but where we need to consider an issue that may be fluid and change from year to year, and planning will be a part of that, of course, then, any kinds of guidance or regulations wouldn’t appear on the face of the Bill, in order to ensure that things could move swiftly where that’s required.”<sup>79</sup>

87. He subsequently told us, when asked about the principle for deciding what is primary and what is secondary legislation:

“... there are a number of issues that are examined when doing that. Capacity might be one issue, but the other issues would be to do with the issue of flexibility and the need sometimes to futureproof legislation to make sure we don’t have legislation that becomes obsolete quickly and then there’s need for an amended Act to change that legislation, but it certainly wouldn’t be the case that we decide on what is and what isn’t in the Bill according to our analysis of the scrutiny capacity of the Assembly.”<sup>80</sup>

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<sup>76</sup> ML13

<sup>77</sup> ML13

<sup>78</sup> CLA Committee, RoP paragraph [52], 23 March 2015

<sup>79</sup> CLA Committee, RoP paragraph [50], 23 March 2015

<sup>80</sup> CLA Committee, RoP paragraph [108], 23 March 2015

88. The Counsel General did not think it was a fair observation to say Bills should have more detailed development before being brought to the Assembly.<sup>81</sup> As regards the legislation in the Fourth Assembly he felt that:

“... very little, if any of it, can properly be characterised as framework legislation. I understand ‘framework’ to be legislation that really has very little substantive content and that virtually leaves everything to subordinate legislation. I do not think that any of the Bills readily spring to mind as being of that type”.<sup>82</sup>

89. In an interesting observation, he added:

“The balance between how much is put on the face of the Bill and how much is left to secondary legislation is a slightly different point and, once again, as I have already said, it is essentially a matter of political judgment to be considered and, if necessary, argued about.”<sup>83</sup>

90. We do not fully agree with the suggestion that the balance between what is to be included in primary and secondary legislation is a political judgement. There are aspects of the question that are issues of proper legislative practice and ultimately good law-making.

91. We received a significant number of comments on this issue with many expressing concern that not enough material was being placed on the face of Bills.<sup>84</sup>

92. YourLegalEyes told us that framework legislation should be avoided and that it was better to delay introduction rather than introduce general provision to be filled out with subordinate legislation.<sup>85</sup> They also suggested that framework Bills make informed consultation, scrutiny and proposals for amendments impossible.<sup>86</sup> Similar views were expressed by the Welsh Local Government

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<sup>81</sup> CLA Committee, RoP paragraph [70], 17 November 2014

<sup>82</sup> CLA Committee, RoP paragraph [70], 17 November 2014

<sup>83</sup> CLA Committee, RoP paragraph [71], 17 November 2014

<sup>84</sup> CLA Committee, RoP paragraph [56 and 61], 19 January 2015; CLA Committee, RoP paragraph [165; 169-170], 19 January 2015; CLA Committee, RoP paragraph [135], 2 March 2015

<sup>85</sup> ML11

<sup>86</sup> ML11

Association, who noted that it was harder for individual authorities to comment on the implications of a Bill if it was framework in nature.<sup>87</sup>

93. The Hansard Society expressed concerns about a general drift towards delegated powers and legislation in Westminster,<sup>88</sup> as well as the taking of broad powers without knowing how or whether they are to be exercised.<sup>89</sup> While we acknowledge that statements of policy intent can mitigate this problem, we share these concerns as they apply in Wales.

94. The Hansard Society also indicated that at Westminster the drift towards the use of delegated powers was in some instances as a result of an incomplete policy development process.<sup>90</sup>

95. The Learned Society of Wales provided a compelling analysis of the issue surrounding how much information should be placed on the face of the Bill. They said:

“It is tempting for those involved in the work of government to view the legislative process as a means of furthering their policy objectives, rather than as a method by which the needs of democracy are served. Those making choices regarding whether to place provisions on the face of primary enactments or to reserve them to later subordinate legislation, as well as choosing the level of scrutiny to which that subordinate law-making is subjected, should be constantly justifying their choices according to the principles of democratic government. If their provisions directly affect the lives of citizens by imposing duties, conferring rights or conferring powers, or intend to give government or public bodies powers which will affect such duties, rights or powers, then the democratically-elected representatives of the citizens should be afforded the opportunity fully to deliberate, debate and decide upon those proposals. Likewise the choice of whether to subject subordinate legislation made by ministers to affirmative or negative procedure should be made in accordance with a clear understanding of the need to make good the democratic deficit involved when law-making is delegated, and not be treated as a

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<sup>87</sup> CLA Committee, RoP paragraphs [201-203], 19 January 2015

<sup>88</sup> CLA Committee, RoP paragraph [176], 9 March 2015

<sup>89</sup> CLA Committee, RoP paragraphs [183-184], 9 March 2015

<sup>90</sup> CLA Committee, RoP paragraphs [196-197], 9 March 2015

game in which as much power as possible should be retained in the hands of the executive.”<sup>91</sup>

96. The Learned Society also considered the issue of the use of Henry VIII powers.<sup>92</sup> They felt them to be:

“... a particular cause of concern ... If a correct choice has been made initially with regard to what democratic principle requires to appear on the face of an enactment, any suggestion that what appears there can thereafter be changed without a similar level of scrutiny deserves to be treated with suspicion.”<sup>93</sup>

97. It cited some “bad examples” of their use in some Fourth Assembly Bills,<sup>94</sup> but added that “this is not to say that it is always inappropriate to utilise such ‘Henry VIII powers’”.<sup>95</sup>

98. The views of the Learned Society of Wales reflect and articulate clearly why we have taken such a strong line against Bills where too much detail has been left to subordinate legislation rather than appearing on the face of the Bill. We remain concerned by this approach.

99. We have found some of the arguments put forward by the Welsh Government to justify their approach to be surprising, particularly relating to the time available for scrutiny.

100. While we accept that there is, as others such as the Hansard Society have suggested,<sup>96</sup> an argument for taking account of the time available for scrutiny, we believe that this has been given too much emphasis by the Welsh Government. In particular, we found its views set out in paragraphs 27 and 28 of its written evidence to be somewhat disconcerting and to stray too far into the territory of what is properly a matter for the legislature to determine. They stated:

“27. There is also significantly greater flexibility in making subordinate legislation as it is not subject to the same timetable constraints as Assembly Bills and it enables the

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<sup>91</sup> ML3

<sup>92</sup> These are powers which enable Ministers to amend Acts by means of subordinate legislation.

<sup>93</sup> ML3

<sup>94</sup> ML3

<sup>95</sup> ML3

<sup>96</sup> CLA Committee, RoP paragraph [208], 9 March 2015

law to be updated to match changing circumstances or for the law to be corrected or amended in the light of experience.

28. If this process works well, it would help the Assembly to focus on the essential points, policy and principle, in its scrutiny.<sup>97</sup>

101. Nevertheless, we do acknowledge that on some other occasions there has been an acceptance that issues relating to such things as the level and amount of time available for scrutiny are rightly a matter for the Assembly as the legislature to determine.<sup>98</sup>

102. As indicated at the start of this section, we have frequently commented in our Bill reports on the Welsh Government's assertion that there is a need to future-proof Bills and allow for flexibility. Such views have been repeated by the Welsh Government during this inquiry. In our view the need to future-proof Bills and allow for flexibility is becoming a stock argument used by Welsh Ministers to justify what we perceive to be an over-reliance on regulation-making powers in Bills. That is disappointing particularly when there is rarely any context provided about the potential "shelf-life" of a particular Bill or why it needs to be supplemented with subordinate legislation at a later date: simply allowing for the unexpected is too great a degree of abdication of responsibility by the Assembly.

103. While there may be circumstances in which the need for future-proofing and flexibility is justified, such an argument should not be used to supplement an Act, at some unspecified later date, with significant policy detail in subordinate legislation as it will not be subject to the robust scrutiny it deserves.

**Recommendation 6: We recommend that the Welsh Government:**

- (i) reviews its approach to the balance it adopts between what is contained on the face of a Bill and what is left to subordinate legislation;**
- (ii) publishes the outcome of that review, including the principles that it will apply to the future drafting of Bills to ensure that an appropriate balance is struck.**

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<sup>97</sup> ML13

<sup>98</sup> For example, CLA Committee, RoP paragraphs [5, 37 and 71], 16 March 2015; CLA Committee, RoP paragraph [82], 23 March 2015

**Recommendation 7: We recommend that the Welsh Government considers the available techniques for making the delegation of powers more acceptable, including the expression on the face of the Bill of the purposes of, and constraints on, delegated powers.**

104. We have related concerns about the use of powers in Bills for the Welsh Ministers to make supplemental and consequential provisions through secondary legislation. The Head of the Welsh Government's Legal Services told us that consequential amendment clauses are:

“... fairly common in legislation, not simply here, but elsewhere ... if you take very complex large Bills, such as social services, with a large number of provisions, I think it's not unusual and it's to be expected that you will find some provision there in order to make changes as the implementation work develops further. You wouldn't want to run into obstacles that are incapable of being overcome, provided that those clauses are fairly tightly constrained and are directed towards that purpose of making a smooth implementation process. So, I don't think that you would see those disappear, although, clearly, we would always seek to ensure that as many issues as possible are addressed at that point in time that the Bill is taken through.”<sup>99</sup>

105. We note these comments. However, there is a danger that the routine use of such provisions, particularly those that permit the amendment of primary legislation, may encourage Bills to be introduced that are not fully formed (see also recommendations 1 and 10).

**Recommendation 8: We recommend that powers to make supplemental or consequential provision should not be included routinely in Bills, and should be reserved for cases where there are special reasons why the Welsh Government needs to deal with minor or consequential issues through delegated legislation. Such reasons must be clearly set out in the Explanatory Memorandum.**

#### ***Accuracy on introduction***

106. The Welsh Government noted that the drafting accuracy and completeness of a Bill on introduction is reliant on three factors, namely: the time available to develop the policy and prepare accurate

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<sup>99</sup> CLA Committee, RoP paragraph [55], 16 March 2015

drafting instructions; the expertise of those involved and the presence of appropriate quality controls.

107. The Law Commission noted that:

“If policy is still evolving through the drafting process, there is a risk that bill instructions may be undermined. The bill may fail accurately to reflect the initial policy thrust behind it.”<sup>100</sup>

108. They went on to highlight how:

“Inadequate initial preparation can also give rise to the tabling of a disproportionate number of government amendments. These take up valuable Parliamentary time and can compromise the integrity of a bill. The Law Commission’s 1969 Report observed that late amendments are more likely to result in a text that loses sight of the Bill’s overall structure.”<sup>101</sup>

109. Concerns of this nature were also expressed by the Presiding Officer, reflecting experiences during the Fourth Assembly. She highlighted a particular concern arising from Welsh Government drafting as being:

“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.”<sup>102</sup>

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<sup>100</sup> ML18

<sup>101</sup> ML18

<sup>102</sup> ML17

110. She also noted that:

“... scrutiny can be hampered ... if major changes to a Bill are made after Stage 1 consideration of the general principles, as the subsequent amending stages tend to offer less scope for a thorough examination of the issues and participation by stakeholders.”<sup>103</sup>

111. We discussed these issues with the Office of the Legislative Counsel and our exchanges highlighted how the policy development process and drafting process fit together. They told us:

“... one of the main points of having a drafting office, is to challenge the assumptions that underlie the policy. It is through the process of producing the words that you really get to the root of what people are trying to achieve and the things that are missing and the things that are wrong ... when you’re at the policy development stage and you’re putting together your ideas in your own language, it’s impossible to think through all the things that you would need to think through to produce a piece of legislation that’s perfect. It’s only if you’re going through the process of actually trying to turn that into a piece of legislation that you solve those problems.”<sup>104</sup>

112. The First Legislative Counsel added that:

“I’ve heard it said that it would be better if legislative counsel and lawyers were involved earlier in the process. I think that is definitely a way of improving that particular aspect of things, because we are able to accelerate that process of challenging things. I’d like to think that, in future, we will be able to get involved earlier in the process and bring our way of thinking to things ... It’s the development of a mindset almost and a discipline that understands what the law is and how it works. I don’t think you can expect everybody to understand that. It’s just not realistic.”<sup>105</sup>

113. The Law Commission explained how the quality of legislation

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<sup>103</sup> CLA Committee, RoP paragraph [23], 24 November 2014

<sup>104</sup> CLA Committee, RoP paragraph [67], 9 March 2015

<sup>105</sup> CLA Committee, RoP paragraph [71], 9 March 2015

could be improved:

“by

- ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;
- -having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;
- minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;
- making greater use of Keeling Schedules (as part of the Explanatory Notes) to clarify changes that a bill makes to previous enactments; and
- -providing for the clear repeal of any existing enactments that are superseded by the bill.”<sup>106</sup>

**Recommendation 9: We recommend that the Welsh Government commits to improving the quality of legislation it introduces by:**

- (i) adopting the principles advocated by the Law Commission and highlighted in paragraph 113 of this report;**
- (ii) involving the Office of the Legislative Counsel as early in the policy development process as practicable in each case.**

114. In our view, the process of amending Bills at Stages 2 and 3 should be used as a means to debate and suggest improvements to a Bill that has been introduced. It should not be used (except in exceptional circumstances or to deliver a committee recommendation made at Stage 1) to introduce large and significant amounts of legislative text that were, for whatever reason, not ready or unavailable at the time the Bill was introduced.

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<sup>106</sup> ML18

**Recommendation 10: We recommend that the Welsh Government must introduce Bills that can be reasonably considered to be fully developed at the point of introduction.**

115. We believe that implementation of recommendation 3 regarding draft Bills, will aid the delivery of recommendation 10.

116. We believe that recommendations 9 and 10 should be incorporated into the internal guidance referred to in recommendation 2 so that it is understood across all Welsh Government departments.

117. As this section of the report highlights, drafting issues can impact on the accuracy of a Bill on introduction. Some of these issues are covered in the next section, which looks at the wider issue of the way in which Bills are drafted.

## **Drafting**

### ***Consolidation***

118. Consolidation of law means taking an area of law that has fallen into disrepair as a result of layers of amendments and modification, and producing a single clean text, in accordance with best contemporary practice.

119. We have touched on the issue of consolidation, and more directly the development of a Welsh statute book in our inquiries into powers granted to the Welsh Ministers in UK laws.<sup>107</sup>

120. As more Welsh laws have been placed on the statute book, the issue of the accessibility of legislation has been brought into even sharper focus. Part of that issue concerns the consolidation of Welsh laws and it is an issue on which we received substantial evidence.

