

EXTERNAL REVIEW OF LEGISLATION FOR THE WELSH GOVERNMENT

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“Law, in particular statute law, is the instrument of government – it is perhaps the primary means governments have of giving effect to policy.”

www.gov.uk/government/news/the-rule-of-law-and-the-role-of-the-law-officers

“Legislation is just one of a number of ways of giving effect to a policy proposal; it is necessary when the law needs to be changed – all legislation is policy, but not all policy is legislation.”

[Legislation Handbook on Assembly Bills](#)
gov.wales paragraph 1.7

“The really significant issue is the need for a cultural shift around the importance of legislation.”

Review interviewee

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I should like to thank REDACTED for her work in compiling a consolidated document of lessons learned from past Bill teams.

Finally, my particular thanks must go to Christopher Warner. I could not have been given better or more helpful support and assistance than I received from Chris and his team. As a guide into the Welsh Government and Senedd processes and procedures, as the co-ordinator of interview sessions, written representations and manager of the all staff survey he has been an invaluable assistant. Despite my enormous thanks for all he has done to help me with this review, any faults or omissions remain my responsibility.

Note about the Quotation Boxes

Quotations taken from interviews with, or written submissions from, one or more of the participants in this review are attributed anonymously so that anonymity, assured to all, is preserved. In some instances these comments are a combination of 2 or more comments made to me.

David Noble

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1. Introduction

"[T]here needs to be a change in the approach to the legislative programme. We will need to be honest about the challenges with each other and Ministers. We must be as assured as possible that the Bills that are announced in July as part of the First Minister's next annual statement on the legislative programme are deliverable and on track, and we must put the legislative programme on a better footing for the future."

Message from the Permanent Secretary – The Legislative Programme April 2022

"Setting aside Brexit and Covid, we have ended up with significant pressures on very significant bits of legislation that Ministers have had to take very difficult decisions on – but [these results] were entirely predictable."

From a Review Interview or Written Submission

- 1.1 It has become clear following recent high profile changes to the announced Welsh Government legislative programme that "Ministers' legislative ambitions ha[ve] been hampered by a combination of skills and capacity issues, as well as possible inefficiencies in process. The combined impact of Brexit and the coronavirus pandemic have placed huge pressures on the organisation, but these factors do not fully account for delays in preparing Bills for introduction and in implementing Acts previously passed by the Senedd."¹
- 1.2 This "rapid review" has taken place with the aim of "enabling lessons to be identified and acted upon quickly, while balancing the need to ensure the exercise does not unduly divert resources from ongoing priority legislative work."² I provide a short overview of the methodology employed in Annex 2 to this report.
- 1.3 The following key themes have been identified (after the rapid review of documentation, interviews, analysis of processes and procedures and the information provided by other jurisdictions) as having impacts upon the preparation and delivery of primary legislation by the Welsh Government³:

¹ Terms of Reference – see Annex 1

² Terms of Reference – op cit

³ Although this review is primarily focussed on the delivery of Bills ready for introduction into the Senedd and then the handling of necessary amendments, it also looks beyond that part of the process at "complete delivery of the policy intention"

- ♦ Policy Development capability & capacity
- ♦ Structures & Processes
- ♦ Guidance & Training
- ♦ Resources
- ♦ Cultures & Organisational Management

1.4 I deal with these themes and the impacts they each have in the following chapters, referring to findings from my review and where relevant, evidence and information from other jurisdictions.

1.5 In the final chapter I try to draw from this review some possible options to be considered, refined and implemented in order to improve the legislation-making processes and outcomes for the Welsh Government. I have not called these "recommendations" since, in the context of this review, it has not been possible to do the detailed analysis and assessments to harden these options into definite recommendations. Instead, I have sought to provide a range of options covering short, medium and longer term changes from which those who commissioned this review may choose. My own view is that some of these will be easier and quicker to adopt and implement than others; that all of them would lead to improvements; and that some, which will take longer and be more costly or resource intensive, are likely to produce the most fundamental benefits. I identify 5 key or critical options which, if asked, I would recommend should be implemented. However, that choice is a matter for others to determine.

1.6 Before moving to the analysis of the themes identified and the possible options for improvement it is necessary and, I hope, helpful to summarise by reference to examples, the nature of the problem as revealed over the course of this "rapid review". I do this in the remaining paragraphs of this introductory chapter.

GOOD QUALITY LEGISLATION TAKES TIME AND RESOURCES

"[We have] seen the compression of timelines for each stage in the policy and legislative process.

In some respects the legislative system is a victim of its own success: it has proven that it can produce quality outputs quickly, most recently in relation to COVID-19 emergency legislation, and there have been relatively few public failures.

[Our] concern is that there appears to be an ever increasing expectation that all legislation can be expedited all at once. This is putting considerable pressure on the system, under which mistakes are and will continue to be made, and the quality of legislation will suffer."

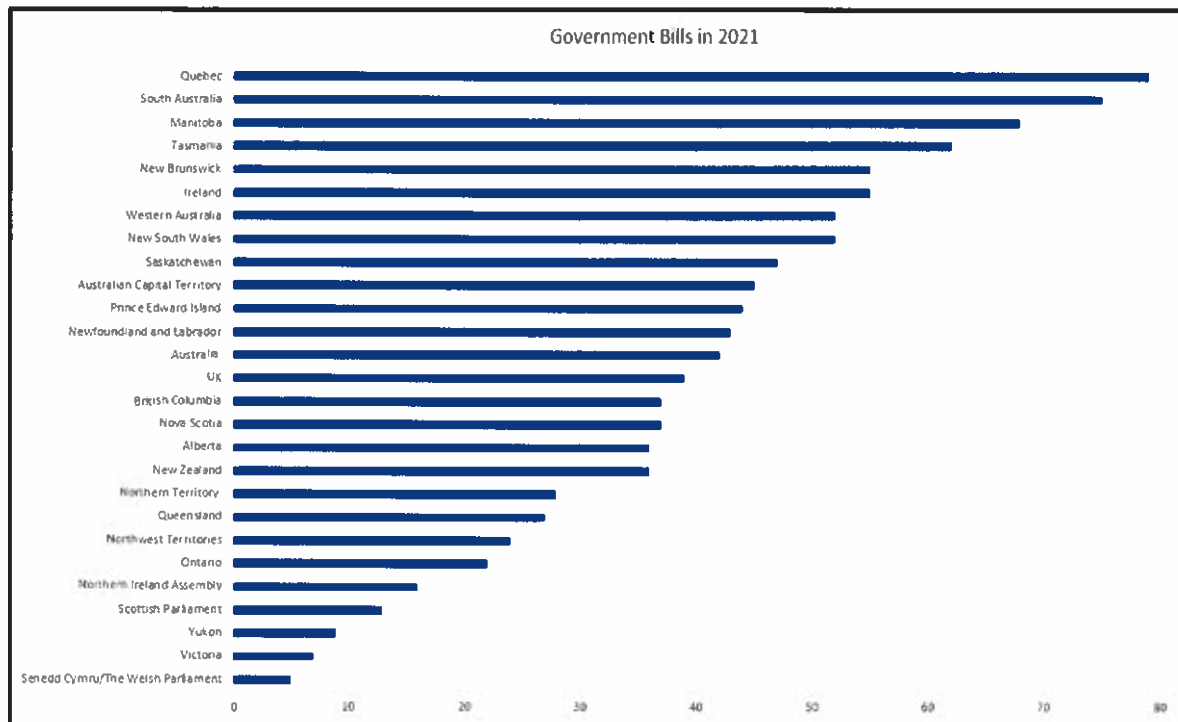
1.7 The words quoted above could have been said by some of those I have interviewed who work in, or had previously worked in, the Welsh Government. Indeed, it encapsulates some of the many-expressed views on the current way in which the Welsh Government and, in particular, its civil service develop policy into new law through the legislative process. However, it is taken from the Annual Report of the Legislation Design and Advisory Committee (LDAC) of New Zealand in the section of that report where they identify " ... key trends LDAC has seen"⁴ They go on to add that the committee "..... is not under the illusion that perfection in process and design is achievable, but that does not mean that current processes cannot be improved."

