



Ein cyf/Our ref: MA-L/CG/0409/19

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26 June 2019

Dear Lucy,

## **LEGISLATION (WALES) BILL**

May I, first of all, take this opportunity to congratulate you on your appointment as Solicitor General. I look forward to meeting you in due course.

This is a response to a letter of 25 April 2019 which I received from your predecessor, Robert Buckland QC MP, which set out concerns of the UK Government in relation to the Legislation (Wales) Bill.

Mr Buckland's letter argued that the Bill goes beyond the National Assembly's legislative competence. It made three points, all relating to the fact that the provisions about the interpretation and operation of legislation in Part 2 of the Bill are designed to apply to Welsh subordinate instruments made by the Welsh Ministers or other devolved Welsh authorities under Acts of the UK Parliament. That is the effect of section 3(2)(b) of the Bill and Mr Buckland's letter invited me to take forward an amendment to remove section 3(2)(b) from the Bill.

I do not share the view that section 3(2)(b) of the Bill is beyond the legislative competence of the National Assembly. Neither did the Llywydd (Presiding Officer) in the National Assembly. Our position is that the approach taken in Part 2 of the Bill is within the Assembly's competence.

I think it is helpful if I identify some key points at the outset, relevant to the objections which were raised in Mr Buckland's letter:

- The provisions in Part 2 of the Bill will apply to future subordinate instruments made by the Welsh Ministers and other devolved Welsh authorities under Acts of the UK Parliament.
- They will apply to those future subordinate instruments as a 'default position'. I use the phrase 'default position' because (as section 4 of the Bill expressly reflects) the operation

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

of the provisions in Part 2 will be displaced if there is express provision to the contrary or the context requires otherwise. That express provision or context could be found in the Act of Parliament under which the Welsh subordinate instrument is made, in the subordinate instrument itself, or indeed in any other relevant legislation.

- The 'default position' contained in Part 2 will provide a clear backdrop to what the Welsh Ministers or other devolved Welsh authorities do in making a future subordinate instrument, which can be relied on in drafting and reading the instrument. However:
  - Because (see section 4 of the Bill) Part 2 will operate subject to the parent Act of Parliament (and to any other constraint on the power to make the subordinate legislation in question), its effect can be no more expansive than the choices which the Welsh Ministers or other authority could legitimately make for themselves in making the future subordinate instrument.
  - Because the operation of Part 2 can be displaced by the Welsh subordinate instrument itself (expressly or otherwise), Part 2 does not tie the hands of the Welsh Ministers or other authority, who can choose to depart from the 'default position' where that is considered appropriate (and so far as it is within the powers that Parliament has conferred).
- From a policy perspective, the advantages of the Part 2 'default position', as the backdrop against which all future Welsh subordinate instruments will be made, are as set out in paragraph 44 of the Explanatory Memorandum: *"to provide a modern, bilingual interpretation Act for Wales"* which *"would shorten and simplify future legislation, and promote consistency in the language, form and operation of future legislation"*.

### **Argument that Part 2 modifies GOWA section 107(5)**

I will start with the argument in Mr Buckland's letter to the effect that section 3(2)(b) of the Bill would make an impermissible modification of section 107(5) of the Government of Wales Act 2006 ("GOWA"), which provides that Part 4 of the Act *"does not affect the power of the Parliament of the United Kingdom to make laws for Wales"*. The letter argues that applying a set of default rules to the interpretation of Welsh subordinate instruments made under a UK Act (which may be different from the default rules applying to the parent Act by virtue of the Interpretation Act 1978) is *"qualifying the power of Parliament to make laws for Wales and for those laws to mean what Parliament intended that they ought to mean"*.

I cannot agree with this analysis.

- The power of the UK Parliament to legislate for Wales is not affected or qualified by the application of Part 2 of the Bill to Welsh subordinate instruments made under Acts of Parliament.
- None of the provisions in Part 2 of the Bill apply to Acts of the UK Parliament. Section 3(2)(b) applies the Part 2 provisions to *"subordinate legislation ... made under an Act of the Parliament of the United Kingdom"*; but not to the Act of Parliament itself.
- Nothing in Part 2 limits the power of the UK Parliament to confer functions of making subordinate legislation on others, or to confer those functions on whatever terms it considers appropriate, expressly or by implication (including where the context requires a particular conclusion as to the UK Parliament's intention).
- The provisions of the Interpretation Act 1978 continue to govern provisions of Acts of the UK Parliament, including those which confer delegated legislative power on the Welsh Ministers and other devolved Welsh authorities.

