Written evidence submitted by YourLegalEyes.

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We welcome this second inquiry in the law making and drafting of Welsh Bills and in particular we welcome the extended scope of this inquiry which goes beyond the drafting of Welsh Government's Bills.

We also welcome the extension of the deadline to submit evidence, without which we could not have submitted evidence.

We no longer have the capacity to study every Bill line by line and to research comparative material as we did when we were in Cardiff Law School, which we regret. Our submission therefore will not address many of the very specific questions and points raised in the consultation letter.

1. Principles

2. We would like to point to the excellent work of the UCL which researched and codified the constitutional standards recommended by the House of Lords Select Committee on the Constitution. (UCL, The Constitutional Standards of the House of Lords Select Committee on the Constitution, January 2014). Their codification shows what is considered to be best modern practice is in the UK Parliament context. Their Report can be accessed here.

3. We would also like to point to the House of Commons Political and Constitutional Reform Committee's report 'Ensuring Standards in the Quality of Legislation' (HC 85, 2012-13) and in particular paragraph 99 and Annex A setting out a draft code for legislative standards for primary legislation. The Report can be accessed here.

4. **We think that the Assembly might consider producing an equivalent document in the form of a Code based on the comments made by this Committee (and its predecessors) and by AMs during their scrutiny of legislation, as well as including the principles contained in Welsh Government guidance.**

5. Such codification could reflect the Welsh practice and traditions and it would be a very useful supporting document for AMs when scrutinising legislation. The codification could not only be a check list to assist AMs and this committee but also to assist the Welsh Government in drafting the legislation. It would also help the public to participate in the scrutiny of Welsh Bills. Such checklist would even be more important as a new intake of AMs is expected in 2016 and it would be vital to guaranty the efficient scrutiny by new AMs.

6. The Assembly might decide for example to go back to the 'four corners doctrine' which has been eroded progressively. The doctrine was enunciated by Lord Thring at the end of the 19th century according to whom "It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the Bill in order to comprehend its meaning". (Lord Thring, Practical Legislation (2nd edn, 1902) p. 8.)

7. **Such codified principles should equally apply to government and Members legislation.**

8. Consolidation

9. Once a year consideration should be given to the preparation of consolidating legislation. Discussions have been reported to have taken place several times by the Counsel General in addressing the Assembly about having a fast-track Assembly procedure for such Bills but no progress seems to have been made so far. While we appreciate that the current UK Wales Bill would allow the Welsh Government to instruct the Law Commission to undertake consolidation projects for Wales, **we believe that it would still be reasonable for Wales to consider introducing its own consolidating legislation for devolved subjects once a year**.

10. **A programme for the consolidation of subordinate legislation in devolved areas is also vital to the accessibility of the law in Wales.**

11. Consolidation offers a unique advantage in Wales because it would de-couple intertwined provisions in UK legislation. Without such consolidation it is at present often difficult to clearly understand which provisions are not relevant to Wales because they apply to England only. Thus consolidation in addition to the regrouping of legal provisions relating to a particular devolved subject can offer a clarification of the territorial application of existing legislation.

12. The use of 'editing consolidation' could be explored whereby a simple re-publication of the law could be allowed. The Assembly could explore who could be allowed to propose such legislation (legislature and/or government) and the type of minimal scrutiny such Bills could receive. In Austria for example the Federal Chancellor may re-publish legislation to ensure the coherence of the statute book.

13. Volume of legislation

14. There have been less Bills introduced in the fourth Assembly than we anticipated but this is not necessarily a bad thing. It could mean that the government is not rushing to introduce legislation when the policy is not sufficiently developed but it could also point to capacity issues within the government.

15. Drafting

16. In relation to drafting, **we consider that as far as possible there should be some sort of a template for the structure of Bills**. For example, a comprehensive interpretation section could always follow an overview section at the beginning of the Bill. Currently some Bills contain these overview sections while some do not. It would be better to have an agreed principle which would apply equally to both government and Members' Bills.

17. While we understand that each Bill is unique, we also know that Bills present common characteristics. If one could always expect to find categories of sections at the beginning or the end of a Bill, this would improve their accessibility. This is the case for example for the commencement section which is often if not always at the end of an Act.

18. **Important provisions embodying policy principles should be at the beginning of the Bill** so that they do not go unnoticed and undebated under the guillotine.

19. Framework legislation should be avoided. We think it is better to delay the introduction of legislation rather than introduce general provisions which will be filled out later in subordinate legislation.