1.8 The Welsh Government is not alone in experiencing pressures on its legislative capabilities nor in seeking to improve the legislation development process and the accessibility of its statute book. Similar, indeed more emphatic, expressions of concern were found in other jurisdictions also. However, for other administrations developing and passing legislation is "business as usual" – indeed a core element of what they do. In Wales it was not. During the period between 2011 and 2016, the focus given to the Legislative Programme by the then First Minister and Permanent Secretary, meant that it was given a priority

⁴ Annual Report of the Legislation Design and Advisory Committee for 1 January 2020 to 31 December 2020. June 2021, Wellington, New Zealand p.4 <http://ldac.org.nz/assets/documents/Annual-Report-2020.pdf>

status and resources, but this was not sustained for the long term. The impact of Brexit and the pandemic in the last few years has increased the pressure on the legislative programme both in terms of legislation and the resource pressures.

1.9 Having said this, it is also helpful to place Wales into context in terms of its legislative output when compared (roughly) with other jurisdictions:



Noting that the raw figures in the indicative bar chart prepared by the secretariat are not always strictly comparable⁵ it does show that Wales is a significant outlier in terms of output. The government's primary legislation programme is not huge in terms of numbers and should be manageable with the correct resources.

⁵ Indeed, the relatively low figure for Victoria is unusual in the context of their normal output

A Short History of the Optometry Bill in 3 Quotes

16 December 2021

"We are actively contemplating bringing a very short Bill in front of the Senedd, during this Senedd term, to change some of the rules around high-street optometry, so that we can make better use of that workforce." Mark Drakeford MS First Minister [Committee for the Scrutiny of the First Minister 16/12/2021 – Welsh Parliament \(senedd.wales\)](#)

10 February 2022

"During the Senedd's scrutiny of the First Minister committee meeting in December 2021, the First Minister said that the Welsh Government is considering bringing forward an optometry Bill during this Senedd term to change some of the rules around high-street optometry. Have you got any further details on what that might look like?" Joyce Watson MS

"Yes. Well, I'm hoping it's going to be a very, very short Bill. So, that's my opening line. I think it's something that we'll be going out to consultation on next month—so, in March—and we're hoping that it will be introduced into the Senedd in September, and then we'll get Royal Assent in May." Eluned Morgan MS [Health and Social Care Committee 10/02/2022 - Welsh Parliament \(senedd.wales\)](#)

10 June 2022

"During the development of the policy, officials continued to consider the instruction of the First Minister, agreed in the Standing Committee for Cabinet on the Legislative Programme on 26 January 2022, that all Bill Teams consider whether policy objectives could be achieved by means other than a bill. An alternative possibility was identified that would use existing regulation-making powers.... If you agree to take forward regulations using existing powers, it is proposed that this be considered as part of the Cabinet discussion on 20 June to seek formal approval to remove the Optometry Bill from the legislative programme." Reform of primary care optometry services: Legislative options Advice to Ministers 10/6/2022

1.10 In contrast to the previous comment, this set of quotations relate directly to legislation that was being developed and promoted by the Welsh Government in the current Senedd but was not proceeded with after having been confirmed.

1.11 Given the Welsh Government's stated approach to legislation ("Our aim is to produce good law; that is law which is *necessary*, clear, coherent, effective and accessible"⁶) and the exhortation on policy (and Bill) teams that this aim should be "a feature of the thinking at each stage of the Bill's development"⁷,

⁶ [Legislation Handbook on Assembly Bills \(gov.wales\)](#) paragraph 1.8 (emphasis added)

⁷ [Legislation Handbook on Assembly Bills \(gov.wales\)](#) paragraph 1.8

significant questions arise from this recent example.

- 1.12 Was sufficiently early consideration given to the existing legislative powers, the legislative design, and presentational issues around a Bill for this purpose before public commitments to legislate were made? Why did it take until the presumably detailed “development of the policy” phase to identify the possibility of using existing secondary legislative powers to achieve the policy intent? Is the First Minister’s instruction to consider alternative methods of achieving policy objectives now clearly understood and implemented in the pre-Bill bidding period?
- 1.13 What role did any of the internal “governance” processes, Boards and Committees play in this assessment and with what outcomes? What advice was provided by policy officials, lawyers, Bill drafters and Directors General to Special Advisers and Ministers (including the First Minister) before this Bill proposal was added to the legislative programme?
- 1.14 Add to this, the experience of Ministers and the civil service with the current Agriculture (No.1) Bill and the delayed implementation of the Renting Homes (Wales) Act 2016 (quoted below), and it is clear that the current system for seeking, assessing, developing and then implementing policy through legislation proposals, if not broken, is producing far from optimal results.

“I have decided to postpone implementation of the Act until 1st December 2022. This will allow more time for landlords to complete the necessary preparations ahead of implementation. Wholesale reform of the type that the Renting Homes (Wales) Act is bringing about happens only very rarely - perhaps once in a generation. I want to do all I can to ensure landlords have adequate time to make the necessary preparations to comply with the requirements of the Act.” [Written Statement: Implementation of the Renting Homes \(Wales\) Act 2016: deferral of implementation date \(30 May 2022\) | GOV.WALES](#)

“This delay has come completely out of the blue. We understand that this is a huge piece of legislation that fundamentally changes the entire rented sector in Wales, but what is taking so long? Royal Assent was granted six years ago, and the Welsh Government still hasn't published all the regulations.....we'd urge Ministers to get on with publishing the remaining regulations within their original timeframe of June and July to ensure there is a more sufficient lead-in time and to avoid any further delays and uncertainty.” [Renting Homes \(Wales\) Act postponed | Propertymark](#)

1.15 Looking further back from the immediate and current programme into the forward planning process, I heard from more than one contributor that the Year 3 programme for Bills is "not deliverable". And yet, from the paperwork I have also had access to, that message does not appear to be being passed through the current governance processes.

1.16 This is concerning on two levels:

- First because it indicates a continuing gap between official processes recording progress or issues and reality on the ground, at the very least in terms of speedy accurate reporting; and
- Second because it indicates or implies at the very least that the messages about honest conversations through the organisation to the Ministerial level are not being heeded.