121. There was considerable support for the greater use of consolidation in Welsh law (including in some cases, and as part of that process, the re-stating of provisions) from a range of stakeholders. For example the Presiding Officer,<sup>108</sup> Citizens Advice Cymru,<sup>109</sup> the British Medical Association Cymru Wales,<sup>110</sup>

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<sup>107</sup> CLA Committee, *Inquiry into powers granted to Welsh Ministers in UK laws*, March 2012; CLA Committee, *Inquiry into powers granted to Welsh Ministers in UK laws: review of outcomes*, November 2013.

<sup>108</sup> CLA Committee, RoP paragraph [27], 24 November 2014

<sup>109</sup> ML14

<sup>110</sup> ML16; CLA Committee, RoP paragraph [106], 19 January 2015

YourLegalEyes,<sup>111</sup> the Welsh Local Government Association,<sup>112</sup> Graham Walters (a lawyer in private practice)<sup>113</sup> and the Queen’s Printer (and Director of Information Policy and Services at the National Archives).<sup>114</sup> It was also a key theme that arose in discussions at our stakeholder event in October 2014, where problems were highlighted in particular with education law and the time taken to find Welsh provisions buried within an interlocking mass of law that applies to England and Wales.

122. A perceived lack of consolidation within a Bill was a cause of frustration for some. UCAC suggested it made intelligent and comprehensive scrutiny challenging<sup>115</sup> and explained how Welsh law needed to be clear to those “working with the law without being an expert in law”.<sup>116</sup>

123. Keith Bush QC said:

“In terms of the simplicity and clarity of the legislation, consolidation wins hands down. Amending and re-amending a piece of legislation originally drafted as a unified England and Wales statute, adding ever more complex “opt-outs” in relation to Wales, inevitably makes the understanding and application of the legislation ever more difficult. An added advantage of consolidation is that it enables the encrustations caused by previous forms of devolution to be cleared away.”<sup>117</sup>

124. He concluded:

“No greater contribution could be made to the clarity and simplicity of Assembly legislation than a programme of consolidation of statute law in relation to devolved fields such as Education, Local Government, Planning, the Environment etc.

Assembly Members called upon to scrutinise legislation in these fields would themselves, in common with the Welsh public generally, benefit from the simplification of the “Welsh

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<sup>111</sup> ML11

<sup>112</sup> ML12; CLA Committee, RoP paragraph [240], 19 January 2015

<sup>113</sup> CLA Committee, RoP paragraph [150], 19 January 2015

<sup>114</sup> CLA Committee, RoP paragraphs [70-71], 9 February 2015

<sup>115</sup> ML7

<sup>116</sup> CLA Committee, RoP paragraph [118], 2 March 2015

<sup>117</sup> ML4

statute book” and its unscrambling from the body of England and Wales legislation which the Assembly has inherited.”<sup>118</sup>

125. The Welsh Government acknowledged consolidation as a significant issue, particularly in the context of accessibility of legislation.<sup>119</sup> It saw it as “a UK wide problem that has a specific Welsh dimension”.<sup>120</sup> It noted that:

“Resource considerations and the need to implement policy quickly can also lead to choices being taken to amend existing laws rather than consolidating: amending what is there rather than starting afresh.”<sup>121</sup>

126. We acknowledge that the consolidation of legislation is resource intensive.<sup>122</sup> However, wanting to implement policy quickly as a reason for not consolidating, a point made also by the Counsel General,<sup>123</sup> is not in our view a convincing argument. It could be counter-productive, if, as a result of that approach, the policy is inaccessible and not understood by those affected by it.

127. We also understand that other difficulties exist. For example, the Welsh Government<sup>124</sup> and Graham Walters<sup>125</sup> raised the complexity of trying to decouple Welsh law from English and Welsh law, where issues of legislative competence and human rights may be problematic.

128. In our 2013 follow-up report<sup>126</sup> on powers granted to Welsh Ministers in UK laws, we recommended that the Welsh Government should publish a clear timetable for the preparation of a Welsh statute book. While supporting the recommendation in principle, in its response to the report the Welsh Government could not commit to a timetable, re-iterating that “consolidating and restating legislation within devolved areas in order to develop a distinctive “Welsh Statute

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<sup>118</sup> ML4

<sup>119</sup> ML13

<sup>120</sup> ML13

<sup>121</sup> ML13

<sup>122</sup> CLA Committee, RoP paragraph [149], 9 March 2015

<sup>123</sup> CLA Committee, RoP paragraph [100], 17 November 2014

<sup>124</sup> ML13

<sup>125</sup> CLA Committee, RoP paragraphs [153-158], 19 January 2015

<sup>126</sup> Constitutional and Legislative Affairs Committee, *Inquiry into powers granted to Welsh Ministers in UK laws: review of outcomes*, November 2013

book” is a huge task.”<sup>127</sup> It suggested considering how the Law Commission may be able to assist.

129. The Law Commission explained that consolidation is a part of its statutory functions.<sup>128</sup> We note also that, as acknowledged by the Law Commission,<sup>129</sup> the *Wales Act 2014* has amended the *Law Commissions Act 1965* so that it is possible for it to accept direct references from the Welsh Ministers.

130. The Law Commission also indicated that a lack of co-operation and funding for consolidation work was an issue in respect of UK legislation.<sup>130</sup>

131. Despite the difficulties, we strongly believe that further progress is needed on consolidating Welsh laws. A coherent, well-ordered statute book should be seen as the key to the rule of law and not as a luxury. We believe that the case of consolidating Welsh law is more pressing than the case for UK consolidation generally.

132. We are concerned that, as the Law Commission told us:

“... repeated legislative activity in a particular field can distort the law—distort the shape of the statute—with different amendments at different times, and it can leave the law in a poor state.”<sup>131</sup>

133. We welcome the project being undertaken by the Law Commission to consolidate Welsh planning law.<sup>132</sup>

134. We believe that the Welsh Government needs to do more to overcome the problems and barriers to the consolidation of Welsh law and focus on developing and delivering a positive solution.

135. We believe that the Welsh Government should collaborate with the Law Commission to establish a long-term plan for the consolidation of law in Wales.

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<sup>127</sup> Welsh Government, *Welsh Government Response to the Constitutional and Legislative Affairs Committee’s Inquiry into Powers granted to Welsh Ministers in UK laws: Review of Outcomes*, January 2014

<sup>128</sup> CLA Committee, RoP paragraph [219], 16 March 2015

<sup>129</sup> CLA Committee, RoP paragraph [165], 16 March 2015

<sup>130</sup> CLA Committee, RoP paragraph [219], 16 March 2015

<sup>131</sup> CLA Committee, RoP paragraph [217], 16 March 2015

<sup>132</sup> ML18; CLA Committee, RoP paragraph [165], 16 March 2015

136. We recognise the need for resources to fund this work. Equally, there needs to be an acknowledgement by the Welsh Government of the high costs to citizens and businesses of a statute book that is confusing and inaccessible.

**Recommendation 11: We recommend that the Welsh Government, in collaboration with the Law Commission, develops a long-term plan for consolidating law in Wales.**

137. There would appear to be some confusion regarding what exactly constitutes consolidation. The Counsel General and Office of the Legislative Counsel have commented about what has been achieved,<sup>133</sup> and yet this does not seem to have been acknowledged by stakeholders. What constitutes consolidation is an issue that should therefore be addressed as part of the plan.

138. We note the support of the Presiding Officer for consolidation and that a Standing Order to deal with consolidation Bills is being prepared.<sup>134</sup>

**Recommendation 12: We recommend that the Business Committee commits to preparing a Standing Order on consolidation Bills, ideally in time for the Fifth Assembly. The aim of the Standing Order should be to provide expedited passage for Bills which are certified by Legislative Counsel as not involving any substantive change of law.**

139. We also note the Law Commission's suggestion for a special procedure not only for consolidation Bills but also for non-controversial law reform Bills.<sup>135</sup>

**Recommendation 13: We recommend that the Business Committee explores the scope for a simplified procedure for law reform Bills implementing Law Commission reports.**

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<sup>133</sup> CLA Committee, RoP paragraph [106], 17 November 2014; CLA Committee, RoP paragraph [138-145], 9 March 2015; See also ML13.

<sup>134</sup> CLA Committee, RoP paragraph [123], 17 November 2014

<sup>135</sup> CLA Committee, RoP paragraph [261], 16 March 2015; Law reform Bills make technical changes to law where policy is non-controversial and they are consensual among stakeholders.

## ***Drafting quality***

140. The Presiding Officer highlighted the importance of the quality of drafting of Bills and we endorse her comments:

“... 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.”<sup>136</sup>

141. In her view, the Welsh Government’s drafting had generally met this standard, although she highlighted specific areas where there was room for improvement.<sup>137</sup>

142. Support for the overall quality of drafting also came from UCAC, who considered the quality of drafting in both languages to be of a high quality,<sup>138</sup> Graham Walters<sup>139</sup> and Mold Town Council.<sup>140</sup>

143. Equally areas for improvement were highlighted by some respondents. For example, YourLegalEyes felt that the use of indefinite expressions should be avoided.<sup>141</sup> Both Mold Town Council<sup>142</sup> and the Learned Society of Wales<sup>143</sup> saw the complexity of some provisions to be an issue. The Society made an important point that “fashion should not govern form”.<sup>144</sup> They felt that “the test should always be whether the usage enhances readers’ understanding”, a point illustrated by its view that the introduction of letters to demarcate the subjects of provisions in some Bills did not achieve greater clarity.<sup>145</sup>

144. As we have noted in paragraph 22, the Law Commission is undertaking a review of the form and accessibility of the law applicable in Wales.

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<sup>136</sup> ML17

<sup>137</sup> ML17

<sup>138</sup> ML7; CLA Committee, RoP paragraph [120], 2 March 2015

<sup>139</sup> CLA Committee, RoP paragraph [135], 19 January 2015

<sup>140</sup> ML5

<sup>141</sup> ML11

<sup>142</sup> ML5

<sup>143</sup> ML3

<sup>144</sup> ML3

<sup>145</sup> ML3

**Recommendation 14: We recommend that the Law Commission takes account of the views of stakeholders who have contributed to our inquiry as part of their project on the form and accessibility of the law applicable in Wales.**

***The use of plain language in drafting***

145. We received some evidence on the use of plain language. Its importance was highlighted,<sup>146</sup> as was the need to avoid unfortunate terminology.<sup>147</sup> UCAC spoke of the language used in Welsh Government Bills as being “clear and readable”,<sup>148</sup> with Graham Walters having no particular issues with the “clarity in the wording”.<sup>149</sup>

146. We note and recognise the Welsh Government’s comments regarding plain language in its evidence, and acknowledge the difficulties that can arise. We would agree with its assertion that:

“Precision and effectiveness cannot be compromised in the interest of clarity; and over-simplification, therefore, can result in legislation failing to have its intended result.”<sup>150</sup>

147. The Welsh Language Commissioner raised the importance, particularly in a legislative context, of:

“... selecting a standard terminology for the Welsh and English versions of Bills from the outset, in order to facilitate the process of dealing with a particular subject area.”<sup>151</sup>

148. We agree with the Welsh Language Commissioner that:

“The Welsh Government should lead the way by ensuring that standard terminology – and any other language resources developed – are shared with internal and external stakeholders in the most accessible way possible, in order to promote and facilitate the use of Welsh in this area.”<sup>152</sup>

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<sup>146</sup> ML5

<sup>147</sup> ML17

<sup>148</sup> CLA Committee, RoP paragraph [120], 2 March 2015

<sup>149</sup> CLA Committee, RoP paragraph [122], 19 January 2015

<sup>150</sup> ML13

<sup>151</sup> ML10

<sup>152</sup> ML10

149. We also agree with the suggestion of one of her officials that, while there are many expert terminology databases available, it would be helpful to have one central database.<sup>153</sup>

150. We believe it is important to ensure an effective method of sharing this information with the media and other stakeholders that may wish to discuss a Bill. This will ultimately ensure consistency and avoid the use of multiple terms that confuse the public and others.

**Recommendation 15: We recommend that the Welsh Government leads on the production of a standard terminology database, working closely with the Welsh Language Commissioner.**

151. We also wish to commend the Assembly's Research Service for its publication of a glossary of bilingual terms for individual Bills following their introduction.<sup>154</sup> We believe this to be a valuable contribution not only to aiding the scrutiny and understanding of Welsh legislation, but also to promoting the Welsh language.

### ***Dual language drafting***

152. One of the issues we sought to examine during our inquiry was that of drafting in the Welsh language. The Learned Society of Wales identified a misapprehension between translating a text and drafting in Welsh:

“The legislation is enacted in both language versions so that they become law by being enacted not translated. How the versions are produced prior to being introduced, scrutinized and decided upon is not material to their status as law, and the notion that one version is a translation of the other can serve to perpetuate the misapprehension that one of the versions can be relied upon as that which alone expresses the intention of the legislature.”<sup>155</sup>

153. We acknowledge the point made by the Society and recognise the benefits co-drafting can bring as highlighted by the Counsel General:

“... the process of consideration and thinking in the two separate languages as part of the drafting process helps to

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<sup>153</sup> CLA Committee, RoP paragraph [140], 9 February 2015

<sup>154</sup> Available from the [Assembly's website](#)

<sup>155</sup> ML3

tease out meaning in a way that would not happen if you were simply using a single language.”<sup>156</sup>

154. The current approach adopted towards producing a bilingual text was explained by the First Legislative Counsel:

“So, what generally happens is that it’s produced in one language first, and normally that is in English, but during that process, there will be discussions about terminology and there’ll be discussions about various phrases that we want to ensure are, of course, the same in Welsh and English. So ... the text is generally produced in the one language first and is then translated, but then, it returns to us as the drafters, and it’s at that point that we put a lot of work into ensuring that both texts are equivalent.”<sup>157</sup>

155. He acknowledged that this approach wasn’t always followed; some co-drafting of Bills had taken place and on one occasion, a Bill had been drafted in Welsh and the English text produced afterwards.<sup>158</sup> When asked whether he would like to see more genuine co-drafting, or whether this was not a productive way of working, the First Legislative Counsel said:

“It depends on the situation. I think, in some cases, depending on the nature of the Bill, we should be co-drafting ... I’d be thinking more about Bills that have a high impact on the public, a high impact on individuals. But there are situations where I’d have to say it might not be practical: if you have very, very large Bills. Our experience has shown us that if you do co-draft, or if we produce both texts within our office, then it is very time consuming. It is considerably more efficient to use the legislative translators, who are expert at what they do, and are able to produce the second text far quicker than we can.”<sup>159</sup>

156. The First Minister outlined his view:

“I think the immediate aspiration would be to move to a situation where we are not over-reliant on a translation service, I think that’s fair to say, and to have, in time, more drafting

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<sup>156</sup> CLA Committee, RoP paragraph [43], 17 November 2014

<sup>157</sup> CLA Committee, RoP paragraph [25], 9 March 2015

<sup>158</sup> CLA Committee, RoP paragraph [27], 9 March 2015

<sup>159</sup> CLA Committee, RoP paragraph [30], 9 March 2015

lawyers who can truly operate bilingually in both languages. We would need then to recruit more drafters, more lawyers and more Bill officials who can work through the medium of Welsh, so that they can work with support from the translation service, but not relying on the translation service to translate, but, rather, they are seen as working seamlessly bilingually both as teams and as lawyers.”<sup>160</sup>

157. We acknowledge and recognise that, as the Welsh Government indicates “drafting legislation is ... complex, and drafting it in two languages is even more challenging”,<sup>161</sup> particularly in terms of recruitment, resources and training.<sup>162</sup>

158. Equally we recognise the huge effort and commitment of the drafters in the Office of the Legislative Counsel who are at the forefront of, as the First Minister told us, resurrecting Welsh as a legal language after 1,000 years and in quite a short space of time.<sup>163</sup>

159. It should not be forgotten that challenges also exist as part of the gradual change of status and usage of the Welsh language within the judicial system in Wales and in the longer term, the possible creation of a separate Welsh jurisdiction.