20. **When sections or schedules of a Bill intend to amend previous legislation, it would be good practice if the new legislation could restate the whole section** instead of stating 'after X delete Z and/or after X insert Y'. Being able to read a whole section each time would help ensure clarity as to its meaning and coherence. With the electronic modern tools, this should not represent as much of a burden as might have been the case when word processors and electronic publication did not exist.

21. **Keeling Schedules would be very useful if provided within the Explanatory Memoranda in addition to the Tables of Derivations for legislation amending significantly previous Acts.** An example of Keeling Schedules prepared by Whitehall in 2012 in relation to an Education Bill can be accessed here: Education Bill *keeling schedules* - Department for Education, right hand column). The Keeling Schedule system is also considered in paragraphs 88 to 97 of the Fourteenth report of the House of Lords Select Committee on the Constitution under the heading 'Keeling Schedules' which can be accessed here. It is worth noting that Parliament strongly recommends the production of such schedules as an aid to scrutiny. We understand that the Assembly Legal Services and possibly the Welsh

Government produce them anyway for internal use. These should then be published and made accessible as part of the scrutiny work.

22. We welcome the Welsh Government's publication of consultation documents on Bills before their introduction (as was recommended by this Committee). **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 understand from the policy documents why a present law needs changing (Environment Bill).

23. The Green and White Papers should be clear and precise enough so that it should not be possible for members of the public to 'misunderstand' the contents of the legislative proposals or to be left guessing what the powers will be and what they would be used for. In that respect we disagree with statements that the Assembly should only decide on the principle whether the Government should have or not a specific power. Informed debate cannot happen without clear examples of how every power would be used. **If there is a need for a power** (i.e. something is wrong with the current system), **then it would be very easy to explain why and how the new power might be used.**

24. There appears to be a noticeable improvement in the quality and contents of Explanatory Memoranda as there is a general absence of adverse comments in Committee reports (differently from the practice in the third Assembly). The same seem also to be the case for subordinate legislation as there are very little adverse reports from this committee.

25. We only found one report by the Finance Committee on Bills. We do not know if this is a publication problem or if the Committee did not scrutinise other Bills. The link to its unique report on Bills relating to the Housing Bill was broken. The Finance Committee scrutinised many of the Measures in the third Assembly and it is surprising to us not to find reports from that committee on all the main Bills. Perhaps this Committee could consider exploring how the financial implications of the Bills are scrutinised in this Assembly.

26. As regards to particular drafting we believe that expressions such as 'should have regards (among other things) to xxx' or 'in particular' should be avoided because they are too indefinite. **In such instances a full list should be provided on the face of the Bill or power taken to issue statutory guidance enabling the government to set out the circumstances of the exercise of the power. This should be one of the requirements to help to achieve certainty in law.**

27. There are still problems with framework legislation, though this is much less of a problem than in the previous Assembly. Examples of such legislation include the Active Travel Bill, the Social Services Bill and the apparent proposals in the Environmental Bill White Paper. Such legislation makes it impossible to have informed consultation, scrutiny or propose amendments. **There may be**

sometimes good reasons to propose that provisions will be complemented by subordinate legislation or guidance. But the reasons should be justified and explained in the Explanatory Memoranda. The contents of the subordinate legislation or guidance in draft at least should also be available for Assembly scrutiny together with the Bill.

28. We understand that this suggestion might have capacity implications but **we believe that it is better to delay the introduction of a Bill in order to offer a full legislative package (primary and secondary legislation) for scrutiny so that such scrutiny would be much more efficient and knowledgeable.** The quality of both the primary and of the subordinate legislation could only significantly improve if this was the rule. The absence of that information makes scrutiny a guessing exercise which is not the purpose of a Parliament in scrutinising proposed legislation. It makes it equally difficult for the consumers of the law to understand and prepare for the changes which might affect them.

29. Marie Navarro supports the provision of overview sections contained in Government Bills such as those contained in the Housing Bill. They make it easier to understand the structure of Bills and their intentions. It reminds her of continental and European drafting, even though New Zealand is the stated precedent. The House of Lords Committee on the Constitution does not share this view believing that such provisions have serious limitations. They concluded that 'a purpose clause should not form part of a bill'. It considered that the introduction of such sections 'amount to a major change in the interpretation of law. A purpose clause would invite the courts to engage in purposive rather than literal construction'. Instead, the Lords considered that the place to include such provisions would be the Explanatory Notes. (Ibid, paragraph 82-86).