1.17 The recent paper on reporting progress across the Welsh Government makes it clear that "It is vital that reporting is honest, transparent and complete." And that "It is vital that Ministers and officials have a shared sense of the scope of PfG [Programme for Government] work in their work areas and a shared sense of progress." To have received the reports I have referred to in paragraph 1.15 above (concerning the deliverability of the third year programme) indicates that there is still some way to go in achieving honest, transparent and complete reporting. Having said this, I have noticed that recent papers relating to the Agriculture Bill there is evidence of rather more direct and honest reporting of issues, albeit rather late in the day.

1.18 I was consistently told in interviews and in written submissions by a variety of Welsh Government officials (and some Ministers) that there is currently a small cadre of people with real expertise in undertaking the various aspects of Bill work and that there has been a failure to redeploy people with those skills and expertise swiftly enough to the Bill teams. Others commented that some of the reasons for this were that there has been (and still is in some areas) a lack of recognition of the scale of the task of preparing a Bill from initial policy development through to Introduction to the Senedd (let alone, full implementation of the resulting Act). Many commented that resources were being tied up with other Ministerial priorities and that there were difficulties in de-prioritising other work. Bottlenecks caused by delays to some Bills were also

mentioned as they had negative impacts on the "central" resources required for all Bills (e.g. legislative counsel/ translation/ economists).

1.19 The next chapters provide more detail on the problems identified above, using the structure of the five broad themes which have emerged during the course of this review. I appreciate that there have been and indeed currently are pockets of good practice and areas of considerable delivery success. But the former are rarer than they should be and the latter tend to have arisen through what has been described as "heroic efforts" by individuals in and around Bill teams. I do however, want to pay tribute to those individuals and the results they have delivered. In the final chapter I hope to make clear that some of the options stem from the pockets of good practice and/or the individual success stories.

2. Policy development (including, policy, lawyer, and bill management capability & capacity)

"Strange dichotomy – Ministers want Bills but the civil service organisation is so busy 'feeding' the machine in other ways that somehow it isn't given sufficient priority. The civil service organisation still doesn't give sufficient weight to development of policy."

"We simply do not have enough policy thinkers with the skills and expertise to translate high level Ministerial policy aims into detailed legislative propositions."

"More comfortable doing delivery than we are thinking [for legislation]."

"Policy teams need to do inventive thinking about problems and need flexibility around solutions – that all takes time and that time isn't built into the system."

"Substantial problem is the lack of appreciation of just what is involved or necessary to turn a bright idea into legislation. A Bill might be proposed and some high level stuff – a page or so of thoughts – is provided but that is not developed policy instructions."

"You need policy officials who understand what you use legislation for and can instruct. Should be supported by people who understand the policy area and law in detail. That's our biggest problem."

"In my experience in relation to policy development, it is more about the experience of the people in the policy team. In previous teams we have all had some experience of developing policy and legislation. But my current policy team are working on a significant programme for legislative reform [and] only a few people have any experience of developing policy and/or legislation. This makes the process very slow."

"The split between management of policy and legal services leads to completely different approaches to resource prioritisation. Having access to legal service resource is a negotiation for policy teams, and sometimes priorities in legal services appear to be pulling away from the priority of delivering legislation."

From Review Interviews & Written Submissions

Policy Development

- 2.1 This issue was consistently identified by interviewees, in written submissions and from the Bill project lessons-learned documentation as a key one: the timeliness and thoroughness of the detailed policy development that is required to take a proposal beyond the higher-level Ministerial policy aims and statements. The need for prompt and adequate resourcing of the policy development function (with strength and depth of capability) was a universal refrain, in particular from Ministers and from those dependent upon the receipt of detailed and well-developed policy instructions for Bill provisions.

2.2 There is important and relevant historical context to be borne in mind when examining this topic. I was told by a number of those interviewed that before devolution the Welsh Office (a small UK Government department) did not routinely become involved with legislation (other than at one remove from their Whitehall equivalents). The Welsh Office did have some officials who knew how to develop policy proposals and take legislation through the UK Parliament on the rare occasions when specific Welsh Bills were required/granted slots. Some substantial Bills were delivered in those pre-devolution years such as the Local Government (Wales) Act 1994. Arguably three developments then happened to dilute that capability, knowledge and understanding in the Welsh Government civil service after devolution:

- 2.2.1 the departure over time of a number of those who were knowledgeable about the Whitehall legislation processes, for example through voluntary redundancy schemes and routine retirements;
- 2.2.2 the transfer into the Welsh Government of staff from sponsored bodies such as the Welsh Development Agency and Cadw increased the number of “civil servants” but not the number who had expertise in developing policy proposals into legislation; and
- 2.2.3 there was a certain loss of access to OPC drafting resources in London and it took time to build the resource now available in the Office of the Legislative Counsel.

2.3 I set out this history briefly in order to better understand the current issues identified in the first two quotes above. They suggest an apparent emphasis upon non-legislative work within the organisation and a limited number of sufficiently capable and experienced policy officials to develop primary legislation across the wide landscape of policy areas now available to the Welsh Ministers and the Senedd on which to legislate specifically for Wales. As one well-informed contributor said to me “the real issue is getting the policy thinking and quality right. This is one of the key problems causing slippage; the broader policy is there but when instructing [lawyers and then drafters become involved] there isn’t the detail”. Looking back at the Optometry Bill issues quoted in Chapter 1, I was given this assessment: “The optometry team was experienced in policy but not in legislation. There was a frustration from OLC that the team were articulating the outcome they wanted ([even the words]) but not how to get there.”

2.4 I have struggled to obtain reliable figures on the actual number of Welsh Government officials who are “policy professionals” for want of a better description (i.e. those officials who understand how to develop policy from broad political statements and intentions – sometimes contained in party manifestos – via primary and secondary legislation through to full implementation on the ground where changes to previous systems and environment are made for the people of Wales). At best, I was told, with the caveat that survey questions and response options have changed over time, that in October 2021, 26% of People Survey respondents self-declared that ‘Policy’ best reflects the type of work they do in their main job.⁸ An internal baseline review conducted by managers from 2019 showed an alignment to policy profession of 19% with 25% aligned to operational delivery.

2.5 Current staff complement, I was told, is close to 5,700 FTE, so by my calculations, that suggests there might be fewer than 1,500 FTE doing policy based upon the 2021 figures.⁹ And, it is worth emphasising that a minority of those will have had recent and/or extensive experience of legislative development work.

⁸ This was a slight increase from the previous year (24%). Over time, the percentage of staff aligning themselves to policy has generally increased, with a small dip in October 2020, which may have been affected by the change in the description of the profession from ‘policy development & delivery’ to ‘policy’ in the 2020 survey.

⁹ The professions categories used are: Operational delivery; Policy; Finance; Digital, data and technology; Inspectors; Communications; Programme and project management; HR; Legal; Statistics; Procurement and contract management; Social research; Engineering; Personal assistance; Marketing; Facilities; Translation; Science; Knowledge and information management; Surveyors; Planning; Health; Internal audit; Economics; Vets.

"Many policy teams see themselves as separate from the legislation process - an add on to their core work - and Bill Managers, often without the policy background take all the responsibility for delivery (and often also have to fill in the policy gaps). Policy teams should be formally part of the Bill Team structure with clarity on their role and responsibility for delivery."