160. In view of the acknowledgement of co-drafting as being ideal for some Bills,<sup>164</sup> we believe that there should be a clear long-term plan for the Welsh Government of increasing the proportion of co-drafted Bills. In developing this plan we believe that the Welsh Government should work closely with the Welsh Language Commissioner.

**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.**

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<sup>160</sup> CLA Committee, RoP paragraph [164], 23 March 2015

<sup>161</sup> ML13

<sup>162</sup> CLA Committee, RoP paragraphs [9-19], 9 March 2015

<sup>163</sup> CLA Committee, RoP paragraph [132], 23 March 2015

<sup>164</sup> CLA Committee, RoP paragraph [30], 9 March 2015

161. We note the comments of the Presiding Officer that:

“... there is a lack of consistency sometimes between Welsh and English drafts of legislation, and this can waste a lot of time in committee, and in Plenary, just trying to make amendments.”<sup>165</sup>

162. We have already touched on the issue of drafting errors (including between English and Welsh texts) in Chapter 3 and earlier in this Chapter. The possibility of law passing into force in two inconsistent forms obviously raises serious issues for the rule of law, and will inevitably cause serious confusion and uncertainty for citizens. The fact that this has been recognised as a recurring problem suggests there may be an issue with quality control. It also highlights some of the time pressures the Welsh Government appears to put itself under to introduce Bills on a particular date. Either way, we believe that sufficient time should be built into the process, to minimise the risk of this occurring in the future; we believe this issue should be addressed through recommendation 1.

### ***Overview and long titles***

163. Both the Learned Society of Wales<sup>166</sup> and the Welsh Government<sup>167</sup> commented about the use of long titles and overview sections, and the relationship between them. The First Legislative Counsel provided further information and examples of how overview sections could be used in place of the long title<sup>168</sup> in subsequent correspondence.<sup>169</sup>

164. We have noted the suggestions put forward by the First Legislative Counsel. However, while we have no objection in principle to the use of overview sections, we do not share the enthusiasm for replacing the long title with an overview section. We found the suggested approach to be unconvincing; it has the potential to be confusing and lacks presentational clarity.

165. In our view the long title serves a procedural function and concisely summarises the intent of a Bill. Overview sections briefly explain a particular set of provisions and are about navigation and

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<sup>165</sup> CLA Committee, RoP paragraph [29], 24 November 2014

<sup>166</sup> ML3

<sup>167</sup> ML13

<sup>168</sup> The long title is set out on page 1 of the Bill. It describes the purposes of the Bill.

<sup>169</sup> Letter from the First Legislative Counsel, Welsh Government to David Melding AM, Chair of the Constitutional and Legislative Affairs Committee, *Inquiry: Making Laws in the Fourth Assembly*, 20 April 2015

orientation for the reader after enactment. We see such provisions as working in conjunction with the Explanatory Memorandum and Explanatory Notes (rather than instead of them).

166. In its written evidence, the Welsh Government suggested that (in the context of replacing the long title) overview sections could be treated as non-amendable provisions, with any changes to them undertaken as printing changes.<sup>170 171</sup>

167. In our view, and as a general point, treating overview sections as inoperative, non-amendable provisions would not be acceptable; given that overview sections could potentially consist of a considerable volume of text they should be regarded as substantive text and subject to amendment. Assembly Members must be entitled to express an opinion about the adequacy and accuracy of an overview section.

### ***Interpretation Act***

168. The Learned Society of Wales suggested that having a Welsh interpretation Act<sup>172</sup> may be beneficial and help enhance the understanding of legislation.<sup>173</sup> It said:

“This might well make it possible to remove from each and every enactment some of the technical provisions which follow a standard form, as well as giving an opportunity to provide for a proper approach to the interpretation of bilingual legislation in Wales, and facilitate use of modern technological innovations.”<sup>174</sup>

169. We sought views on this suggestion.

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<sup>170</sup> ML13

<sup>171</sup> Printing changes are changes made to the text of a Bill that are not considered necessary by amendment. For example, errors in internal cross-referencing, that are typographical in nature or of simple punctuation. Clerks are responsible for making a judgement in each case.

<sup>172</sup> The *Interpretation Act 1978* is the principal statute laying down rules for the interpretation of legislation.

<sup>173</sup> ML3

<sup>174</sup> ML3

170. The Counsel General observed:

“On one view of it—and others would disagree, I know—if you need to go to an interpretation Act to understand the Act that you are looking at, then that is a sort of admission of failure.”<sup>175</sup>

171. He added that:

“... there are elements of interpretation that are particular to the Welsh context, which are simply not dealt with in the interpretation Act as it currently stands, for example, linguistic issues and the interpretation of Welsh expressions and so on. My preference is to make clear on the face of an individual Act what it means.”<sup>176</sup>

172. The First Legislative Counsel outlined the two schools of thought on whether there should be a separate Welsh interpretation Act:

“... as things currently stand, there is a Scottish interpretation Act, there’s also a Northern Ireland interpretation Act ... it’s appealing to think, ‘Well, there should definitely be a Welsh interpretation Act’ ... from a technical perspective, some people would argue that that isn’t necessarily helpful. Some people don’t think that interpretation Acts are helpful ... I suspect that a number of lawyers have never even heard of the Interpretation Act ... So, I think that there is an argument to say that you shouldn’t have an interpretation Act, and that you should always know what the legal position is from the Bill itself. Having said that, the type of things that you have in interpretation Acts are quite technical and, I think, on balance, it does help to have them, because you deal with particular situations ... It also has some technical provisions that go beyond the meaning of certain words.”<sup>177</sup>

173. He noted the difficulty of having a Welsh interpretation Act as well as the *Interpretation Act 1978* because of the potential for confusion about which one applies.<sup>178</sup> He suggested that the more separate the

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<sup>175</sup> CLA Committee, RoP paragraph [124], 17 November 2014

<sup>176</sup> CLA Committee, RoP paragraph [126], 17 November 2014

<sup>177</sup> CLA Committee, RoP paragraph [114], 9 March 2015

<sup>178</sup> CLA Committee, RoP paragraph [115], 9 March 2015

Welsh body of law becomes, the easier it is to make a case for a Welsh interpretation Act.”<sup>179</sup>

174. The Queen’s Printer indicated support for an interpretation Act.<sup>180</sup>

175. The Law Commission suggested that “the real question will be whether there should be separate principles of interpretation that apply in relation to Wales and Welsh legislation.”<sup>181</sup> It saw difficulties with such an approach but acknowledged that “it may well be that there is a case for laying down special rules of interpretation for bilingual legislation”.<sup>182</sup>

176. We do believe there would be some merit in developing a separate Welsh interpretation Act as a means of improving the understanding of Welsh law and consider that, over time, the case for such an Act will grow.

177. We note the difficulties this may entail and welcome the Law Commission’s consultation on this issue as part of its review on the form and accessibility of Welsh law.<sup>183</sup> From our perspective, we are satisfied that the technical difficulties can be overcome by clarity in the Welsh Act as to the extent to which it is exclusive.

**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.**

***Impact of reserved powers model on drafting***

178. At the outset of our work, we were intent on understanding the implications of a reserved powers model of legislative competence for law-making in Wales. Since then the UK Government has committed to such a model.<sup>184</sup>

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<sup>179</sup> CLA Committee, RoP paragraph [117], 9 March 2015

<sup>180</sup> CLA Committee, RoP paragraph [40], 9 February 2015

<sup>181</sup> CLA Committee, RoP paragraph [192], 16 March 2015

<sup>182</sup> CLA Committee, RoP paragraph [192], 16 March 2015

<sup>183</sup> Law Commission, Consultation Paper No 223, *Form and Accessibility of the Law Applicable in Wales: A Consultation Paper*, July 2015

<sup>184</sup> HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*, Cm 9020, February 2015

179. There was support for a reserved powers model of legislative competence as being simpler and clearer, and therefore preferable to the existing model.<sup>185</sup>

180. Nevertheless, we note the Welsh Government's view that it is not the model but the breadth of competence that impacts on the development and drafting of legislation.<sup>186</sup> We also note the Counsel General's view that while a reserved powers model "would make things clearer" he didn't think "it is the panacea that some people think that it is."<sup>187</sup>

181. We did hear some evidence from a Legislative Counsel with experience of the reserved powers model in Scotland who noted:

"The conferred-powers model means you have to think slightly differently about how you tackle a particular subject. That often doesn't necessarily impact on the drafting, but it can do."<sup>188</sup>

182. We share the concerns of both the First Minister<sup>189</sup> and the Presiding Officer<sup>190</sup> about the risk that moving to a reserved powers model could result in the removal of some legislative competence from the Assembly.

183. Since starting this inquiry, we have considered and reported on the reserved powers model as part of work on the UK Government's plans for further devolution to Wales.<sup>191</sup>

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<sup>185</sup> ML 7, ML11, ML12, ML16, ML17

<sup>186</sup> ML13

<sup>187</sup> CLA Committee, RoP paragraph [140], 17 November 2014

<sup>188</sup> CLA Committee, RoP paragraph [16], 9 March 2015

<sup>189</sup> CLA Committee, RoP paragraph [144-156], 9 March 2015

<sup>190</sup> CLA Committee, RoP paragraph [135], 17 November 2014

<sup>191</sup> Constitutional and Legislative Affairs Committee, *The UK Government's Proposals for Further Devolution to Wales*, July 2015

## 5. Explanatory Memoranda

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### General

184. Explanatory Memoranda play a key role in helping Assembly Members scrutinise legislation and the public to understand it. The importance of the Memoranda has been underlined by the Supreme Court referring to them during their considerations of Assembly Bills.

185. Standing Order 26.6 details what must be included in an Explanatory Memorandum. In effect, it sets out minimum information requirements that must be included; other information may and often is required to clearly explain and provide a complete synopsis of the purpose of the legislation.

186. However, the quality of Explanatory Memoranda has been highly variable in the Fourth Assembly, a point acknowledged by the Welsh Government.<sup>192</sup>

187. The Presiding Officer told us that a:

“... well-drafted and comprehensive explanatory memoranda are essential if we are going to be able to scrutinise legislation properly.”<sup>193</sup>

188. We agree. In our view a poor Explanatory Memorandum can have a detrimental effect on the Assembly’s ability to scrutinise a Bill and the ability of all those affected by it to understand a Bill’s purpose and effect.

189. We heard conflicting evidence about the quality of Explanatory Memoranda, being told that they were both better<sup>194</sup> and worse<sup>195</sup> than those in Westminster.

190. However, there were shared views about the length of the documents, and how this can hinder their effectiveness. UCAC told us:

“They tend to be very long and repetitive. Despite their length, they do not always manage to throw further light on the provisions of Bills....”<sup>196</sup>

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<sup>192</sup> ML13; CLA Committee, RoP paragraph [73], 16 March 2015

<sup>193</sup> CLA Committee, RoP paragraph [42], 17 November 2014

<sup>194</sup> ML14

<sup>195</sup> CLA Committee, RoP paragraph [40], 19 January 2015

191. The British Medical Association Cymru Wales said:

“I find the explanatory memoranda have been very helpful, but sometimes, they just seem to be overly long and quite impenetrable...”<sup>197</sup>

192. We have noted that in addition to Explanatory Memoranda, a lot of information is included in Statements of Policy Intent. While this is often useful, some content could be more usefully included in the Explanatory Memorandum and the Explanatory Notes.

193. There should be careful consideration given to what information is included in an Explanatory Memorandum, starting with that which is required by Standing Order 26.6. Any additional information the Welsh Government wishes to include should be robustly assessed, to ensure that it helps aid the reader’s understanding of the legislation.

194. The variety of views on the quality and effectiveness of Explanatory Memoranda suggests that there may be value in the Welsh Government engaging with regular stakeholders about what changes could be made to improve their effectiveness. It is clear to us that this is an opportune time for such an assessment so that changes can be made in time for the Fifth Assembly.

195. A number of stakeholders highlighted how helpful Keeling Schedules<sup>198</sup> were in understanding how proposed legislation can impact on provisions in existing Acts.<sup>199</sup> However, they could be of minimal value if they are not explained clearly and / or poorly presented.

196. UCAC suggested that Bills could usefully include provisions referring to:

“... the sections of other legislation that are to be revoked or annulled as a result of the creation of this particular piece of legislation ... in bringing a Bill forward, having some sort of

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<sup>196</sup> ML7

<sup>197</sup> CLA Committee, RoP paragraph [42], 19 January 2015

<sup>198</sup> A Keeling Schedule is a document that sets out how the text of provisions of another piece of legislation will appear once textually amended by a Bill.

<sup>199</sup> For example ML11, ML14, ML18

summary or schedule of what's to be replaced if this Bill is implemented as an Act, would be of assistance.”<sup>200</sup>

197. We believe that including such summary information in the Explanatory Memorandum would be useful.

198. We also believe there is scope for Explanatory Memoranda to cover how (rather than simply whether) the Welsh Government has taken account of human rights in developing the legislation, as suggested by Graham Walters<sup>201</sup> and as we have highlighted in recent reports.<sup>202</sup> We also recognise that some Welsh Government Explanatory Memoranda have covered how the Bills have taken account of children's rights issues and we consider this to be good practice.

199. We welcome the Welsh Government's acknowledgement that more could be done to assist the users of legislation by improving Explanatory Notes and welcome its project to consider how this could be achieved.<sup>203</sup>

### **Financial content**

200. A range of stakeholders<sup>204</sup> highlighted concerns about the quality of the financial information provided within Explanatory Memoranda.