30. Competence issues

31. As we have constantly considered since the inception of devolution, a clearly drafted reserved powers model for Wales would be better than the current conferred powers model. **We believe that such a reserved powers model would allow more certainty as to the scope of the devolved powers** by avoiding 'the ghost exceptions' such as 'employment law' and 'human rights' and 'criminal law' . Subjects are claimed not to be devolved but we are not sure who said so and whether such statements are accurate in the absence of a legal list of reserved matters.

32. Looking at the three Bills which have been referred to the Supreme Court, **we think that there would have been no need to refer two Bills out of the three Bills that were referred under the reserved powers model.** Indeed the referral of the Byelaws Bill was triggered by a dispute over a remote executive power and there would have not been any reference to specific executive powers to be the subject of reservations or exceptions to such restrictions as is the case in Part 2 and Part 3 of Schedule 7.

33. Also, the Agricultural Wages Board's fate would have been already decided as being or not included as a 'reserved matter' listed in the new Schedule (as is the case in the Scotland Act 1998) leaving no doubt as to whether it was devolved or not.

34. We concede that the Asbestos Bill would still have been referred to the Court because it raises genuine questions such as: what constitutes the primary purpose of the Bill and whether this is a devolved subject or not.

35. **We believe that the efficiency and benefits of the reserved powers model would very much depend on how the actual reservations will be drafted.** It is legislatively possible that a reserved powers model could result in pages after pages of very specific reservations (with references to specific Acts or sections or even to specific executive powers). If this occurs there might well be the same problems as under the current system. This could even result in the same proportion of Bills being referred to the Supreme Court. **The change of model should therefore seek to avoid the constant reference to specific executive powers or Acts to define the competence of a legislature, which to us is a constitutional anomaly and which makes the whole system very difficult to operate.**

36. It is not apparent to us what extent the current drafting of Assembly competence limits legislative proposals in Wales (by the Welsh Government or AMs). This Committee might consider asking AMs and the Welsh Government if their needs have ever been constrained by the drafting of Schedule 7.

37. In relation to the procedure for the referral of Bills to the Supreme Court, **we believe that referrals should be allowed at the beginning of the procedure rather than at the end of it**. Considerable and wasted time can be taken by the Assembly and the public participating fully in the scrutiny process only to see the Bill being suspended at the end of the process and possibly to have the provisions in question being removed.

38. **New legislation could allow the Presiding Officer as well as the Attorney General and the Counsel General to refer contentious Bills to the Supreme Court at or around introduction.** This could even take place before the PO makes the statement on competence.

39. Such new power would mean that the Presiding Officer could protect and save precious parliamentary time. It would also avoid the Presiding Officer having to make a decision and subsequently having to ask Committees to also look into whether the Assembly has competence or not on the matter. The Agricultural Wages Board Bill and the Asbestos Bill have revealed how difficult and delicate it was for the Assembly, the Presiding Officer, the Chairs of Committees to handle such competence issues within the current Assembly procedures.

40. **The intimation period provisions could also be put into place to avoid lengthy speculation** as to whether or not a Bill would be referred. The Assembly Clerk could receive the same letters as she does under the current system from Counsel General and Attorney General but also from the PO of their intention to refer or not a Bill at the beginning of the Bill's journey under new procedures.

41. **The current referral provisions at the last stage of the Bill procedure should remain** to catch contentious amendments passed during the scrutiny

process (which could be outside of competence), **but the likelihood of such late referrals might by then be very diminished.**

42. Bill Procedure

43. **We suggest that this Committee and any other Stage 1 Committee should revisit Bills which have been substantially amended at Stage 2 (or at further stages).** If a Bill is significantly amended and in particular if additional provision is made by amendments then a second Stage 1 type of scrutiny should be carried out. This was done in relation to the Mobile Homes Bill **and this good practice which could be extended to other Bills at least before Report Stage** (for example this would have been useful for the Social Services Bill).

44. **We believe that this Committee should produce additional reports on amendments at Stages 2, 3 and/or Report when they contain substantial changes to subordinate legislation provisions** for example. Such reports would help in the debate of amendments at further stages. Again this was done for the Mobile Homes Bill and we think this practice should be used at every opportunity when substantial amendments have been passed. **These additional scrutiny sessions and reports are even more important because the Assembly is a unicameral body.**

45. According to the Presiding Officer's determination on proper form of amendments, a form entitled 'Notice of an amendment' must be completed by AMs to table amendments (form published in the Annex of the Assembly's 'Guidance on Bills in the Assembly'). The form makes it optional to complete a box explaining the purpose of the amendment to be tabled. We think that **the reasons for proposing amendments should be systematic and published together with the actual amendments** so that the meaning of amendments becomes much more understandable and accessible. Reading through hundreds of amendments without any explanation is a very hard exercise, even for experts in the field. **The notice of amendment form could be amended so that 'section 4 - Amendment explanation' is no longer optional. This information could then be published with the 'Notices of Amendments'.** We see no reasons why such reasons should not be published with the amendments. This would make the whole process much more intelligible and accessible to all AMs, the government and the public.