"Resources are too split or fragmented. Specialist teams should be parachuted in to work alongside policy colleagues - I know this is already happening with Bill managers - but also should include lawyers and RIA/business case experts so that Policy people don't have to work on areas they are untrained/inexperienced in."

"It is sometimes assumed that those involved can manage their usual workload alongside the delivery of a Bill. So there are often no changes to a departmental structure which means the Bill work suffers and this causes delays or poorly developed policy (or both)."

"It is often the case that a Bill Team is established with persons in the Bill Team acting as a lead/co-ordinator lead for particular work strands within the overall Bill. Those with the actual policy experience then sit outside the Bill Team and input policy thoughts, ideas etc. into the Bill Team lead but doing so alongside their normal day job."

From Review Interviews & Written Submissions

2.6 Very often I was told that this legislative policy work was merely "added to the day job" of officials. Others said that there was a clear "[n]eed, across the board to improve the level of policy skills [and] we have a number of well-versed colleagues in Bill preparation process - but too few". Given the consistency with which this message about having sufficient numbers of capable policy colleagues to deliver an ambitious programme of legislation (whether that be a small number of widely-scoped Bills as at present or a larger number of smaller more tightly-focussed Bills as other jurisdictions tend to do) it is clear that if an administration lacks adequate policy expertise it will inevitably rely on legal advisers to compensate and formulate the policy. This can be rewarding and very frustrating for lawyers at the same time! It may give some a welcome chance to broaden their outlook beyond the purely legal but it will inevitably mean that they come under pressure to deliver both policy and legal instructions and risks conflict with policy colleagues. They may also lack policy skills or experience.

- 2.7 However, as a number of examples from recent legislation show, performing this detailed policy analysis and development at the start of the process is critical to prevent embarrassing problems which impede policy aims or lead to unwanted outcomes during the course of the Bill's progress through the Senedd and indeed afterwards into implementation. I was informed that Bill instructions often comprise of a large amount of background information (much of it of limited relevance to those drafting a Bill) as the introductory third; the concluding third being a long description of the perceived or intended benefits of the policy leaving a compressed middle third of a much smaller section to set out the policy intent. In some case, this section does not adequately address the existing law and often remains at a high level of abstraction rather than detailed analysis and identification of preferred options to solve particular problems.
- 2.8 It is sufficient alone to refer to the substantial and lengthy change to renting homes legislation in Wales as the exemplar of this detailed policy development not having happened sufficiently well in advance of Bill drafting and indeed, enactment. Wales is not alone in this: At least one of the other jurisdictions I have contacted noted that policy analysis is not a valued skill, and people leaving the administration with substantial experience and expertise in this area were not being replaced. Replacement by inexperienced officials was also noted as a problem in some jurisdictions where the Bill policy development expertise has declined.
- 2.9 There appears to be strong support from the First Minister (as shown by the instruction he has issued) for a need to consider alternatives to legislation first and even as a "75% of what you want to achieve" option for Ministers. However, at the same time, there is a clear imperative for a shift of emphasis in the civil service "machine" to recognise that a central function of the Welsh Government is producing good quality primary legislation to deliver those parts of the Programme for Government which require it. This has certainly been the case since the significant transfers of legislative competence to the Senedd Cymru/Welsh Parliament in 2011 and 2017 and arguably from the time when first primary legislative powers were conferred under the Government of Wales Act 2006. This is considered in more detail in the chapter on culture.

2.10 It is perhaps worth noting the patterns from other jurisdictions. In New South Wales instructions come from departmental lawyers. In Queensland and Victoria they tend to come from policy teams. How useful this is depends on whether or not legal teams have the knowledge and capabilities to instruct on legislation as distinct from advising on existing legislation or possibly even drafting subordinate instruments. If they aren't, then a lot of repetitive advice is generated because policy teams insist on hearing authoritative advice direct from drafters. This then makes the process longer than it needs to be.

2.11 In New Zealand the Parliamentary Counsel's Office (PCO) places a heavy emphasis on the "one team of people being involved in the Bill" approach. Having said that, it seems, rather like some of the Australian States, that different departments construct their instructions process differently: Some are not submitted through their lawyers for example. However, PCO would push hard for that to be the exception since the drafters do not want to use/waste valuable drafting time doing the first legal analysis. Alternatively, some legal teams want to be the key channel and will hold a very close relationship with policy colleagues. One of the keys to successful Bill management and the "one team approach" comes from the early Tripartite meeting involving Departmental policy officials, a key adviser in the Prime Minister's office and PCO representatives. This provides an important discipline in providing a clear understanding of what the overall priorities are for the government in relation to all the priority Bills¹⁰.

2.12 Having noted this issue, it is fair to say that I have also seen evidence of work underway to develop and strengthen the capability of the Welsh Government civil service to develop policy (and indeed to develop the "policy profession" within the organisation)¹¹. From what I have seen however, there is little or no direct reference to the need for a particular focus on

¹⁰ "Priority Bills" is a reference to the ranking system used by most NZ governments when developing their legislation programme with 4 or more levels of priority. See: [Government legislation programme | Department of the Prime Minister and Cabinet \(DPMC\)](#) & [Chapter 25 Preparation of Legislation - New Zealand Parliament \(www.parliament.nz\)](#). Given the capacity of the Parliament to process Bills in a yearly session and the capacities of PCO and others to deliver Bills for introduction, historically Priority 1 and 2 Bills will be drafted and (usually) introduced with others possibly being worked on ready for future sessions when they may receive a higher priority (subject to other demands from the government)

¹¹ Building on the 2019/20 Policy Capability Review work is underway to develop a Policy Capability Framework that supports the Welsh Government policy profession to create better policy.

policy-making for legislation. This may be an inadvertent gap, or the fact that it is included without specific reference but given the competence and capability issues which have been so extensively referred to in documentation supplied, and in the interviews and written submissions, to this review, it is perhaps unfortunate¹².

2.13 There are two further issues under this heading which need to be considered. Solving them will not be easy and indeed, in some respects, one generates, or contributes to, the other:

2.13.1 The first is “**resilience**”: The impacts on individuals who possess the necessary degree of capability and competence to develop policy into legislation, of working on primary legislation from the early policy development stages right through the Senedd processes to Royal Assent (and even beyond into implementation). In many submissions and interviews I noted reference to the drain on resilience that working on primary legislation generates. This clearly affects all those in a Bill team – but for those developing policy at the very start who remain with the work until Royal Assent it is particularly acute and chronic. One comment I received put it succinctly: “People can feel quite burned out at the end of a Bill’s scrutiny process (which can involve long hours and weekend work and working at a frantic pace particularly at key stages) and be ready for a change.”

“[There has] also been a constant churn of policy leads on Bills.... suspect that our experience is not in isolation. In terms of the Act ... can only think of 1 policy lead that has retained some involvement in the implementation stage. The other policy leads have all changed and in some cases on multiple occasions.”