201. The Auditor General for Wales emphasised the importance of financial information. He said:

“... the Assembly needs information on the expected costs that arise from its legislation if it is to legislate responsibly and for the overall benefit of the people of Wales.”<sup>205</sup>

202. The Wales Audit Office undertook a review of the financial information in Explanatory Memoranda since November 2011. They outlined how improvements can be made to overcome:

- a general lack of clarity in the presentation of estimates of costs and timescales within Explanatory Memoranda regarding the proposed legislation; and

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<sup>200</sup> CLA Committee, RoP paragraph [127], 2 March 2015

<sup>201</sup> CLA Committee, RoP paragraph [179-180], 19 January 2015

<sup>202</sup> For example, Constitutional and Legislative Affairs Committee, *Report on the Planning (Wales) Bill*, January 2015

<sup>203</sup> ML13

<sup>204</sup> For example, ML12, ML17, ML 20

<sup>205</sup> ML20

- variations in the completeness of estimates of costs, leading to a lack of an overall view of the cost of the legislation.<sup>206</sup>

203. Standing Order 26.6(vi) sets out the financial information that must be included in the Explanatory Memorandum, yet the Auditor General for Wales felt it “is usually not readily apparent” and “the reader has to do a fair amount of work to arrive at an overall understanding.”<sup>207</sup>

204. The Auditor General’s concern was:

“... the Assembly should have a clearer idea of the cost of legislation at the point in which you consent to the legislation.”<sup>208</sup>

205. He felt that the more information Standing Orders specify is needed in the Explanatory Memoranda, the more complex the Memoranda become.<sup>209</sup> He found the option analyses often included in Explanatory Memoranda to be confusing and suggested an approach based around what “the current state costs” and the “cost after legislation”.<sup>210</sup>

206. It is clear that the presentation of financial information needs significant improvement.

207. The Auditor General for Wales felt that one solution would be to amend the Assembly’s Standing Orders to require a table summarising the costs required by Standing Order 26.6(vi). A copy of a table he suggested is attached at Annex 4.

208. We were persuaded by the Auditor General’s suggestion that such a cost estimate summary table should be included in the Explanatory Memoranda. The table would help ensure a consistent approach across all Bills. It would aid the Assembly and stakeholders in scrutinising and understanding the financial impact of proposed legislation.

209. An official accompanying the Auditor General for Wales also commented that information should be clearly signposted within each

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<sup>206</sup> ML20

<sup>207</sup> ML20

<sup>208</sup> CLA Committee, RoP paragraph [10], 18 May 2015

<sup>209</sup> CLA Committee, RoP paragraph [16], 18 May 2015

<sup>210</sup> CLA Committee, RoP paragraph [8], 18 May 2015

Explanatory Memorandum so that it can be easily located,<sup>211</sup> a point we endorse as being relevant to all the requirements of Standing Order 26.6.

210. We are concerned that a financial scrutiny gap could occur when significant changes having financial implications are made to a Bill after Stage 1. We believe that committees should thoroughly consider the cost implications of amendments and also undertake further scrutiny of those implications between amending stages should that prove necessary.

### **Proposals for change**

211. We believe that the Welsh Government's approach to Explanatory Memoranda needs to be overhauled, both in terms of how they are presented and what they should include. As part of this overhaul, we believe that it would be sensible to review the relationship between Explanatory Memoranda and Statements of Policy Intent to ensure that the balance of content is correct.

**Recommendation 18: We recommend that the Welsh Government should review its approach to Explanatory Memoranda and publish the outcome of that review in readiness for the Fifth Assembly.**

212. In undertaking this review we believe that the Welsh Government should focus on ensuring that Explanatory Memoranda:

- are more concise and less repetitive, with an emphasis on the legislation itself rather than the wider policy context;
- are more consistently and clearly structured around a standard template;
- are more easily navigable including clear signposting to the specific requirements of Standing Order 26.6;
- contain better financial information that is linked to the actual costs of the Bill and compared to existing costs, rather than the additional costs that could arise from options considered; and
- explain clearly how the new law relates to and amends the existing legal framework.

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<sup>211</sup> CLA Committee, RoP paragraph [19], 18 May 2015

213. We note that the Presiding Officer does not consider there is a need to change Standing Orders in relation to Explanatory Memoranda.<sup>212</sup>

214. Nevertheless we do believe that they could be amended to bring greater clarity to what is required, particularly as regards financial information. This would contribute to improving the accessibility of law and encouraging greater public engagement with the democratic process.

215. We have already made one recommendation (recommendation 4) regarding the information to be included in Explanatory Memoranda (relating to draft Bills).

**Recommendation 19: We recommend that the Business Committee reviews the requirements of Standing Order 26.6 before the Fifth Assembly and in particular considers:**

- (i) including a requirement that the Member in charge signposts where precisely in the Explanatory Memorandum the Standing Order requirements can be found (for example, by means of an appropriate index);**
- (ii) the suggestions made by the Auditor General for Wales about how Standing Order 26.6(vi) could be improved to provide clearer financial information;**
- (iii) including a requirement that the Member in charge of a Bill explains how they have taken account of the human rights convention in preparing the Bill;**
- (iv) including a requirement that the Member in charge of a Bill provides a table of derivations.**

216. We believe that placing a requirement on the Welsh Government to prepare Keeling Schedules has merit. Including such a Schedule within the Explanatory Memorandum may make that document unwieldy and we believe that it should be prepared as a separate document.

**Recommendation 20: We recommend that the Business Committee prepares proposals to amend the Assembly's Standing Orders to require Keeling Schedules to accompany a Bill on introduction (where it proposes to amend existing primary legislation).**

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<sup>212</sup> CLA Committee, RoP paragraph [49], 24 November 2014

## 6. Legislative Scrutiny

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### Legislative process in the Assembly

217. The Assembly's legislative process for the scrutiny of Bills is set out in Standing Order 26.

218. In very general terms, there is a four-stage process for the scrutiny of a Bill:

Stage 1: consideration of its general principles by an Assembly committee;

Stage 2: detailed consideration by the same committee that undertook Stage 1 involving debating and voting on amendments tabled by Assembly Members;

Stage 3: detailed consideration in a full meeting of the Assembly (called plenary) involving the debating and voting on amendments tabled by Assembly Members;

Stage 4: a vote by the Assembly on whether to pass the final text of the Bill.

219. Between Stage 3 and 4, a further optional stage—Report Stage—is available at the request of the Member in charge of the Bill<sup>213</sup> and with the agreement of the Assembly.<sup>214</sup> It takes the same form as Stage 3.

220. If passed by the Assembly at Stage 4, a Bill must receive Royal Assent from the monarch before formally becoming an Act of the Assembly.

221. More detailed information about the legislative process is considered at appropriate points in this Chapter.

### Capacity of the National Assembly

222. Scrutiny of legislative proposals by the Assembly is a fundamental part of the law-making process. As the Learned Society of Wales told us:

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<sup>213</sup> Standing Order 24 defines the Member in charge of legislation including a Bill. For a Welsh Government Bill, the Member in charge is likely to be the relevant Welsh Minister. For a Member Bill, it is the Assembly Member who has been given leave by the Assembly to introduce a Bill.

<sup>214</sup> Standing Order 26.45

“Careful, considered scrutiny is essential to ensure the best quality legislation. So all efforts to enhance scrutiny, including the role of prelegislative scrutiny involving interested parties, are to be encouraged, having regard to the limitations imposed by the burden on Assembly Members.”<sup>215</sup>

223. The Auditor General for Wales commented that:

“... scrutiny relies on two things: it relies on the information by which you scrutinise, and it relies on time to scrutinise ... the Assembly really could do with more time to scrutinise legislation. That might mean that you need to look perhaps at pre-legislative consultation stages a bit more in order to ensure that the legislation itself—not just the intent behind legislation, but perhaps the draft Bill itself—is exposed to a degree of external scrutiny. Because, with the size of legislature that the Assembly is, it will be hard-pressed to scrutinise. I make the same point that I did when I was a member of the Richard commission: I think that the Assembly needs more Members to do its job properly.”<sup>216</sup>

224. The Presiding Officer indicated that an increase in the number of Assembly Members available to scrutinise legislation would be a positive development:

“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.”<sup>217</sup>

225. The need for greater capacity to process legislation was a view expressed at our stakeholder event in October 2014.

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<sup>215</sup> ML3

<sup>216</sup> CLA Committee, RoP paragraph [18], 18 May 2015

<sup>217</sup> ML17

226. The Hansard Society noted that the Assembly lacks:

“... the capacity that leads to a backbench culture of a kind that you find in a bigger legislature. That has implications in terms of committee work and legislation ... But that’s always struck me as one of the issues that defines how Members engage with the work.”<sup>218</sup>

227. The Minister for Finance and Government Business referred to feedback she had received that there is:

“... a lot of pressure on a small number of Members, which goes back to the bigger question about our capacity and our ability to actually handle a lot of legislation as an Assembly.”<sup>219</sup>

228. We have already described in Chapter 4 the improvements we believe could result from the use of draft Bills in pre-legislative scrutiny. We also believe that further improvements could be made to the scrutiny process:

- through changes to legislative scrutiny (arising from Standing Order 26);
- by post-legislative scrutiny; and
- by scrutinising subordinate legislation emerging from Acts and Measures.<sup>220</sup>

229. Improving scrutiny in the ways we are suggesting undoubtedly raises issues about how such improvements are going to be delivered. As well as some of the witnesses we have taken evidence from, many observers have suggested that scrutiny could be improved if the number of Assembly Members were to increase.<sup>221</sup>

230. Certainly, we believe that increasing the capacity of the Assembly would have a positive impact on its ability to undertake all aspects of

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<sup>218</sup> CLA Committee, RoP paragraph [251], 9 March 2015

<sup>219</sup> CLA Committee, RoP paragraph [14], 16 March 2015

<sup>220</sup> A Measure was the name given to primary legislation passed by the Assembly between 2007 and 2011.

<sup>221</sup> *Report of the Richard Commission, Commission on the Powers and Electoral Arrangements of the National Assembly for Wales*, Spring 2004; Electoral Reform Society, *Size Matters - Making the National Assembly more effective, date*; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, March 2014

scrutiny; not just that required by Standing Order 26 but also pre- and post-legislative scrutiny.

231. In our view, it would provide for better, more in-depth and effective scrutiny of the entire life-cycle of a piece of legislation: from proposal to implementation to evaluating its success or otherwise in delivering its objectives.

232. Over the long term we believe that increasing the size of the Assembly has the potential to contribute to improving the quality of law produced by the Assembly. Other factors will also play a role: the approach of the Welsh Government to developing its proposals, the skills of Assembly Members, the research and other support available, as well as the role of committees in the process (we touch on the specific issue of committee structures in Chapter 8 of this report).

233. That is not to say that the existing scrutiny is not up to standard. We believe it is, as do others. However, we believe there is scope for improvements to be made to the scrutiny process within the existing size of the Assembly and the issues under the control of Standing Order 26. We discuss these in the rest of this chapter.

### **The Welsh Government's views on scrutiny**

234. We have commented in our report about some concerns we have had with comments made by the Welsh Government regarding scrutiny (for example in its written evidence<sup>222</sup> and as referred to in paragraphs 99 to 100).

235. When we asked who decides the appropriate level for the scrutiny of Bills, the Minister for Finance and Government Business told us:

“Clearly, it’s a matter for the Assembly to decide what the level of scrutiny should be, but I think it’s very important that we start the process by making sure we’re planning for the timetabling and that we’re making effective use of our resources.”<sup>223</sup>

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<sup>222</sup> ML13

<sup>223</sup> CLA Committee, RoP paragraph [5], 16 March 2015

236. When we questioned the First Minister on this issue, he said:

“... ultimately, of course, it’s for the Assembly itself to decide how scrutiny is taken forward. We do try and timetable Bills according to their complexity and according to the size and nature of each Bill. It’s not an exact science in terms of determining how much time exactly is needed, but we are certainly aware that, when a substantial piece of legislation comes forward, we have to think about ensuring that Members are able to scrutinise properly during the course of the Bill’s progress.”<sup>224</sup>

237. The level of scrutiny to be attached to a Bill is entirely a matter for the Assembly to determine and we therefore welcome the Welsh Government’s clarification on this point and the approach it seeks to adopt.

### **Scrutiny at Stage 1**

238. UCAC felt that Stage 1 scrutiny is detailed and thorough, providing an excellent opportunity “to sound out all of the relevant issues”.<sup>225</sup>

239. We agree. We see the value in Stage 1 as being an opportunity for stakeholders, who may or may not have fed their views into pre-legislative discussions, to explain their views on a formal piece of legislation with an Assembly committee rather than the Welsh Government. The outcome of this interaction will hopefully enable the proposer of the legislation to consider matters from a range of perspectives and to consider alternative and sometimes better ways of delivering outcomes, ultimately with a view to improving the quality of the law produced.

240. Many respondents suggested that more time should be made available for Stage 1 scrutiny, particularly to allow them time to prepare responses to committee consultations. The Business Committee is responsible for agreeing the Stage 1 reporting deadlines for Bills, following a proposal from the Member in charge.

241. The Welsh Local Government Association said that local government would welcome more time for Stage 1 scrutiny “to allow

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<sup>224</sup> CLA Committee, RoP paragraph [226], 23 March 2015

<sup>225</sup> ML7

wider engagement, exploration and scrutiny of legislation”,<sup>226</sup> although it recognised that there was a difficult legislative timetable to adhere to.<sup>227</sup> The British Medical Association Cymru Wales felt that sometimes Stage 1 is too short to allow adequate consultation within membership organisations and at least two months are needed.<sup>228</sup> They also highlighted some of the challenges they face.<sup>229</sup>

242. The Presiding Officer noted that on several occasions, the Business Committee had agreed to extend the original deadline for a Committee to complete its Stage 1 report “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”.<sup>230</sup>

243. There are a range of practical factors to take into account from a committee’s perspective when seeking the views of stakeholders, such as organising a consultation exercise, arranging a suitable number of oral evidence sessions, analysing consultation responses, drafting and agreeing reports.

244. Equally, the Welsh Government needs to be mindful, when proposing a scrutiny timetable for its legislation (through the Member in charge), of the right of a legislature, through its committees, to consult on the government’s legislative intentions and of the amount of work likely to be involved.

245. We understand the concerns of stakeholders who feel that there is insufficient time for them to contribute as they would like to Stage 1 scrutiny. We have considered whether a minimum time for such scrutiny should be included within Standing Orders. However, we believe that recommendation 3 presuming in favour of publishing draft Bills may alleviate some concerns as stakeholders would be more familiar with the purpose of the Bill and therefore more engaged.

246. In our view it would be better to review the need for a minimum period of time for Stage 1 scrutiny after a period of time (for example following the passage of a reasonable number of Bills through the Fifth Assembly) to gauge the impact of publishing draft Bills.