- When the Welsh Ministers (or other authority) make a Welsh subordinate instrument, they will be able to rely on the ‘default position’ in Part 2 of the Bill or override it, but only so far as the parent Act of Parliament allows. The default position provisions in Part 2 will therefore have effect only insofar as the Welsh subordinate instrument in question would have been free to include its own express provision corresponding to the default position.
- Nothing in the Bill places any condition upon Acts of Parliament or instruments made under them taking legal effect (nor indeed places any condition on their legal effect), so it is not in any way comparable with the consent provisions in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, found by the Supreme Court to impermissibly modify section 28(7) of the Scotland Act 1998.

### **Argument that Part 2 of the Bill relates to reserved matters**

I turn next to the argument in Mr Buckland’s letter that, insofar as Part 2 of the Bill applies to Welsh subordinate legislation made under a UK Act that relates to a reserved matter, Part 2 would also relate to a reserved matter.

I cannot agree with the analysis that Part 2 is beyond competence on this ground.

- Whether Part 2 of the Bill is outside competence, on the ground that it “*relates to reserved matters*” by virtue of section 3(2)(b), must be determined by reference to its “*purpose*”; having regard, among other things, to its “*effect in all the circumstances*” (section 108A(6) GOWA).
- I have outlined the purpose of Part 2 above, by reference to the Explanatory Memorandum. I would also invite you to consider the 2017 consultation document *Interpreting Welsh Legislation: Considering an Interpretation Act for Wales*, and the 2018 consultation document that accompanied the draft Bill. In broad summary, Part 2 is intended to provide a set of modern and bilingual provisions for the interpretation and operation of the body of Welsh legislation so as to promote its accessibility, simplicity and consistency. By Welsh legislation, I mean legislation made by the National Assembly, the Welsh Ministers and other devolved Welsh authorities. That corresponds broadly with the definition of Welsh law in section A2(1) of GOWA as law that applies in Wales “*made by the Assembly and the Welsh Ministers*”. And that corresponds of course with the body of law that will be drafted bilingually.
- The default provisions in Part 2 will have dual benefits, for drafters and readers of legislation alike. As I have explained, drafting will be easier and legislation will be shorter, because (where appropriate) drafters can rely upon the application of the detailed interpretation provisions in the Bill. Reading Welsh law will be easier because legislation will be drafted in a more straightforward and simple way and readers can look to the Bill for the meaning of common words and phrases, in both Welsh and English.
- These purposes do not ‘relate to’ any of the matters reserved by Schedule 7A to GOWA. GOWA did not designate ‘statutory interpretation’ as a reserved matter in Schedule 7A. Indeed, where GOWA does talk about the interpretation of legislation it does so in a way which is general: see e.g. section 156(2) of GOWA (and paragraph 13 of Schedule 7 to GOWA as it had effect before the Wales Act 2017), concerning legislation about ‘the meaning of Welsh words and phrases’.
- It is legitimate and within competence for the National Assembly to provide a ‘default position’ about the meaning and operation of legislation that is enacted by the Welsh Ministers and other devolved bodies, in order to promote clarity and consistency. And it is properly for the Assembly to determine that applying the ‘default position’ to all Welsh

subordinate instruments (including those made under Acts of the UK Parliament), subject to any intention to the contrary, is an appropriate way to promote those aims.