Written Submission

2.13.2 The second is “**continuity**” or retention of the necessary staff throughout the process. This, as with resilience, applies equally

¹² “Strengthening policy capability within Welsh Government: forward planning” Paper to Executive Committee 12/7/22 for example makes no reference to legislation, turning policy into law or the particular needs and issues around policy development for Bills and indeed SIs

to other professions involved in developing primary legislation such as legal advisers and legislative drafters but again it is particularly acute in relation to both policy leads and Bill management team members who stay with the project from concept to implementation on the ground.

- 2.14 The need for resilience and continuity of the policy officials engaged on Bill work and for recognition of the value that continuity gives was identified by many (including most acutely by Ministers and Special Advisers) and was reinforced by the survey results. Very often I was told that Bill teams disbanded at Royal Assent, that there was little or no continuity in the policy teams from those who knew the rationale behind a Bill/Act provision and those who then had to implement it or advise further.

Lawyer capability and capacity

- 2.15 This review has coincided with the proposals for a “Reset and Restructure” of the Legal Services (LS) Directorate and consultation is underway.¹³ For some, the timing of this restructure ahead of the outcome of this review might be considered unfortunate but reviews can rarely be timed perfectly not to coincide with events in the environment to which they relate. Arguably this timing may give the Welsh Government the opportunity to consider the options provided by this report in the light of the results of the consultation exercise on the LS Reset and Restructure.
- 2.16 Currently lawyers in the Welsh Government are in disciplines (or client-facing subject teams). This has merit, I was told, in that lawyers working on, for example, local government are very knowledgeable in terms of both the existing law and the policy background. Consequently, they can take forward legal instructions and assist their policy colleagues in getting where they want to go.
- 2.17 As a department or Directorate it also means that the way in which it is structured means that subject teams are supposed to do more than one type of legal work – so they cover advisory work, secondary legislative drafting as well as instructing on Bills and probably engaging with litigation

¹³ A Consultation Document was issued in May 2022 and the proposed structure chart is at Annex 4?

specialists when judicial reviews or other casework arises in their subject area. This has the added advantage of providing lawyers with the attractive mix of work which is often referred to in the UK civil service as being one of their recruiting strengths.

2.18 As regards numbers, I was told that the group totalled 162 headcount (fewer FTE) and that an additional 20 junior level posts had been agreed in recognition of the fact that there was a need for more legal resource.¹⁴ The draft proposed allocation of lawyers to Bills for Years 1 to 3 of the current legislative programme is annexed. This indicates that a total of 72–75 lawyers are planned to be engaged on Bill work. It also reveals that (with one exception now dropped from the programme – Optometry) there are no “small” Bills in the programme.¹⁵ I return to this point later and in the options chapter. For the size of the legislation programme which the Welsh Government undertakes I would only comment that this amount of lawyer activity, although no doubt necessary and welcome is significantly more than would often be found in the comparator jurisdictions. I accept that there will be non “pure” Bill legal work involved in terms of competency issues but even in the other jurisdictions such as the Australian, Scottish and to an extent New Zealand government departments there is similar legal work in terms of Federal/State “competency” issues in Australia, Devolution issues in Scotland and Treaty of Waitangi issues in New Zealand. I return to this in the Resources chapter.

2.19 In my experience, over 30 years working with government lawyers in different administrations, it is clear that variety of work is important to many but equally so is the identification and development of personal and professional strengths. There is a danger, which has occurred in some administrations of lawyers seeking to do small amounts of Bill work (and indeed other legislative work such as SI drafting) either because it is one of the designated “career anchors” or because it is necessary to have “ticked that box” for progression. This can have unintended consequences of diluting legislative skills and expertise across a wide cohort and also not picking up

¹⁴ As mentioned previously, recognising the difficulties, it would be helpful for the Welsh government to have similar precision about the numbers in its policy profession to match those it has for Lawyers, Bill Managers and Legislative Drafters.

¹⁵ Legal Services Draft Baseline Review Methodology 2022 dated 16 May 2022 (Extract is at Annex 7)

those individuals best suited to this work over other legal work. It is also clear that decisions about allocation of instructing lawyers to Bill work is critical to ensure that they are effective and that the input of Legal Services to Bills is consistent. Where instructing lawyers are not experienced or lack the appropriate skills for Bill work this leads to the type of instructions described above. Some of the gaps will have been left by policy officials and some by the lawyers themselves. This corrodes relationships in the "linear model" of instructing on a Bill and increases tension at the "fences" between the three groups. I should add that I was told that the Legal Services Department has expanded with new recruits quite significantly over the recent past and has lost (beyond its control) a number of those with corporate legal/policy memory and experience in Bill instructions from the past.

- 2.20 As an aside, I merely mention in this regard that, very few of the legislative drafting lawyers I managed ever expressed an interest in carrying out litigation for instance, once they had developed and were enjoying their legislative drafting skills and work. Equally, there were very many government lawyers who disliked or were ill-suited to the (sometimes limited) exposure they had to statutory instrument drafting work. This was particularly so where, inevitably in many cases, they had little prior experience of such drafting work or when confronted with substantial projects which then occupied all their time.

"Delaying the development of consequential amendments until after Royal Assent has resulted in a less than adequate understanding of the complexities of the interconnection. In some instances changes to the official Act are needed to remedy the situation or there has been significant delays to full implementation."

From Review Written Submissions

Add to this the tendency, which has developed in Welsh legislative practice, to leave most, if not all, the consequential amendments to existing legislation caused by the policy changes in a Bill to subsequent statutory instruments, drafted normally within LS not OLC and the consequences for a coherent and well-drafted statute book for Wales are clear.

- 2.21 Obviously, the ideal for good statute book creation and maintenance – especially as the Welsh Government and Senedd sets out on its path of creating a more codified Welsh suite of legislation – would be to ensure that

all consequential and miscellaneous amendments flowing from a particular Bill are indeed drafted by legislative counsel and included in that Bill. However, I appreciate that this is currently a "counsel of perfection" and probably not immediately feasible. It should however remain the ambition in my view in order to avoid the sort of issues set out in the quotation above.

2.22 Therefore, in the options chapter, I suggest that serious consideration is given to more tailored approaches to the deployment of legal and indeed, legislative counsel, resources to ensure that all significant legislation is drafted by specialist (OLC) drafters as is often the case in similar sized jurisdictions (eg. most Australian States and New Zealand).

2.23 This next element goes beyond legal involvement in Bill development but, since the Legal Services part of the organisation has two "boundaries" with policy colleagues and with OLC colleagues and because this issue has been raised most in relation to those boundaries, I cover it here. It has become clear, from reading the many comments/written submissions and conducting the interviews over the course of this rapid review, that an acute issue in terms of successful Bill development and delivery to timetable arises at the "transactional boundaries"¹⁶ during a Bill's development from Ministerial statement to an enacted Welsh Act.

"What the Bill lacked as a whole was what we were trying to legislate for. I don't know why Legal Services didn't pick it up – they had probably [all] been talking at cross-purposes."

"An absence of common purpose and shared understanding, relationship before between policy and LS was terrible. Probably LS were not being listened to and the policy team frustrated that things [were] not progressing."

"[We have a] growing legal team but it and policy are working in defined silos. Fundamental question about linear way we do legislation – policy to legal services to drafters – when things go wrong, an awful lot of the time is people pointing to other people."