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<sup>226</sup> ML12

<sup>227</sup> CLA Committee, RoP paragraph [250], 19 January 2015

<sup>228</sup> ML16

<sup>229</sup> CLA Committee, RoP paragraphs [73-74], 19 January 2015

<sup>230</sup> ML17

247. If the government does not fully accept recommendation 3 on publishing draft Bills, we believe that a review should be undertaken earlier in the Fifth Assembly.

**Recommendation 21: We recommend that the Business Committee, following an appropriate period of time in the Fifth Assembly, reviews the need for a minimum period to be included in Standing Orders for the scrutiny of Bills at Stage 1.**

### **Financial scrutiny**

248. One key aspect of scrutiny is scrutinising the cost of legislation.

249. Its importance was a theme of the Auditor General for Wales' evidence to us.<sup>231</sup> He said:

“... the Assembly needs information on the expected costs that arise from its legislation if it is to legislate responsibly and for the overall benefit of the people of Wales.”<sup>232</sup>

250. SOLACE Wales,<sup>233</sup> and Flintshire County Council<sup>234</sup> have highlighted the need for better regulatory impact assessments. Flintshire County Council referred to the need:

“... for a more effective system of Regulatory Impact Assessments with a more realistic appraisal of the likely cost of the proposed legislation.”<sup>235</sup>

251. The suggestion of a more realistic appraisal of the cost of legislation highlights why financial scrutiny is so important.

252. YourLegalEyes were surprised at the absence of reports from the Finance Committee on all the main Bills in this Assembly, noting that (at the time of their submission) they only found one report by the Finance Committee on Bills.<sup>236</sup>

253. It may be that financial scrutiny of Bills is hampered by the poor quality of financial data found in Explanatory Memoranda that is referred to in Chapter 5 and which recommendation 19, in part, seeks

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<sup>231</sup> ML20; CLA Committee, RoP paragraphs [2 to 98], 18 May 2015

<sup>232</sup> ML20

<sup>233</sup> ML15

<sup>234</sup> ML6

<sup>235</sup> ML6

<sup>236</sup> ML11

to address. However, that should not prevent the financial scrutiny taking place.

254. We have not considered in any detail (or received any evidence on) the mechanism by which the Finance Committee and other committees interact to scrutinise the financial aspects of legislation. Undertaking such scrutiny is vital given that it may impact on how successful a Bill is in delivering its policy objectives.

255. If no mechanism currently exists, we believe one approach would be for the Finance Committee to undertake an initial assessment of the financial implications of a Bill soon after it is introduced and to notify its findings to the relevant committee undertaking Stage 1 scrutiny of that Bill. The relevant committee could then use this information, together with its subject expertise, to undertake fuller financial scrutiny of a Bill, should that be necessary.

256. The Finance Committee may have greater constraints on its time in the future because of the Assembly's acquisition of tax-raising powers. As a result, the Business Committee should consider who undertakes financial scrutiny as part of any advice it gives to the Assembly about the committee structures in the Fifth Assembly (see Chapter 8 and recommendation 31).

257. The Welsh Government told us that:

“Looking ahead, the Government envisages that it may also be appropriate to deal with certain financial or tax revenue issues through an alternative scrutiny process ...”<sup>237</sup>

258. The Auditor General for Wales commented that:

“... the Assembly will face a particular challenge once the treasury functions start to flow to the Welsh Government, and we start to look at tax raising. I think there will be a need to ensure that those provisions are adequately introduced, adequately explained by memoranda, and adequately scrutinised by the Assembly”.<sup>238</sup>

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<sup>237</sup> ML13

<sup>238</sup> CLA Committee, RoP paragraph [60], 18 May 2015

259. He also felt that the emergence of a strong treasury function will have a real impact on legislation,<sup>239</sup> noting that in Whitehall “the involvement leads to a much clearer definition of what the costs are, which, in turn, aids that democratic oversight.”<sup>240</sup>

260. It is clear from correspondence<sup>241</sup> that the Assembly Commission is carefully considering and preparing for the advent of fiscal devolution through its strategic planning for the Fifth Assembly. We welcome the priority being attached to this work. We believe the Assembly Commission should clarify the changes that may be needed to Standing Orders arising from its work.

## **Amending Bills**

### ***Current procedure***

261. As previously indicated, there are currently two compulsory amending stages (at Stage 2 in committee and Stage 3 in plenary), with the potential for an additional Report Stage at the request of the Member in charge of the Bill. In addition, there are further opportunities to move amendments at further Stage 3 and further Report Stage proceedings. Such amendments may only be tabled for the purpose of clarifying a provision in a Bill or to give effect to commitments given at the earlier Stage 3 or Report Stage proceedings.<sup>242</sup>

### ***The number of Welsh Government amendments***

262. We have already highlighted in Chapter 4 our concerns that incomplete policy development can lead to incomplete Bills being introduced and consequently to a significant number of Welsh Government amendments being tabled at later stages in the legislative process.

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<sup>239</sup> CLA Committee, RoP paragraphs [82], 18 May 2015

<sup>240</sup> CLA Committee, RoP paragraphs [82 and 86], 18 May 2015

<sup>241</sup> Letter from David Melding AM, Chair, Constitutional and Legislative Affairs Committee to Jocelyn Davies AM, Chair, Finance Committee, *Inquiry: Making Laws in the Fourth Assembly*, 26 March 2015; Letter from Jocelyn Davies AM, Chair, Finance Committee to David Melding AM, Chair, Constitutional and Legislative Affairs Committee, *Inquiry: Making laws in the Fourth Assembly*, 16 April 2015; Letter from Jocelyn Davies AM, Chair, Finance Committee to the Presiding Officer, *Budget Procedures*, 5 May 2015; Letter from Presiding Officer to Jocelyn Davies AM, Chair, Finance Committee, 19 May 2015

<sup>242</sup> See Standing Orders 26.39-26.41 and 26.46

263. In particular, we believe that a significant number of single language amendments tabled to cover drafting errors could potentially hamper the time available to consider more substantive amendments, a point made by an official accompanying the Presiding Officer.<sup>243</sup>

264. The Presiding Officer referred to this specific issue:

“I think that it is very important that a lot of work is done before the Bill is placed before the Assembly. There is nothing more time-wasting than having to make all of these amendments, which we have done with several Bills. The social services Bill was one and there was another one ... to which there were hundreds of amendments, and that just takes up so much time. So, there could have been a lot more preparatory work done by the Government before it brought it forward; I think that might help. I think that pre-legislative scrutiny helps quite a lot.”<sup>244</sup>

265. However, she did not believe that more stages were necessary to deal with a large volume of amendments. She said:

“I do not think that we need more stages, but we need more time for the existing stages. It is important that we are not wasting time on amendments that should not be there—things that should have been sorted out before the legislation came forward. I think that is the big issue.”<sup>245</sup>

266. Chapter 4 of this report indicates the ways in which we believe the number of Welsh Government amendments could be limited to those arising solely from scrutiny.

267. Sections within this chapter highlight how we believe scrutiny of a significant number of amendments could be tackled (including where policy changes are proposed by the Welsh Government at amending stages).

### ***Additional Stage 1 scrutiny by committees***

268. When we asked whether there was scope to bring matters back to a committee between amending stages for additional scrutiny (similar

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<sup>243</sup> CLA Committee, RoP paragraph [36], 24 November 2014

<sup>244</sup> CLA Committee, RoP paragraph [53], 24 November 2014

<sup>245</sup> CLA Committee, RoP paragraph [59], 24 November 2014

to that undertaken at Stage 1), the Presiding Officer hoped “that that would not be necessary”,<sup>246</sup> although if there “are things that cannot be put right in Stages 2 and 3, then that might be a way forward”.<sup>247</sup> She noted that it could lead to “increased pressure on committees’ capacity if that should happen”.<sup>248</sup>

269. An official accompanying the Presiding Officer noted that the process for looking at timetables for Bills had been strengthened and there was already a lot of flexibility in the Standing Orders.<sup>249</sup> Indeed, later the Presiding Officer said:

“I think that time needs to be factored in to make sure that stakeholders do actually get the opportunity, because the laws are about the people of Wales, and, if they cannot have their say in them, then they are not going to be fit for purpose at the end.”<sup>250</sup>

270. There was also a call from YourLegalEyes for “Stage 1 committees” to revisit Bills which have been substantially amended at Stage 2 or later.<sup>251</sup> Similar views were expressed by the Welsh Local Government Association:

“The Assembly should introduce a referral mechanism into the legislative process, whereby significant amendments (either in number or nature) introduced at Stage 3 may have a significant impact on the scope or practicability of the Bill and may require further Stage 1 scrutiny and engagement with relevant stakeholders. It may not be a necessary process for all Bills, however, would be a valuable safeguard for scrutiny in a unicameral legislature.”<sup>252</sup>

271. The Children, Young People and Education Committee have demonstrated one possible approach. The Minister for Education and Skills tabled amendments at Stage 2 of the Qualifications Wales Bill relating to a new policy area. The amendments were agreed at Stage 2 proceedings of the Children, Young People and Education Committee. Following these proceedings, it undertook a short consultation

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<sup>246</sup> CLA Committee, RoP paragraph [61], 24 November 2014

<sup>247</sup> CLA Committee, RoP paragraph [63], 24 November 2014

<sup>248</sup> CLA Committee, RoP paragraph [63], 24 November 2014

<sup>249</sup> CLA Committee, RoP paragraph [65], 24 November 2014

<sup>250</sup> CLA Committee, RoP paragraph [81], 24 November 2014

<sup>251</sup> ML11

<sup>252</sup> ML12

exercise on the agreed amendments to hear the views of stakeholders in advance of Stage 3 scrutiny in plenary. We welcomed and commended their approach, and would hope that other committees would be in a position to adopt a similar practice (should their work programmes allow).<sup>253</sup>

272. We believe the existing Standing Orders provide the flexibility for committees to undertake further scrutiny on amendments tabled and agreed to at Stage 2, should that be necessary and time is available.

273. Nevertheless, we are aware of the potential time constraints involved for both a committee and stakeholders in undertaking such work. However, as we have indicated, we do not believe that committees should as a matter of routine find themselves in the position of having to undertake scrutiny of significant amendments tabled at Stage 2 because of the introduction of an incomplete Bill. Recommendations 3 (relating to draft Bills), 9 and 10 (relating to the accuracy of a Bill on introduction) are relevant to this issue. Our views on the Report Stage (see below) may also alleviate potential concerns about the time available to undertake additional scrutiny work.

### ***Consideration of amendments by the Constitutional and Legislative Affairs Committee***

274. On a point related to the scrutiny of amendments, YourLegalEyes called for this Committee to report on amendments that contained significant delegated powers.<sup>254</sup>

275. We welcome and agree with the point made by YourLegalEyes and will look to undertake such scrutiny in future. We will reflect this approach in any legacy work undertaken for our successor committee in the Fifth Assembly.

### ***Report Stage***

276. YourLegalEyes also called for a “systematic” Report Stage as a means of “revising and polishing” Welsh law and saw it as a useful stage in a unicameral Assembly.<sup>255</sup>

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<sup>253</sup> Letter from David Melding AM, Chair of the Constitutional and Legislative Affairs Committee to Ann Jones AM, Chair, Children, Young People and Education Committee, *Qualifications Wales Bill Stage 2 Amendments*, May 2015

<sup>254</sup> ML11

<sup>255</sup> ML11

277. The Minister for Finance and Government Business didn't think that a Report Stage should apply to every Bill as a matter of course<sup>256</sup> and that it should be determined on a case-by-case basis.<sup>257</sup> The First Minister was not in favour of another compulsory stage<sup>258</sup> and when questioned further said:

"I personally, wouldn't favour the system where the Report Stage is, in effect, another Stage 3 where any number of amendments are just put down once again and exactly the same situation happens again. I don't think that adds anything. So, I think the answer would be it would depend on what the stage might look like ... is it something that would add a substantial amount of time to the passage of the Bill? How limited would the scope of the Report Stage be? Would there be the opportunity for, as it were, technical amendments to be put down, and if so, who would define what those amendments would be? I think all of those things would have to be looked at in terms of coming to a view as to whether a Report Stage of that kind would be appropriate."<sup>259</sup>

278. We believe that a compulsory Report Stage would add value to the scrutiny process and lead to improvements in the quality of the law produced, particularly given the Assembly's status as a unicameral legislature that does not have the additional scrutiny delivered by a second chamber.

279. We disagree with the First Minister's view that it would open the door to a Member in charge losing control of a Bill.<sup>260</sup> As soon as a Bill is formally introduced it becomes the responsibility of the Assembly. This includes the responsibility to process Bills so as to allow the elected government to secure its business and we have every confidence in the Assembly's will and ability to discharge that responsibility whether or not an additional amending stage is available.

280. In any event, we consider that a compulsory Report Stage is likely to add only a month to the legislative process, which does not appear particularly onerous when judged against the potential length of time

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<sup>256</sup> CLA Committee, RoP paragraph [75], 16 March 2015

<sup>257</sup> CLA Committee, RoP paragraph [80], 16 March 2015

<sup>258</sup> CLA Committee, RoP paragraph [97], 23 March 2015

<sup>259</sup> CLA Committee, RoP paragraph [101], 23 March 2015

<sup>260</sup> CLA Committee, RoP paragraph [96], 23 March 2015

taken for scrutiny in a second chamber. In addition, the Welsh Government will know it has to be factored into its internal processes before a Bill is introduced.

281. As with the existing optional Report Stage, we consider that the Presiding Officer should retain the power of selection over amendments,<sup>261</sup> ensuring an independent arbiter of what amendments it would be appropriate to debate.

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.

**Recommendation 22: Given that the Assembly is a unicameral legislature, we recommend that the Business Committee prepares proposals to amend the Assembly’s Standing Orders to provide a compulsory Report Stage for the scrutiny of every Bill, unless the Assembly, by resolution on a two-thirds majority, decides otherwise.**

#### ***Drafting of non-government amendments***

283. One issue that has caused us some concern relates to the following comments of the Welsh Government:

“Further work is also required to consider what more (if anything) could be done to facilitate non-government amendments that are accepted by the Assembly. It is considerably more difficult for any person who has not been involved in the initial drafting of a bill to draft technically accurate amendments.”<sup>262</sup>

284. When questioned on this point, the First Legislative Counsel said:

“I would argue that it’s much more difficult for the person who hasn’t drafted it in the first place, because the legislation has been put together in a particular way, it’s got a particular vocabulary, it’s got a particular pattern of the use of words and

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<sup>261</sup> Standing Orders 26.34 and 26.46

<sup>262</sup> ML17

it's not always apparent to somebody who's picking up that document afterwards, or it isn't easily apparent sometimes. So, that's the reason why there are difficulties."<sup>263</sup>

285. He also commented on the number of stages of scrutiny in the Assembly compared to Westminster:

"... in comparison to Westminster, for example, where you've got up to seven amending stages, it's a lot easier to have a probing amendment and to have an amendment that is intended essentially to be the catalyst for a political discussion. In our case, we generally have two amending stages, and so I think it's more important that the amendment is technically correct, because we don't necessarily have a means of rectifying it."<sup>264</sup>

286. We are not convinced by the line of argument being put forward, particularly as in one sense it seems to run contrary to the function of a legislature.