- It is true that some of the legislation to which Part 2 applies may relate to reserved matters, but this does not take Part 2 itself outside the Assembly's legislative competence. The Supreme Court found that the sentencing reforms at issue in *Martin v Most* [2010] UKSC 10 did not 'relate to reserved matters', even though they directly governed reserved road traffic offences. The Supreme Court recognised that the purpose of the reforms was a broad one, intended to promote coherence and consistency. The Court did not think there was even a borderline case of the reforms relating to reserved matters. And that was all in a case where provisions of a Bill had an immediate effect on laws applicable within a reserved area, including laws already in existence. The Court discussed reform of limitation periods, intended to promote coherence and consistency, as another example of general provision which would not fall foul of this restriction on competence.
- The introduction of Part 2 of the Legislation (Wales) Bill has a broad purpose, intended to promote coherence and consistency. As with general reforms of magistrates sentencing powers, and as with general reforms of limitation periods (an example which was discussed in *Martin v Most*), there is in Part 2 a general purpose – for legitimate reasons of reform which promote consistency – which does not fall foul of 'relating to reserved matters'. Part 2 is applicable to Welsh subordinate instruments generally, regardless of their subject matter. But that is because of the broad and legitimate purpose, and the intention to promote coherence and consistency. Moreover, there is no direct and immediate effect on any law within a reserved area; and there is no effect at all, even as a default position, on any law already in existence. The competency concerns in this case are therefore far weaker than they were in *Martin v Most*.
- In this context I repeat that Part 2 makes provision about the interpretation and operation of Welsh legislation in general. It does this for purposes relating to the clarity, simplicity and consistency of that legislation. Those are its purposes, and they are consistent with its effect.
- The position as to clarity, coherence, simplicity and consistency can be tested by considering the position if the Bill sought to 'carve out' any subordinate instrument *to the extent that it could be said to take effect in relation to a reserved matter*, so that the 'default position' would not apply to any such instrument. It is legitimate to hold to the position that such a 'carve out' – as no doubt with similar 'carve outs' for limitation periods in *Martin v Most* – would not promote but would undermine the aims of clarity, coherence, simplicity and consistency. Indeed, the writer and reader of the subordinate instrument would need to embark on a complex and time-consuming exercise of analysis, not dictated by the title or source of the instrument, as to which provisions fell on which side of the line in which circumstances.

### **Argument that Part 2 modifies 'the law on reserved matters'**

Mr Buckland's letter argues, finally, that the application of Part 2 of the Bill to Welsh subordinate legislation made under an Act of Parliament which itself relates to reserved matters is an impermissible modification of 'the law on reserved matters'.

I cannot agree with this analysis.

- The relevant restriction in GOWA protects 'the law on reserved matters' that already exists. But the coming into force of Part 2 of the Bill will leave the substantive law on reserved matters intact.

- Mr Buckland's letter stated the view that the considerations relevant to the previous argument are also relevant to this argument. I agree, and have answered the previous argument above.
- Part 2 will, as I have explained, apply prospectively only. It will not modify any Act of the UK Parliament or any existing subordinate legislation. It will apply only to future subordinate legislation and only in so far as there is no contrary intention.
- In all these circumstances, there is no 'modification' and none is identified.

## **Policy questions**

Beyond the scope of the points raised in relation to legislative competence, Mr Buckland's letter made some points which go to the wisdom of the policy choices being made by the National Assembly. The letter contends that applying Part 2 of the Bill to Welsh subordinate legislation made under Acts of the UK Parliament will cause confusion and legal uncertainty. For completeness, I should make clear that I do not share this view.

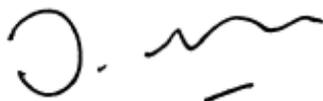
The policy considerations have been carefully considered and explained. Such points are, ultimately, about the wisdom of the legislation (and of the legislature in enacting it). We have engaged with UK officials on this question. My officials have set out the Welsh Government's position on these issues. They asked for concrete examples of how you believe the Bill would create difficulties of this kind, and no examples have been given.

I would add this. The current position is already complex. Understanding how the Interpretation Act 1978 applies to Welsh legislation is far from straightforward. This is particularly the case so far as the Welsh language version of our legislation is concerned, and it is hard to see how the application of the 1978 Act to our bilingual laws is consistent with the principle established by the Government of Wales Acts that the English and Welsh language texts have equal standing for all purposes. The Welsh Government sees the Bill as necessary to reflect the emergence of a growing body of bilingual Welsh law, as recognised by section A2(1) of GOWA (inserted by the Wales Act 2017).

Mr Buckland's letter requested an amendment to the Bill to exclude Welsh subordinate legislation made under UK Acts from its application. However, the scope of the Bill reflects the Welsh Government's policy and its view on legislative competence. I have addressed the arguments about legislative competence in this letter, and why they have not persuaded me that there is a need for the Bill to be limited in the way requested.

I am copying this letter to the Chair of the Constitutional and Legislative Affairs Committee of the National Assembly, and to the Llywydd, and placing a copy in the Member's Library.

Yours sincerely,



**Jeremy Miles AM**

Y Cwnsler Cyffredinol a Gweinidog Brexit  
Counsel General and Brexit Minister