From Review Interviews & Written Submissions

¹⁶ By this I mean the points at which one group of people pass the "baton" to another group of people. I have heard extensive complaints made by one group or individuals about inadequacy of work done by other groups or individuals in the linear Bill development process. These were particularly acute between policy officials and lawyers and legislative counsel at the junctures between policy and legal instructions and first drafts, but continued into the parliamentary process as well.

2.24 I have selected only a few comments for the quotation box above but there could have been many, many more. I deal with one aspect of this issue (the linear development process in the chapter on structures and processes) but there are two other related reasons that contribute to this significant issue in my view:

2.24.1 an apparent lack of understanding between the various groups of the role which each plays and the needs of each when one of these transaction points occurs in the process of developing a Bill; and

2.24.2 an apparent (and in some cases, evident) failure to deploy the appropriate personnel within those groups to the particular tasks demanded of them in developing a Bill.

2.25 I return to the first of these in the chapters on training & guidance and culture & organisational management, but suffice to say here that it has become clear during the course of this review, that some people in the Welsh Government appear not to fully appreciate the different disciplines which are needed to be brought to bear to develop from a broad policy statement at Ministerial level through to the very detailed and precise law which will affect the citizens of Wales (sometimes including criminal sanctions and life-affecting provisions). This process of legislative development requires particular “thinking” at different points by different professionals. It can appear from the outside to be overly long/detailed or even fussy or “gold-plating” but I have seen no evidence of that in the brief examination of recent legislation I have been able to do during the course of this review. It is always worth remembering that the output of this activity is “hard law” which bites on individuals, organisations and communities (sometimes with criminal sanctions or other enforcement or with substantial human rights or financial consequences). For these reasons the need to delve deep into a broad policy intent and tease out the detailed impacts and scenarios is unavoidable when making good and effective legislation. How this is done however, can be the difference between a successful legislative project and one which fails to meet timetables and/or objectives.

2.26 On the second point I would note the following: The Welsh Government has already recognised that for Bill drafting work it is necessary to have a cadre of people (OLC) who develop and hone their drafting skills

"I've been fortunate to do Bills with teams of people who know what they are doing – and understand the challenges including the political ones. But [we] don't have breadth of people in that position – always scrabbling around."

"[X] and [Y] were really good on [Z] Bill but we have lost them to parts of organisation where there is little legislation. Now working with [another] Bill team which is inexperienced."

"The bridge between policy and legal is *the* thing – there is competition for people we know are good – amongst various Ministers."

"How good are we at building on the expertise of those who have been through the process? [It seems] not. I have worked with fantastic Bill teams but they disappear. We don't even keep them for secondary legislation for their Bill. When we have a raft of complex secondary legislation..."

" [It is a] rare experience to see people recognised from a previous Bill, which is probably not the right experience"

From Review Interviews

and legal knowledge to deliver that function. Equally, it seems that there has been a recognition that another cadre of people (Bill Managers) require to be identified, recruited and "held" as a centrally managed and allocated resource. These are two critical functions in the delivery of a successful Bill project but, in my view, they are far from the only ones where identification of individuals with particular skills, aptitudes and frankly, the personality traits which suit them to the tasks involved in Bill development, would be beneficial. Indeed, I would go further and say that, having recognised the need for particular specialisms in drafting and Bill management (even if in the second category this may be a time limited specialism as individuals then take those skills to other parts of the administration), it is not be too much of a leap to understand that some lawyers and some policy officials will be better at, and better suited to, Bill work than others. This is not to say that there needs to be strict "specialisation" but more a recognition of the nature of the demands and the capabilities and aptitudes needed to meet those demands and a flexible management and individualised deployment of resources to meet those needs.

2.27 There is much said about the creation of “Bill teams” within the documentation and indeed in the interviews and written submissions although it is rare (for resource reasons) for there to be the classical Bill team of dedicated policy, legal, bill management and drafting officials working solely on the one legislative vehicle for the whole duration of that Bill, as was the case in larger administrations (at least in the past). The reality is that most Bill teams currently are comprised of “adjuncts” – individuals in policy and legal commands, most of whom have Bill work as, at best, a substantial element of their current job description and, at worst, as an unwelcome addition to their “main day job”. Recognising the reality of this – and the inevitability given the limited resources available – requires creative and intuitive management of those limited resources to ensure that the “team” indeed has the classic range of skills, aptitudes¹⁷ and experience necessary to deliver rather than to fail.

“The team leader is the most important person in terms of team performance in LS (Legal Services). Attitude is key. Two things happen [with Bill work] – LS do help but the reality is that [the] policy thinking isn’t done at the level of detail required. Or LS don’t help (because they don’t see it as their role or because they can’t help).”

From Review Written Submissions

It is clear from the interviews I have undertaken that the failure to do this consistently is a significant frustration from a political perspective.

2.28 As with policy development so with legal instructions to drafters, it is necessary to have a combination of expert subject-related knowledge (why current policy is what it is and why it needs to change and to what – what the law currently is and what needs primary legislation to change it and how) together with the skills and attitudes needed to deliver the team’s outcomes. The currently proposed structure for Legal Services with Bills mapped (Annex 4) shows the inevitably uneven distribution of Bills across divisions and

¹⁷ I am uncertain whether much thought goes into this aspect when creating a Welsh Bill team but there is significant academic evidence that high performing teams require a range of skills and aptitudes – for example the 9 Belbin “behavioural attributes” [Belbin Team Roles | Belbin](#). In a situation where an “adjunct team” is being created it is arguable that ensuring you have the right behavioural attributes is as important if not more important than expert knowledge- since that expert knowledge can instead be called upon when needed.

collegiate working groups – taking Year 2 as an example (and omitting Optometry) the bulk of that year's programme (4 Bills) lands in two divisions within the same collegiate working group. This may well be deliverable if the right knowledge, skills, aptitudes, *and* behavioural attitudes exist in that group but the possibility of moving lawyers with previous successful bill experience and enthusiasm to assist those Bill teams, much as Bill managers will be allocated, might provide assistance and assurance.

2.29 I discuss the training and guidance materials available for those engaged on Bill work in a later chapter. I would not minimise the need for relevant, timely and helpful training together with accurate and accessible guidance but it is worth noting that most of those interviewed or who commented on this said that learning how to do legislative policy development work, and indeed, "Bill-lawyering work" (not just the narrow "legal instructions to drafters" element) is best done on-the-job. This requires mentorship and management by those with a breadth and depth of prior relevant experience.

2.30 I was told that the rationale for locating secondary implementation legislation with LS lawyers is that those lawyers know the subject area, but I also heard that is becoming less and less true and is certainly not universally the case. Contrast this rationale with the position of legislative drafters who have drafted a Bill (and its amendments). They are not only be specialist drafters but will, by the time of enactment and commencement, have detailed and expert knowledge about the secondary legislation powers for implementing SIs, transitional and consequential amendments, repeals and other matters not provided for on the face of the Act. I am certainly unpersuaded by the rationale in relation to the drafting of the most difficult implementation instruments in relation to large-scale system changing Bills/Acts at least. I appreciate that there will be resource/capacity issues wherever this work is located but in most of the comparator jurisdictions which manage their legislative programmes well this model is followed.