287. We believe that the Welsh Government should always consider the principle and merits behind a non-government amendment rather than how technically sound it is. We believe that the Welsh Government should be open to considering the ideas of others and, where they consider them to have merit, tabling re-drafted amendments if necessary to deliver the best possible law for the benefit of citizens in Wales.

288. As we indicate in paragraph 261, there are existing mechanisms available in Standing Orders that would allow the Welsh Government to bring forward amendments to give effect to commitments at Stage 3 and Report Stage—through further Stage 3 proceedings and further Report stage proceedings respectively. Both stages are optional for the Welsh Government and could also be used to deal with any perceived technical deficiencies arising in non-government amendments agreed to by the Assembly.

289. In addition, we consider that probing amendments are a powerful scrutiny tool available to Assembly Members and we believe their use strengthens our case for the compulsory Report Stage we recommend.

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<sup>263</sup> CLA Committee, RoP paragraph [90], 9 March 2015

<sup>264</sup> CLA Committee, RoP paragraph [94], 16 March 2015

It will ensure that there is plenty of opportunity for probing amendments to Bills that are considered at the end of an Assembly where the time available for scrutiny might otherwise be an issue.

290. The Office of the Legislative Counsel told us that it had drafted non-government amendments for some opposition Assembly Members.<sup>265</sup> We welcome the assistance that has been given to Assembly Members and believe there may be merit in pursuing this approach further in certain circumstances (for example in relation to technically complex Bills and those that are unconsolidated) but in a more structured way.

291. We recognise the important role played by Assembly Clerks and policy lawyers in the amendments process. Nevertheless, we believe that in relation to the circumstances described above, using the drafting expertise of the Office of the Legislative Counsel to help Assembly Members draft amendments to specific Bills would benefit the scrutiny process and the quality of law produced by the Assembly. The Welsh Government would of course have first call on their services.

292. One possible approach would be to explore the feasibility of secondments from the Office of the Legislative Counsel to the Assembly Commission; secondees could work on drafting Member Bills and assisting with the drafting of backbench amendments.

**Recommendation 23: We recommend that the Assembly Commission and the Welsh Government explore the feasibility of putting in place arrangements for the secondment of staff from the Office of the Legislative Counsel to the Assembly Commission.**

### **Innovation and the amending process**

293. During our inquiry a number of suggestions were made to help improve the amendments process and these are discussed briefly below.

#### ***Purpose and effect text***

294. YourLegalEyes<sup>266</sup> and the Welsh Local Government Association<sup>267</sup> suggested the use of explanatory text to accompany amendments

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<sup>265</sup> CLA Committee, RoP paragraph [94], 9 March 2015

<sup>266</sup> ML11

<sup>267</sup> ML12

when tabled. We are aware that this option is already available to Assembly Members when tabling amendments, although we are unclear about how useful it has been.

295. Nevertheless, we believe that providing such text has the potential to aid the scrutiny of Bills, not just for Members participating in amending stages but also by enabling stakeholders and the public to follow and understand proceedings more easily. In particular, it could help identify amendments that are designed to amend the Bill's policy and those aimed at improving or correcting drafting. We would encourage any explanations to be kept short and concise.

**Recommendation 24: We recommend that further work is undertaken by the Business Committee to inform consideration of amending Standing Orders to require that all amendments tabled to a Bill (including Welsh Government amendments) are accompanied by text that explains their purpose and effect.**

296. We do not believe that this would prove onerous for the Welsh Government as they have agreed to publish the purpose and effect tables they have produced for their amendments, a move we welcome.

297. However, we recognise that for Assembly Members and Commission staff, this would add to their workload at what is already a busy deadline-driven process. Any decision to progress with the change to Standing Orders we suggest must be adequately funded by the Assembly Commission to ensure the successful delivery of the intended benefits.

298. It will also be necessary for all those involved in the production of explanatory text to take account of the probability that the courts will be prepared to have regard to them in the same circumstances as those in which they already rely on Explanatory Notes to Bills.

***Increasing time available for consideration of a large number of tabled amendments***

299. A more novel suggestion was to link the time available for considering tabled amendments prior to scrutiny in committee to the number of amendments tabled by the Welsh Government at amending

stages,<sup>268</sup> potentially as a means of ensuring Bills are fully formed on introduction and also reducing the drafting of errors.

300. However, such an approach could be risky as it could lead to pressure to encapsulate complicated ideas in a small number of large amendments rather than distributing the material appropriately through the Bill. As such, it could also risk putting form over substance and convenience.

301. In view of these risks, we are not persuaded by the suggested approach and believe that other recommendations in our report seek to address the issues of concern that gave rise to the suggestion.

### ***Changing amendment tabling deadlines***

302. The British Medical Association Cymru Wales suggested that amendments could be published earlier in advance as a matter of routine to give organisations such as theirs the chance to look at them.<sup>269</sup>

303. We do not believe that the existing Standing Orders regarding the deadline for tabling amendments (currently 5 working days before an amendment is considered<sup>270</sup>) need to change.

304. However we would encourage the Welsh Government and Assembly Members to table their amendments as soon as possible to enable stakeholders to engage with the changes being proposed to Bills, should they wish to do so. There is evidence that during the course of the Fourth Assembly amendments to Bills are being tabled earlier<sup>271</sup> and this is to be welcomed.

### ***Use of technology***

305. The Learned Society of Wales made the following suggestion regarding the use of technology:

“... with modern technology, amendments could be presented in electronic form to allow AMs and the public to see the

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<sup>268</sup> ML11; Stakeholder event, 13 October 2014

<sup>269</sup> CLA Committee, RoP paragraph [94], 19 January 2015

<sup>270</sup> Standing Order 26.59. By convention the Welsh Government tables its amendments 7 working days before the start of proceedings.

<sup>271</sup> By looking at the dates of daily notices of amendments relative to tabling deadlines

original text, the effect of the amendment upon it in a ‘tracked-change’ format, and what the final text would look like when amended, all at the press of a computer key, and much the same could be done with proposals amending earlier legislation.”<sup>272</sup>

306. We see considerable merit in this suggestion and consider it is worthy of further consideration.

307. We believe that there would be merit in the Assembly Commission considering the way in which technology can be used to aid legislative scrutiny, in particular by investigating the feasibility of showing how a Bill would look should an amendment be agreed to.

### ***Tracking the legislative process***

308. A number of respondents, such as the Welsh Local Government Association,<sup>273</sup> YourLegalEyes<sup>274</sup> and UCAC,<sup>275</sup> noted that they found it difficult to track the progress of legislation after Stage 1.

309. UCAC suggested that the difficulty possibly stemmed from the workload the legislative process entailed, rather than the process itself.<sup>276</sup> We agree that the capacity of organisations to engage with the legislative scrutiny process may be an issue, as suggested by others.<sup>277</sup> As such, making information available to stakeholders explaining what is happening in the Assembly assumes even greater importance.

310. While the use of technology could potentially help, we have noted the suggestion that summaries of proceedings could be made available.<sup>278</sup>

311. We are aware that the Assembly’s Research Service publishes summaries of successful amendments at Stage 2 proceedings on some Bills and they were commended by YourLegalEyes.<sup>279</sup> We believe that if this were to happen as a matter of routine, this could potentially increase the accessibility of the Assembly’s proceedings to a wider

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<sup>272</sup> ML3

<sup>273</sup> CLA Committee, RoP paragraph [255], 19 January 2015

<sup>274</sup> ML11

<sup>275</sup> CLA Committee, RoP paragraphs [163-4; 172], 2 March 2015

<sup>276</sup> CLA Committee, RoP paragraphs [171], 2 March 2015

<sup>277</sup> For example, CLA Committee, RoP paragraphs [73-74], 19 January 2015

<sup>278</sup> For example ML11, ML12

<sup>279</sup> ML11

audience, as well as improving the understanding of the legislative process and aiding transparency.

312. We recognise that this approach is resource intensive and may require additional resources but we consider that the production of such documents would be a sensible investment with benefits for the Assembly and the wider public.

**Recommendation 25: we recommend that the Assembly Commission should ensure that it publishes summaries of amending Stages of all Bills within an appropriate period of time after the completion of that Stage's proceedings.**

313. We consider that recommendations 24 and 25 should be seen as contributing to continuous improvement in the process of legislating. We believe that they will aid understanding and accessibility, as well as facilitating more informed scrutiny.

**Additional scrutiny – impact on the Welsh Government's legislative programme**

314. We are acutely aware that making recommendations which add to the length of scrutiny may impact on the delivery time of the Welsh Government's legislative programme.

315. However, we believe that this will act as an incentive to ensure that the Welsh Government's legislation is properly planned, complete and accurate on introduction.

316. Equally, we believe it will encourage the Welsh Government to focus on whether law is actually needed, having regard to our views on the volume of legislation.

**Curtailed scrutiny**

317. As part of our inquiry we have considered the curtailed scrutiny afforded to three Welsh Government Bills:

- Agriculture Sector (Wales) Bill – subject to the emergency procedure under Standing Orders;
- Control of Horses (Wales) Bill – by-passed Stage 1 scrutiny;
- National Health Service Finance (Wales) Bill – by-passed Stage 1 scrutiny.

318. The Welsh Government felt there are times when it is appropriate or necessary to fast track Bills; for example the National Health Service Finance (Wales) Bill, which needed to be in place in time for the next financial year.<sup>280</sup> According to the Welsh Government, the policy within the Bill had been extensively debated by three committees prior to introduction and it dealt with a single, very narrow policy.<sup>281</sup>

319. When asked about the flexibility of current processes and procedures, the First Minister said:

“I’ve seen nothing to suggest that the current procedures are causing difficulty in terms of scrutiny.”<sup>282</sup>

320. By-passing Stage 1 scrutiny (or “fast-tracking” legislation) and scrutiny subject to the emergency procedures can speed up the process of putting law on the statute book and the ability to deal with a particular problem. But there are potential drawbacks:

- there is no formal interaction in formal proceedings between stakeholders and legislators;
- an opportunity is lost for those stakeholders who have not been consulted by the Welsh Government to provide any formal evidence to the Assembly on the proposals;
- even in situations in which there may be broad agreement that an issue needs to be addressed, an opportunity has been lost to test with all stakeholders whether the drafting of the Bill represents the best possible solution or whether the proposed Bill could be improved; and
- Assembly Members may be unfamiliar with a Bill’s content, potentially making for less-informed scrutiny at Stages 2 and 3.

321. We believe that any decision to adopt curtailed scrutiny should not be taken lightly. To that end, we agree with the Presiding Officer when she said:

“It is important that the reputational risks and resource implications of using fast-track and emergency procedures,

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<sup>280</sup> ML13

<sup>281</sup> ML13

<sup>282</sup> CLA Committee, RoP paragraph [86], 23 March 2015

especially if these are subsequently found to be inappropriate, are fully considered when such decisions are made.”<sup>283</sup>

322. She also emphasised the need to ensure that when “a different process is used, people understand it and we do not lose transparency and accountability”.<sup>284</sup>

323. Many stakeholders commented on these issues. Mold Town Council considered that “reducing the opportunity for effective scrutiny is detrimental to the democratic process”.<sup>285</sup> UCAC expressed a similar point<sup>286</sup> and said:

“It’s an important principle in putting the foundations for the Assembly in place in engaging with civil society. The ability to have your say and have the opportunity to lobby, and try to bring influence to bear can throw up in the air some questions and issues for discussion that perhaps haven’t been considered by others. Perhaps the answer will be the same at the end of the day: ‘Well, no, we’re not going to change and we still think that this is the best course of action’ but at least somebody will have had to consider the matter. And I don’t think there should be many occasions requiring emergency legislation, if at all.”<sup>287</sup>

324. The British Medical Association Cymru Wales told us that “legislation made in haste tends to be bad legislation and, in terms of better law making ... things need to be dealt with and properly debated and scrutinised”.<sup>288</sup> They were unconvinced of the need to bypass Stage 1 scrutiny for either the Control of Horses (Wales) Bill or the National Health Service Finance (Wales) Bill and suggested that:

“... clearer criteria should be adopted that would permit such curtailed scrutiny only when it is specifically justified by needs of urgency.”<sup>289</sup>

325. Putting in place appropriate safeguards was a theme developed

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<sup>283</sup> ML17

<sup>284</sup> CLA Committee, RoP paragraphs [108], 24 November 2014

<sup>285</sup> ML5

<sup>286</sup> CLA Committee, RoP paragraphs [178-183], 2 March 2015

<sup>287</sup> CLA Committee, RoP paragraphs [185], 2 March 2015

<sup>288</sup> CLA Committee, RoP paragraphs [82], 19 January 2015

<sup>289</sup> ML16

by YourLegalEyes:

“Fast track procedures bypassing Committee Stage 1 should be kept to a minimum in the Assembly because there is already only one Chamber ... Criteria for ... an emergency could be set out in the Assembly’s Standing Orders. The Standing Orders could also provide that any such Acts passed under emergency procedures are to be reviewed after a stated period of time to assess whether or not the Act needs to be reviewed, amended or repealed.”<sup>290</sup>

326. The Welsh Local Government Association also suggested that:

“Standing Orders should build in post-legislative scrutiny where emergency legislation is introduced to be commenced after a set-period of time, in order to assess whether the legislation is effective or could be improved.”<sup>291</sup>

327. The Presiding Officer also suggested the use of post-legislative scrutiny to determine whether the accelerated passages of legislation were justifiable in hindsight and/or effective in practice.<sup>292</sup> We endorse this view and welcome the post-legislative scrutiny undertaken by the Environment and Sustainability Committee on the Control of Horses (Wales) Bill.<sup>293</sup>

328. We share the views of stakeholders who have highlighted the importance of the full scrutiny of legislative proposals, and their engagement with such scrutiny, as being an integral part of the democratic process. While we accept that there may be occasions when there is good reason to expedite the scrutiny of legislation, the reasons for doing so must be transparent and themselves subject to scrutiny.