46. To that effect, **the publication of 'Purpose and Effect' tables as was done at Stage 3 of the Housing Bill would be another good way to make render amendments intelligible if this was made compulsory for all types of amendments.**

47. Considering the amount of amendments tabled by the Government and backbenchers, more time might be necessary to go through them. **The Assembly might explore the idea of adopting a rule according to which a specific period should elapse before the final amendments could be tabled or included in the marshalled list depending on the number of amendments tabled at any time**. For example if there are 300 amendments tabled as with the

Social Services Bill then 3 weeks should be given so that AMs and the public can reflect on those and potentially table further amendments. If there are more than 400 amendments as with the Housing Bill then 4 weeks should elapse before the Marshalled List of Amendments is published.

48. Report Stage is a very useful stage in a unicameral Assembly. It could guaranty a review of the coherence of a Bill after a Bill has been substantially amended at Stage 2 and 3. **We think that a systematic Report Stage would offer a unique opportunity for Welsh law to revised and polished so that it is more understandable and accessible when passed**. Going through the Bill from the start could allow issues to be debated a second time but also in terms of drafting it could allow the Bill to be restructured if justified by a considerable amount of amendments agreed. This is not the case at present. A report stage could allow better presentation and revision of the Bill before it is passed and published. This is even more important as very little post-legislative assessment of legislation takes place. **Report Stage would ideally be accompanied by the production of additional reports by all the Committees involved at Stage 1 as was done with the Mobile Homes Bill.**

49. Members Research produces excellent summaries of the changes which have taken place at Stage 2. Such summaries are also produced after Stage 3 if there is a Report Stage. **We would find it invaluable to have the similar reports being systematically produced at every stage of the procedure beyond Stage 1 - whether at Stage 3 and after Report Stage.** This would enable us to reflect better on what has happened at these further stages. While we understand that these reports are produced for the plenary debates, additional reports would allow a reflective study of the legislation process. This would also make it easier to understand the Act that will come into force. It could also assist in post-legislative scrutiny of the Acts.

50. **Fast track procedures** bypassing Committee Stage 1 **should be kept to a minimum in the Assembly because there is already only one Chamber.** Occasionally, there might be good reasons for the use of such curtailed scrutiny of a Bill, for example if the Bill is very narrow in scope and the member in charge can demonstrate previous extensive consultation with those affected has already taken place or because there is a real emergency**. Criteria for such 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. Because the scrutiny has been curtailed the scrutiny of the implementation of such law should be reinforced and revision or repeal should be made easy possibly using a fast-track procedure.

51. Pre-legislative and post-legislative scrutiny are also very important within the context of unicameral parliaments. We welcome the scrutiny by Assembly Committees of proposed legislation such a draft Bills and White Papers, for example the scrutiny by several Assembly Committees of the proposals for new environment law and the scrutiny by the Children, Young People and Education Committee on the forthcoming Welsh Government Bill to establish Qualification Wales. **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.

Consultation periods

52. In order to allow the public to write evidence, **there should be a minimum consultation period of 2 to 3 months**. Without the extension of the deadline to this inquiry, we would not have had to time to prepare, meet and discuss our evidence.

53. **Advance notices of forthcoming consultation is very good idea, as long as sufficient time is given to prepare and submit the evidence**. For example the Communities, Equality and Local Government Committee issued such a notice in April 2014 in relation to the Violence Against Women Bill. The notice can be accessed here. However, the notice indicated that the Bill would be published in June and that the Committee would like to complete its evidence gathering before the summer recess (i.e. end of July). We do not think that this length of time is good practice. It is not fair for those contemplating making submissions to be asked to comment at such short notice. Submissions have to be based on research and consultation about actual proposals. There is also a problem if submissions are requested without the actual Bill having been published. This is not a recipe for in depth consultation.

54. While we appreciate that the Welsh Government and the Assembly have to make the best of recess period, it would be more convenient if consultations did not often take place over holiday periods. We welcome this inquiry which is happening before the summer rather than during the summer holiday.

55. We would be pleased to offer further evidence on any part of our submission.

Marie Navarro and David Lambert.
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