“..statute law, is the instrument of government – it is perhaps the primary means governments have of giving effect to policy.”

www.gov.uk/government/news/the-rule-of-law-and-the-role-of-the-law-officers

2.31 Finally, it is difficult to conclude this chapter on resources for policy development (having also included legal and OLC resourcing as well) other than by reproducing a comment made to me in the course of my interviews (and repeated in different ways by others): “You need policy officials who understand what you use legislation for and can instruct. [They] should be supported by people who understand the policy area and law in detail.” This is more than merely aspiration. It is essential if the Welsh Government is to move from the position that prompted this review to a position where it is confidently delivering its legislative programme of “good law”; owning and managing the Welsh Statute Book. It is for this reason that I have repeated the statement from the preface to this review in the box above.

3. Structures & Processes

"We spend all our time worrying about process rather than content."

"There are many standard procedures which must be followed, but it is not clear if they are there because they facilitate the process, or because of tradition."

"Overreliance on standard processes."

"There isn't enough discipline around timetabling. Everybody thinks they can slip. It then becomes OLC and Translation pressure. Insufficient accountability for failure to comply with timetables."

"People working on Bills see timetables as LPGU owned because LPGU put them to Ministers but they aren't invented by LPGU."

"[N]ot sure that processes contain enough accountability when things are not going in the way they should."

"The manner in which the organisation attempts to develop Bills is a serious issue - countless instructions and memos changing hands in the preparation of legislation. There is no dynamism to the process, it feels almost adversarial in design and certainly antiquated. The timetable is also imposed on a Bill with no real assessment of realism nor deliverability at the outset."

"Structures & processes could be much more collaborative, creative and less linear."

"Our structures don't enable flexible use of resources or longer term planning."

"Our legislation ... too often revolves not around policy but around soundbites, and half-digested strings of words and phrases that are simply lifted from legislation in other jurisdictions, or from stakeholders or pressure groups, without any real interest in what those words might mean or what their effect might be."

From Review Interviews and Written Submissions

3.1 It is difficult completely to separate structures from processes in this instance, but my understanding of the current structure is that within the Welsh Government administration the following elements are in place for Bill development and management:

- Standing Cabinet Committee
- Legislative Programme Board
- Legislative Programme and Governance Unit
- In some Directorates General – Group Legislation Leads/Units
- Individual Bill Project Boards

This, taken from the Welsh Government intranet, although now out of date (eg references to Cabinet Secretaries), presents rather more information about each element of the governance structure.

Governance of the Legislative Programme

Governance arrangements are in place for the Welsh Government Legislative Programme

For help and advice relating to the governance of the Legislative Programme, please contact the [Legislative Programme and Governance Unit mailbox](#).

Legislative Programme Board (LPB)

The Legislative Programme Board (LPB) takes a central role in the overall management and monitoring of the legislative programme.

LPB's aim is to provide overarching guidance and assurance, bringing together colleagues from across the organisation to improve the way we join up on the Government's cross-cutting priorities.

LPB has responsibility for:

- Early identification and management of major risks to the legislative programme;
- Responding promptly to issues as they arise; and
- Providing regular reports to the First Minister and Permanent Secretary, and to Cabinet.

Cabinet Secretaries and Ministers also receive formal briefings from their Policy Group on their own items of legislation.

Cross Directorate Group on Legislation (CDG)

The Cross Directorate Group on Legislation (CDG) is a forum for the exchange of views, good practice, information about roles and responsibilities, and resources, and provides general support to the Legislative Programme.

CDG supports policy integration of our legislation across the Welsh Government, facilitates the sharing of best practice and provides an important assurance role for the Legislative Programme Board.

Governance arrangements in Groups

Governance arrangements vary between different policy areas.

For more information on what happens in your area, [contact your Legislation Lead](#).

Legislation Education Oversight Panel (LEOP)

The Legislation Education Oversight Panel (LEOP) provides oversight for legislation education within Welsh Government, with a particular focus on education and training on primary and secondary legislation and constitutional affairs. LEOP shares information, good practice and discusses common issues with a view to identifying workable solutions. LEOP provides assurance, on a collective basis, to the Legislative Programme Board in relation to legislation education.

3.2 As regards processes: It is best perhaps to refer to the Bill Development Process flowchart created for the purposes of this review by LPGU and the secretariat team (Annex 8) although this gives an impression that is perhaps, deceptively simple and smooth "flowing". In reality the process and the flow can be surprisingly sticky and at times obstructed. The chart does not set out all the elements in addition to the instructions for a Bill. These include:

- the Bill project documentation (4.40–4.44)
- the communications strategy (4.45–4.48)
- lessons learned (4.49–4.50)
- an integrated impact assessment (Chapter 5)
- Regulatory Impact Assessments (Chapter 6)
- Explanatory Memorandum (Chapter 8)
- Explanatory Notes (Chapter 9)
- Possibly Drafts of Subordinate Legislation and Statements of Policy Intent (Chapter 11)
- Consents and Consultations (Chapter 12)

3.3 I include the references to paragraph or chapter numbers from the current Legislation Handbook on Assembly Bills simply to underline the huge burden of associated documentation, policy, legal and administrative work which also have to be delivered by the people trying to develop the legislation itself. Even before entering the Senedd process these requirements can provide procedural stickiness or obstructions which need active management and the deployment of resources to resolve. To an outsider, some of these requirements and processes – albeit not all of them are within the Welsh Government’s control – appear over-engineered when compared with other similar jurisdictions or indeed the UK Government.

3.4 **As regards governance** therefore, at Ministerial level there is (since 2021) the Standing Committee for Cabinet on the Legislative Programme. This Committee, now chaired by the Counsel General, includes the First Minister, Minister for Finance, Chief Whip and Trefnydd as core members and other Ministers are invited to attend as necessary. The Committee also undertakes the function of conducting ‘Ministerial Pre-Introduction Assessment’ (MPIA) meetings, which are convened for each Bill to consider in detail its readiness, risks and issues before agreeing whether to formally proceed to introducing the Bill to the Senedd. However, its scope for early identification of issues with policy development and instructing capability issues early enough in the process for these to be resolved appears to be limited.

3.5 Whilst the current political level structure and process provides for some management of the overall Legislative Programme and involves key Ministerial colleagues as core members it does not completely equate with the type of active Ministerial management of the programme that other

administrations employ. Typically these involve a weekly meeting with the Leader of the House/their deputy, advisers, Cabinet Office and legislative drafting officials, not only to programme legislation (and other business) in the parliament that week/fortnight/sitting but also to manage the programme feeding into the Parliament. Frank and honest conversations which identify issues and decisions for responsible Ministers and their advisers to deal with in order to keep Bill development on track are possible. In the Welsh environment one possible model would be a slimmed-down version of the full Cabinet Committee on the Legislative Programme involving the Trefnydd, Counsel General, (with attendance by the First Minister), Special Adviser(s), Permanent Secretary, LPGU and Legislative Counsel. It would need to then dovetail into the official-level governance to ensure information and decisions flow up and down.