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<sup>290</sup> ML11

<sup>291</sup> ML12

<sup>292</sup> ML17

<sup>293</sup> Environment and Sustainability Committee, RoP [paragraphs 149-247], 12 March 2015; Letter from Alun Ffred Jones AM, Chair of the Environment and Sustainability Committee to Carl Sargeant AM, Minister for Natural Resources, *Control of Horses (Wales) Act 2014*, 8 July 2015; Letter from Rebecca Evans AM, Deputy Minister for Farming and Food to Alun Ffred Jones AM, Chair of Environment and Sustainability Committee, *Control of Horses (Wales) Act 2014*, 15 September 2015

329. We believe it would be sensible for the Business Committee to review the adequacy of procedures for by-passing Stage 1 and for emergency legislation to ensure they are fit for purpose and provide an appropriate level of transparency in the decision-making for the use of such procedures.

**Recommendation 26: We recommend that the Business Committee reviews the adequacy of the procedure that permits the by-passing of Stage 1 scrutiny and the procedure that allows the use of Welsh Government Emergency Bills. In particular it should consider:**

- (i) a requirement for the Business Committee to publish the reasons for its decision under Standing Order 26.9 to permit a Bill to bypass Stage 1 scrutiny in committee, within 2 working days of making that decision;**
- (ii) a requirement that, in tabling a motion proposing that a government Bill be treated as a government Emergency Bill under Standing Order 26.95, the Member in charge must lay a statement explaining why it should be treated as such and the costs and other consequences of not doing so.**

### **Scrutiny of subordinate legislation**

330. One of the themes of our report, and a theme which has emerged during our scrutiny of Bills in the Fourth Assembly, has been the amount of policy detail left to be delivered through subordinate legislation.

331. As well as our concerns about the principle of this approach, we are also conscious that such legislation is not subject to much policy scrutiny. It is particularly difficult for committees with a heavy policy and Bill workload to factor in such scrutiny at short notice following the laying of an instrument and given that there is only a relatively short period in which to report (irrespective of the procedure applied).

332. This point has also been picked up by some respondents such as Mold Town Council, who felt subordinate legislation is not subject to an appropriate level of scrutiny<sup>294</sup> and UCAC, who called for increase in

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<sup>294</sup> ML5

scrutiny as there is insufficient scrutiny for material issues.<sup>295</sup> This issue was also raised at our stakeholder event.<sup>296</sup>

333. We share these concerns particularly in light of our views on framework legislation.

334. The RSPCA Cymru highlighted the different levels of scrutiny that Acts and subordinate legislation are subject to<sup>297</sup> and noted that the current arrangements prevent amendments to secondary legislation.<sup>298</sup> We explored this point with the Hansard Society who told us:

“The danger of amendment is that, in practice, what could happen is that it would reopen the primary legislative debate. It’s also the case that quite a number of statutory instruments will already be on the statute book and operational before the scrutiny process may be complete. So, you don’t want amendment in those circumstances; you need a greater degree of certainty. So, we don’t ... support outright amendment; what we have suggested is that there should be a power of conditional amendment, which is that both Houses have the power to delay implementation of the instrument, but subject to them clarifying what it is about it that they would like to see changed, and to the Government coming back in response to that. So, we would build that in, rather than an outright power of amendment, because I think that could lead to some serious legal difficulties in some cases.”<sup>299</sup>

335. We welcome the scrutiny undertaken by the Health and Social Care Committee<sup>300</sup> of the *Care and Support (Eligibility) (Wales) Regulations 2015* and the associated code of practice in order to consider whether they will achieve the aim of the *Social Services and Well-being (Wales) Act 2014* and to inform Assembly Members’ preparation for their consideration of the regulations in Plenary.<sup>301</sup>

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<sup>295</sup> ML7

<sup>296</sup> 13 October 2014

<sup>297</sup> ML8

<sup>298</sup> ML8

<sup>299</sup> CLA Committee, RoP paragraph [237], 9 March 2015

<sup>300</sup> Letter from David Rees AM, Chair of the Health and Social Care Committee to Mark Drakeford AM, the Minister for Health and Social Services, *Care and Support (Eligibility) (Wales) Regulations 2015*, 15 May 2015

<sup>301</sup> Record of Proceedings, 14 July 2015

336. Nevertheless, we recognise that there are considerable challenges for existing committees to undertake such scrutiny alongside the scrutiny of Bills, Welsh Government policies and the budget. When you also include the desirability of scrutinising subordinate legislation, the challenges strengthen the arguments in favour of increasing the size of the Assembly.

337. Where committees are in a position to undertake such scrutiny, we consider that one of the best ways for them to engage with subordinate legislation is during government consultation on the relevant proposals and feeding in views before the instrument is formally laid, particularly relevant given that such legislation cannot be amended after laying.<sup>302</sup> This however does require close monitoring of all subordinate legislation being issued for consultation.

### **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*.<sup>303</sup> We considered this to be an important, insightful and timely inquiry, which should act as a model of best practice in this area.<sup>304</sup>

340. The Presiding Officer acknowledged that resource pressures impacted on committees' ability to undertake such work. She suggested that committees could consider their approach to post-legislative scrutiny when agreeing their general approach to legislative scrutiny before Stage 1 consideration. While we agree that this is a good idea, we recognise that it does not resolve the resourcing and capacity issues that can act as a barrier to doing this work.

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<sup>302</sup> Standing Order 27.10

<sup>303</sup> Health and Social Care Committee, *Post-legislative scrutiny of the Mental Health (Wales) Measure 2010*, January 2015

<sup>304</sup> Letter from David Melding AM, Chair of the Constitutional and Legislative Affairs Committee to David Rees AM, Chair of the Health and Social Care Committee, *Report on the Health and Social Care Committee's post-legislative scrutiny of the Mental Health (Wales) Measure 2010*, 11 February 2015

341. YourLegalEyes told us that:

“More use should be made of post-legislative scrutiny especially if there are not many Bills being introduced in the Assembly at a given time.”<sup>305</sup>

342. The Law Commission explained the outcome of a project it had undertaken in 2006 with reference to UK Acts.<sup>306</sup> It noted that:

“The Commission understands that since about 2009 government departments have been expected to carry out a post-legislative review of most new Acts (other than Finance Acts and certain other categories of Act listed in the Cabinet Office’s Guide to Legislation). This takes place between 3 and 5 years after enactment and will culminate in a memorandum on the Act in question that is published as a Command paper and submitted to the relevant select Committee. That committee can if it wishes enquire further into the matter or to carry out their own review of the operation of the particular Act. However, the Commission is not in a position to offer an opinion as to how the system is operating in practice or whether it could be improved (for example by adopting our recommendation that a joint committee of both Houses should be tasked with a more systematic role in reviewing the operation of Acts).”<sup>307</sup>

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.

344. Post-legislative scrutiny will also be of added importance where curtailed scrutiny has taken place.

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.

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<sup>305</sup> ML11

<sup>306</sup> ML18

<sup>307</sup> ML18

346. While existing committees cannot bind successor committees to doing specific work, we believe committees could identify the Bills they have considered which would benefit from post legislative scrutiny. This should be highlighted in any legacy work produced, which can then aid the development of successor committees' work programmes in the next Assembly.

**Recommendation 27: We recommend that committees aim to:**

- (i) incorporate consideration of post-legislative scrutiny into their planning of the scrutiny of individual Bills referred to them by the Business Committee;**
- (ii) re-visit their proposed approach after Stage 4 has been completed, taking into account issues raised during scrutiny.**

**Improving public engagement in the legislative scrutiny process**

347. As will be apparent from reading earlier parts of our report (in particular from sections in Chapter 4 on the Welsh Government's policy development and pre-legislative scrutiny) there is a sense from many stakeholders in Wales that the Welsh Government's consultation process is perceived as insufficient to enable full public engagement.

348. Equally there were comments that a lack of time at Stage 1 is hampering meaningful engagement with Assembly committees, and some concerns that proceedings during amending stages were difficult to follow.

349. We accept that a government, when it has a working majority, has a right to pursue and deliver its legislative programme subject to an appropriate level of scrutiny. However that does not mean that the level of public engagement should be marginalised as a result. If anything, it makes it more important. And as we have said already, the key driver must be about delivering good, high quality law.

350. As yet, there would appear to be no data available to help identify the existing level of engagement with public or civic society during the scrutiny process.<sup>308</sup> Without this data it may be difficult to accurately target and effect improved engagement.

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<sup>308</sup> CLA Committee, RoP paragraphs [82-83], 24 November 2014

351. The Hansard Society explained that problems of engagement were apparent elsewhere:

“Westminster is considering experimenting with different types of public engagement initiatives, so, it’s trialled an online public reading stage to mixed effect, and there’s now talk of introducing a new stage prior to Committee Stage that would enable the public to comment on legislation. It’s not entirely clear at this stage how that would work, but, generally speaking, public engagement with the legislative process is quite low, and I don’t think that’s probably going to change any time soon.”<sup>309</sup>

352. There was praise for the Assembly from the Welsh Local Government Association who said it:

“... is to be commended on the accessibility and navigability of its website, particularly around the legislative process, for example, the “Guide to the Legislative Process” section ... provides an excellent introduction to the process and the “Progress of Assembly Bills” section ... provides an easy to read summary of progress of each of the Bills, along with links to key accompanying documents or explanatory guidance around the legislative process.”<sup>310</sup>

353. We have made two recommendations (recommendations 24 and 25) that we believe could contribute to improving engagement with the legislative process. However, we believe more could and should be done.

354. From that perspective, we believe that a review in the final year of the Fourth Assembly provides an opportune time for the Welsh Government and Assembly Commission to review the effectiveness of their public engagement on the legislative process. Such a review could, in particular, examine how the use of technology and social media could be used to maximum benefit.

**Recommendation 28: We recommend that the Welsh Government and Assembly Commission review their approaches to public**

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<sup>309</sup> CLA Committee, RoP paragraph [244], 9 March 2015

<sup>310</sup> ML12

**engagement on the legislative process and publish the outcome of their respective reviews in readiness for the Fifth Assembly.**

## 7. Accessibility of legislation

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355. As UCAC told us:

“legislation in Wales needs to be clear and accessible to more than just lawyers.”<sup>311</sup>

356. We have already touched on one aspect of accessibility in our report, namely consolidation. Indeed the Presiding Officer’s legal adviser told us that “consolidation could be an incredibly important contribution to solving the accessibility problem of Welsh legislation”.<sup>312</sup>

357. We have also considered accessibility in terms of the language used in drafting a bill.

358. This chapter focuses on another aspect of accessibility, namely how easy it is for legal practitioners and the public to find and look up up-to-date Welsh legislation. The evidence we have heard suggests there is a problem and improvement is needed.

359. Graham Walters told us that for many people who were textbook reliant, English law is more accessible than Welsh law, reflecting the problem that there was not purely a basic, Welsh framework.<sup>313</sup> He also highlighted a range of other issues that affected accessibility such as drafting against a background of an England-and-Wales English only text,<sup>314</sup> an apparent lack of standardisation in Welsh Explanatory Memoranda,<sup>315</sup> and the general form of legislation.<sup>316</sup>

360. In particular, Mr Walters’ concern was the accessibility of the law once made:

“The definite concern I have is the ability to access what has been done. So, it’s not the quality, or the process that leads to the particular instrument, it is the ability of anyone who needs to know it, and I obviously stand as a sort of mediator in that, as a lawyer trying to explain it. I think there are definite problems of access, which probably don’t lie with the

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<sup>311</sup> CLA Committee, RoP paragraphs [118], 2 March 2015

<sup>312</sup> CLA Committee, RoP paragraph [124], 24 November 2015

<sup>313</sup> CLA Committee, RoP paragraphs [125-131], 19 January 2015

<sup>314</sup> CLA Committee, RoP paragraphs [138], 19 January 2015

<sup>315</sup> CLA Committee, RoP paragraphs [140], 19 January 2015

<sup>316</sup> CLA Committee, RoP paragraphs [144], 19 January 2015

Assembly, but certainly there are problems with publication, there are problems of communicating to people that something has been done and communicating that it is in force on a particular date, because ... I ... have come across examples of people being wholly unaware of amendments, even down to official bodies being unaware of an amendment and acting irrespective of a change”.<sup>317</sup>

361. The National Archives explained the outcome of some of the work it has undertaken:

“... to try and bring the drafters of legislation closer to the users, and we regularly conduct exercises to measure how best we can present legislation in a way that helps, typically lay people, make sense of the law that they’re reading. Some of the difficulty is ... different legislation applying in different parts of the country, but that isn’t the only thing that people find difficult. Even with ideas around the naming of the component parts of the document—for example, ‘subject to subsection 3’ or ‘Schedule 2 may provide’—people think, ‘Well, where’s Schedule 2? How do I find it? How do I even know that it’s there?’ There is this sense that many people who read legislation have that it’s almost as if ... they’re trying to be caught out.”<sup>318</sup>

362. We welcome confirmation<sup>319</sup> by the National Archives that it is confident of meeting its target of bringing all primary legislation up to date on its website by the end of 2015<sup>320</sup> and that arrangements are in place to keep Welsh legislation updated.<sup>321</sup>

363. The Welsh Local Government Association also made some telling comments regarding accessibility. They noted that: :

“... a complicated and often protracted approach to commencement means that professionals and service users are unclear whether or when law is in force and, currently, the only

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<sup>317</sup> CLA Committee, RoP paragraphs [162], 19 January 2015

<sup>318</sup> CLA Committee, RoP paragraphs [47], 9 February 2015

<sup>319</sup> CLA Committee, RoP paragraphs [62], 9 February 2015

<sup>320</sup> ML19

<sup>321</sup> CLA Committee, RoP paragraphs [63-67], 9 February 2015

way to find this out is to invest in often expensive access to commercial legislative databases.”<sup>322</sup>

364. The comments of the Welsh Local Government Association highlight the gap between what is available commercially and what is available to citizens free of charge.

365. Accessibility of law is a key issue for everyone involved in its production. Collaboration is important and so we welcome and commend the support given by the Welsh Government to help the National Archives achieve its 2015 target.

366. We would also like to see the Assembly Commission develop a productive relationship with the National Archives as part of the process of improving the accessibility of Welsh legislation.

**Recommendation 29: We recommend that the Assembly Commission works closely with the National Archives and the Welsh Government to improve the accessibility of Welsh legislative texts. As part of this process, the Assembly Commission should report to this Committee on the action it is seeking to take before the end of the Fourth Assembly.**

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<sup>322</sup> ML12

## 8. Other matters

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### Member Bills

368. We took evidence from three Assembly Members—Mick Antoniw AM, Peter Black AM and Bethan Jenkins AM—regarding their experience of taking their own legislative proposals through the Assembly’s legislative process.<sup>323</sup>

369. Their overall experience was positive, particularly as regards the support they received from Assembly Commission staff. They did however identify a few issues that they felt needed to be addressed.

370. There appeared to be general agreement that the level of support received from the Welsh Government was an important factor in determining how quickly or if a proposal progressed, with the capacity of the Welsh Government being cited as a particular issue.<sup>324</sup> The point at which the Welsh Government engaged with the Member in charge was also seen as an issue.<sup>325</sup>

371. The Presiding Officer suggested “that it would be helpful for the Welsh Government to be involved at an earlier stage in the development of Members’ Bills which they support”.<sup>326</sup> She also said:

“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 ... 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 ... It may be appropriate before the Fifth Assembly to examine the Member Bill processes in the light of these considerations.”<sup>327</sup>

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<sup>323</sup> CLA Committee, RoP paragraphs [178-283], 24 November 2014

<sup>324</sup> CLA Committee, RoP paragraphs [195-197;274], 24 November 2014

<sup>325</sup> CLA Committee, RoP paragraphs [252-254; 261], 24 November 2014

<sup>326</sup> ML17

<sup>327</sup> ML17

372. The Welsh Government outlined its approach to dealing with Member Bills in its original submission<sup>328</sup> and in correspondence.<sup>329</sup>

373. The First Minister told us:

“ ... thinking about the capacity and the workload on Members of an Assembly committee is something, certainly, that Ministers are aware of. We have to take these decisions as well. For example, our capacity to produce legislation isn't unlimited. We have a legislative programme we have to take forward; we have to bear in mind the legislative capacity that we have and that does have a bearing then on the view that we sometimes take of private Members' Bills, where the amount of legal capacity, particularly, that has to be dedicated to a private Member's Bill can sometimes be quite significant and it can interfere with their own legislation because of it.”<sup>330</sup>

374. Another issue that we noted was the lack of a mechanism or clear understanding about how a backbench Member taking legislation through the Assembly should engage directly with the UK Government where it needed to do so,<sup>331</sup> for example to discuss matters of legislative competence during the development of a proposal. We believe it is important for an appropriate mechanism to be put in place.

375. All three Members suggested areas for improving the current system:

- considering the mechanism for selecting Member Bills, currently by ballot;<sup>332</sup>
- a change to Standing Orders to allow a Member in charge of a Member Bill to move a financial resolution;<sup>333</sup>
- monitoring the delivery and implementation of Acts, resulting from backbench proposals, by the Welsh Government;<sup>334</sup> and

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<sup>328</sup> ML13

<sup>329</sup> Letter from Jane Hutt AM, Minister for Finance and Government Business to David Melding AM, Chair of the Constitutional and Legislative Affairs Committee, 16 April 2015

<sup>330</sup> CLA Committee, RoP paragraph [105], 23 March 2015

<sup>331</sup> CLA Committee, RoP paragraph [223-226], 24 November 2014

<sup>332</sup> CLA Committee, RoP paragraph [279], 24 November 2014

<sup>333</sup> CLA Committee, RoP paragraphs [255 and 281], 24 November 2014

<sup>334</sup> CLA Committee, RoP paragraphs [282], 24 November 2014

- generating more ideas for legislation from society through engagement.<sup>335</sup>

376. We believe that all the issues raised and the areas identified for improvement are worthy of further consideration.

**Recommendation 30: We recommend that the Business Committee reviews the process for Member Bills taking account of the evidence we have received from Assembly Members and their suggestions for improving the process.**

377. As we have already indicated, in view of recommendation 3 regarding draft Bills, the Business Committee will need to consider extending the time available for an Assembly Member to introduce a Bill having been given leave to proceed.

### **Assembly committee structures**

378. During the Third Assembly scrutiny was undertaken by separate policy and legislation committees. At the start of the Fourth Assembly, single subject committees became responsible for the scrutiny of both policy and legislation.

379. This change drew a response from some consultees.

380. The Presiding Officer told us:

“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.”<sup>336</sup>

and

“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-

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<sup>335</sup> CLA Committee, RoP paragraphs [282], 24 November 2014

<sup>336</sup> ML17

ranging, powers. The peak also coincides with a period of budget scrutiny.”<sup>337</sup>

381. In elaborating on these views she told us:

“This was definitely something discussed at great length by the Business Committee at the beginning of the Assembly. It was decided that, to give Members more strength if they were on a committee that looked at the legislative and policy developments in one area, it would make a smoother and better path for legislation. I do not see anything that tells me that that is not happening, but we will keep an eye on it and obviously it will be reviewed. It will be up to the next Assembly to decide whether it chooses to reform, but we will make a recommendation to the next Assembly whether it should have it. Again, the size of committees is an issue. If we have different sized committees, we might be in a totally different ball game ...”<sup>338</sup>

382. The Learned Society of Wales felt that the new approach worked well and was an improvement on the previous system.<sup>339</sup>

383. Others took a different view. The British Medical Association Cymru Wales cited two examples of where it felt policy scrutiny was squeezed in committees because of the scrutiny of legislation being dealt with.<sup>340</sup> They told us:

“ ... it ... appears ... that the committees are trying to juggle too many balls in the air at once, and it looks as if ... they’re trying to slot in this piece of legislation amongst this particular subject inquiry and this particular subject inquiry ... It seems as if it’s a challenge for the Members on the committee to keep on top of everything, and I think it may be beneficial to have separate committees to look at the legislation and they can spend more time and follow that through.”<sup>341</sup>

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<sup>337</sup> ML17

<sup>338</sup> CLA Committee, RoP paragraph [139], 24 November 2014

<sup>339</sup> ML3

<sup>340</sup> ML16

<sup>341</sup> CLA Committee, RoP paragraph [100], 19 January 2015

384. Similar sentiments were considered at our stakeholder event in October 2014.

385. If it were the case that the volume of legislation in some committees is resulting in those committees not having the time they need to hold the Welsh Government to account in their policy areas, that would be a cause for concern.

386. Equally we are conscious that the dual-function of policy and legislative scrutiny can also mean that consideration of proposals for subordinate legislation are squeezed, a point implied by UCAC.<sup>342</sup>

387. We have noted, based on informal soundings at the Commonwealth Association of Legislative Counsel's 2015 conference, that legislatures which have a considerably larger pool of elected Members to choose from have similar-sized scrutiny committees. This suggests that, in terms of effective scrutiny, the number of committees attended by individual Members may be more of an issue than the size of a committee itself. In the absence of an increase in the size of the Assembly, and in anticipation of existing constraints on the composition of committees being removed from the *Government of Wales Act 2006*,<sup>343</sup> we believe that the size of committees (and their timetabling), should be addressed in the next Assembly.

388. We note the Presiding Officer's comment that a recommendation will be provided to the next Assembly about committee structures. We believe that any such recommendation should be made on the basis of data collected about the performance of Assembly committees during the Third and Fourth Assemblies. It should also take account of the recommendations we make in this report which relate to the workloads of committees.

**Recommendation 31: We recommend that the Business Committee in considering the committee structure to be adopted in the Fifth Assembly should:**

- (i) consider a range of options identifying the pros and cons of each;**
- (ii) take account of the practical experiences of Assembly committees;**

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<sup>342</sup> CLA Committee, RoP paragraph [151], 2 March 2015

<sup>343</sup> As highlighted in HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*, Cm 9020, February 2015

**(iii) publish a report of its deliberations including its final recommendation.**

**Data**

389. Our previous section identifies data as being important in the process of informed decision-making.

390. We have noticed that, despite some excellent and high quality evidence about the law-making process, not much hard data has been made available about some aspects of the scrutiny process.

391. We believe that it would be useful if the Assembly Commission were to invest in collecting and publishing data about various aspects of the legislative process, and other aspects of scrutiny with the aim of identifying trends that could help inform workload planning and improve the efficiency of the scrutiny process.

392. It could, for example, cover such things as the number of draft Bills considered by Assembly committees, the number of Bills subject to post-legislative scrutiny; the amount of available time used by committees and the amount of time used by committees for policy and legislation scrutiny.

**Recommendation 32: We recommend that the Assembly Commission invests resources in capturing data relevant to the operation and function of scrutiny in the Assembly as a means of facilitating the decision-making process and ensuring the efficient use of time and resources in the delivery of services to Assembly Members.**

**Legislation software**

393. As our report has made clear, the process by which law is made is important. It follows that accurately reflecting the outcome of votes on amendments within revised versions of Bills is vital, not only to the law-making process, but also to the democratic process itself.

394. We have heard contrasting views about the legislation software that currently performs the functions of drafting and amending Bills.

395. The software was jointly procured by the Assembly Commission and the Welsh Government.

396. The Assembly Commission told us that it requires training to use and to use precisely, but that it was working well.<sup>344</sup>

397. The Office of the Legislative Counsel did not share this view, stating that there were problems with it that affected it more than the Assembly Commission.<sup>345</sup> It cited problems of stability (although conceded that the issue may not be due to the software) and the way in which system for processing amendments operated.<sup>346</sup>

398. It is not possible to reach an informed view on the issues here based on the limited evidence we have heard but it is important to resolve the issues of concern, particularly if there is scope to use the software to develop innovation in the legislative process.

**Recommendation 33: We recommend that the Welsh Government works closely with the legislation software supplier and the Assembly Commission to ensure it finds a solution to the problems it has identified.**

#### **A Queen's Printer for Wales**

399. The Queen's Printer of Acts of Parliament is responsible on behalf of the Crown for superintending the publication of Acts of the National Assembly for Wales. This is a Crown appointment. The Queen's Printer also holds the positions of Controller of Her Majesty's Stationery Office, Queen's Printer for Scotland and Government Printer for Northern Ireland.

400. All Acts of the National Assembly and Statutory Instruments are published in print and online at [www.legislation.gov.uk](http://www.legislation.gov.uk).

401. In her role as the Queen's Printer for Scotland, the current post holder reports to a Scottish Minister, and produces an annual report that is laid before the Scottish Parliament. This post was established in the *Scotland Act 1998*.<sup>347</sup>

402. The Queen's Printer told us:

“It's come up more recently, in the last year or so, about why there isn't a Queen's Printer for Wales – a perfectly valid

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<sup>344</sup> CLA Committee, RoP paragraph [169], 24 November 2014

<sup>345</sup> CLA Committee, RoP paragraph [119], 9 March 2015

<sup>346</sup> CLA Committee, RoP paragraphs [120-121], 9 March 2015

<sup>347</sup> Section 92

question in my mind – just to show that if you’re publishing legislation and other matters, it is under the authority and the provenance of Wales....I think that the stages of going through Measures to Acts have probably meant that it’s been something that’s only really just arisen.”<sup>348</sup>

403. Now that the Assembly has full law-making powers, we feel further consideration should be given to the establishment of a Queen’s Printer for Wales.

**Recommendation 34: We recommend that the Welsh Government fully explores the practicalities and feasibility of the establishment of a Queen’s Printer for Wales.**

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<sup>348</sup> CLA Committee, RoP paragraph [12], 9 February 2014

## Annex 1 – List of written evidence

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The following people and organisations provided written evidence to the Committee. All written evidence, and correspondence referred to in this report, can be viewed in full at:

[www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054](http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054)

<i>Organisation</i>	<i>Reference</i>
Higher Education Wales	ML 1
ESTYN, Her Majesty’s Chief in Inspector of Schools and Training	ML 2
The Learned Society of Wales	ML 3
Keith Bush, QC	ML 4
Mold Town Council	ML 5
Flintshire County Council	ML 6
UCAC	ML 7
RSPCA Cymru	ML 8
Dawn Oliver	ML 9
Welsh Language Commissioner	ML 10
Your Legal Eyes	ML 11
WLGA	ML 12
Welsh Government	ML 13
Citizens Advice Cymru	ML 14
SOLACE	ML 15
BMA Cymru	ML 16
Presiding Officer	ML 17
Law Commission	ML 18
The Queen’s Printer	ML 19
The Auditor General for Wales	ML 20

## **Annex 2 – Attendees at stakeholder event, 13 October 2014**

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Dr. Catrin Fflur Huws, Welsh Centre for Legal Affairs, Aberystwyth University

Graham Walters, Civitas Law Chambers

Kay Powell, The Law Society

Emyr Lewis, Blake Morgan LLP

Prof. Thomas G. Watkin, The Learned Society of Wales

Lynn Williams, The Learned Society of Wales

Daniel Greenberg

Elin Hughes, The Law Commission

Marie Navarro, Your Legal Eyes Ltd.

Bethan Lloyd, Geldards LLP

Mark Hinge, The Bay - Delivering with Devolution Ltd

Dylan Hughes, Welsh Government

Sarah Young, Law Commission

Huw Williams, Geldards LLP

Kumi Ariyadasa, Cardiff Council

Rhodri Williams QC, 30 Park Place Chambers

## **Annex 3 – List of oral evidence sessions**

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17 November 2014	Counsel General
24 November 2014	Backbench Member Panel
19 January 2015	British Medical Association Cymru Wales; Civitas; Welsh Local Government Association
9 February 2015	Queen’s Printer; Welsh Language Commissioner
2 March 2015	UCAC
9 March 2015	First Welsh Legislative Counsel; Hansard Society
16 March 2015	Minister for Finance and Government Business Law Commission
23 March 2015	First Minister
18 May 2015	Auditor General for Wales

## Annex 4 – Extract from the evidence of the Auditor General for Wales

### STANDING ORDER 26.6(vi) COST ESTIMATE SUMMARY TABLE TEMPLATE

	One-off amounts (eg initial set up costs, disposal proceeds and decommissioning costs) £M	Average annual recurring amounts £M	Number of years applying to annual recurring amounts	Total lifetime amount (lifetime of the legislation) (at Net Present Value) £M
<p>A. Gross administrative cost of the Bill's provisions (ie the additional public expenditure arising as a consequence of the Bill before any financial savings):</p> <p>i) WG and related bodies, including NHS</p> <p>ii) Welsh local government</p> <p>iii) Other public bodies</p> <p>Total of i), ii) and iii)</p>				
<p>B. Estimate of administrative savings arising from the Bill:</p> <p>i) WG and related bodies, including NHS</p> <p>ii) Welsh local government</p> <p>iii) Other public bodies (specify)</p> <p>Total of i), ii) and iii)</p>				
<p>C. Net administrative cost of the Bill's provisions (i.e. the net additional public expenditure that will arise as a consequence of the Bill):</p> <p>i) WG and related bodies, including NHS</p> <p>ii) Welsh local government</p> <p>iii) Other public bodies</p> <p>Total of i), ii) and iii)</p>				
<p>D. Compliance costs (i.e. costs arising to members of public etc from complying with the Bill's requirements):</p> <p>i) general public;</p> <p>ii) businesses;</p> <p>iii) other non-public sector bodies (eg voluntary organisations)</p> <p>Total of i), ii) and iii)</p>				
<p>E. Any other financial costs (include brief description here)</p>				
<p>F. Brief description of environmental and social dis-benefits arising from the Bill that cannot be quantified financially:</p> <p>i) one-off</p> <p>ii) ongoing</p> <p>(Include estimates of tonnes of CO<sub>2</sub>)</p>				