- 3.6 As regards governance at the officials' level, the Legislative Programme Board continues to have strategic oversight of the Legislative Programme and the development of future legislative proposals, and provides assurance and advice to the Permanent Secretary, the First Minister and the Standing Cabinet Committee on the delivery of the whole legislative programme.¹⁸ The Board's apparently limited power to direct resources to manage delivery of the programme, or to address capability and capacity issues affecting delivery may have changed following the decision of the new Permanent Secretary to take over chairing the Board. Its ability to respond to the risks to the Legislative Programme should therefore improve. This is particularly critical with issues that arise early in the legislative development process where it is not always clear that problems may be looming.

¹⁸ More recently I was told, the LPB, has also taken on an increased oversight role in relation to the implementation of Senedd Acts. I comment on this further in the section on implementation of Acts.

We need to be able to work now on Bills intended for implementation in the later years of the Legislative Programme but we can't because resources are only released once a Bill is named in the programme, which then places us on the back foot, and makes everything so stressful.

It is a great shame that the opportunity of devolution was not taken to rethink the legislation process - we have taken on much of the outdated language and processes of the UK parliament and, in doing so, alienated staff with no background in legislation. There is insufficient capacity in Welsh Government to operate the same system. More specifically the RIA needs to be reconsidered. Content is too onerous - it greatly exceeds the requirements for UKG [Bills].

From Review Interviews and Lessons Learned

- 3.7 **Authority for Bills:** I was told that in Queensland, authorisation to prepare legislation goes to Cabinet with the drafting instructions and is subject to two rounds of internal scrutiny and in New South Wales there are no drafting instructions with the submission. In Victoria, a Cabinet submission requires drafting office sign off. In New Zealand authority for Bill drafting follows Cabinet approval and usually is accompanied with drafting authority for PCO to take instructions. The Cabinet Papers usually reflect the significant amount of policy development work undertaken therefore in order to obtain drafting approval.
- 3.8 Clearly this approach to developing a legislative programme requires some (possibly considerable) dedication of policy development resources early in the process well before a Bill is added to the legislative programme. This appears not to be the model currently in operation in Wales. Here a Bill is included in the published legislative programme in the worst case before any significant detailed legislative policy development has been undertaken or at best with insufficient time and resources often to meet the commitment. A number of recent examples of this practice have led to postponement of the introduction date. This is clearly a source of frustration for Ministers and their advisers who have to manage the political aspects of such a public programme. It also has the inherent risk of a rushed policy analysis, an over confidence on the results of external sources of policy work (whether that is the Law Commission, an independent report process or extensive stakeholder consultation/co-production) and a consequent compression of timetables for the other key elements of Bill development, drafting and translation.

3.9 It is for these reasons that I am not convinced that the current organisational arrangements (structures and processes) for Bill policy development and management are delivering effectively enough.

“This is being actively monitored and the Cabinet Committee will be appraised of any issues through the regular update on the programme.”

“[This] Bill had been scheduled for introduction on 6 February 2023.....there is now an overlap with the drafting window for these two Bills as well as the same policy officials working on both projects. To reduce the risk to delivery and mitigate the impact of the overlap, it is proposed that the drafting window ..[be] extended, resulting in the introduction date being deferred by six weeks.”

“There was still significant policy work to be done to finalise the scope of [this] Bill and the core policy that is intended to be delivered through it. For this reason, the Bill was scheduled for introduction during the penultimate week of the summer term, in July 2023. However, the challenging timetable does not provide time for policy refinement after the consultation, without reducing the time Legal Services and the Office of the Legislative Counsel have to work on the Bill. This is a significant risk, particularly as the drafting window for a Bill of this nature is particularly challenging, and Legal Services are balancing this work against other priorities....”

“A delay to the publication of the Law Commission’s report had implications for the finalisation of instructions. This is also a lengthy, technical and challenging project. LPGU has concluded that additional time is required to deliver [this] Bill.”

“The January ... Cabinet Committee paper articulated the challenges of delivering [this Bill] in Year 2 ...There was still significant policy work to be done to finalise the scope and the core policy that is intended to be delivered through it... the challenging timetable does not provide time for policy refinement after the consultation ... LPGU have concluded that the current timetable for this Bill is particularly high risk.”

Extracted from CAB(21-22)120

3.10 They need to reflect that this, now core, business of the Welsh Government is a labour-intensive and time-consuming process which requires resources to be planned and managed from well before a Bill is announced through to long after it has received Royal Assent (especially where implementation relies upon secondary legislation, the creation of new bodies and funding arrangements etc.). This is more than “pure” programme tracking and reporting of the Bill itself, as seems to be the result of much of what LPGU and other governance processes are delivering. There appears to be insufficient focus on the preliminary stages of policy development and refinement before a Bill is announced in the Legislative Programme and resolution of those and the resourcing issues rather than merely

recording/discussing them. The commentary in the box above is a litany of missed deadlines for crucial development work, resource pressures and conflicts of priorities as well as overloads of inputs at critical points so that the “machine” for producing Bills cannot cope.

- 3.11 My concern from an admittedly limited and short exposure to these processes and governance structures is that much of what is being reported in the extracts above was known or at the least foreseeable when those Bills were first being discussed. A major reform of a key transport infrastructure begged for early and substantial policy development work, legal advice and resourcing. There appears to be an “optimism bias or culture” in both the early and subsequent stages of the programme. And yet, this optimism is rarely supported by the evidence in practice (or indeed in the recent past).
- 3.12 This, I hasten to add, is not a criticism of LPGU but more an observation on the limitations of the current programming structures and processes. Too often in the papers I have seen phrases like those included in the box above.
- 3.13 At the UK Government level, where there is a bi-cameral parliament to work with, supervision and control of the legislation programme (announced in the Queen’s Speech) is exercised by the Parliamentary Business and Legislation Committee of Cabinet.

A summary of the structure and process is set out in the box below.

The UK Government's Structure and Process for managing the legislative programme

The Parliamentary Business & Legislation Committee's systems for scrutinising bids for legislation and managing the programme are intended to balance the interests of departments and the interests of the Government as a whole, within the constraints of parliamentary capacity. They involve setting the Government's priorities for what the programme should deliver, rigorous scrutiny of preparedness and progress throughout the drafting process and sanctions for failure to translate policy into drafted legislation to a satisfactory timetable, including removing legislation or postponing it to a future session.

The PBL Committee usually receives around twice as many bids for legislative slots as there are slots available in each session. Many potential bills are therefore not awarded a place in the programme and ministerial agreement for secondary legislation is only given where there is a clear requirement for it. It is crucial that bills are ready for introduction at the start of the session and secondary legislation is laid in Parliament on the date requested by departments unless the committee specifically agrees otherwise. Bills and SIs that are awarded a slot but are not ready on time waste opportunities that could otherwise have been awarded to other legislation ... Bills that require amendments after introduction also place additional pressure on parliamentary time and drafting resources. No more than one third of time in the Commons tends to be available for scrutiny of government legislation. Often less is available. The PBL Secretariat supports the PBL Committee in the management of the programme to ensure that this limited time is used as effectively as possible ... time lost on one bill has a knock-on impact on the programme as a whole. Poor management will reflect badly on the Government and on the departments and ministers concerned. In the case of major delays, bills could be lost from the programme altogether....

Frequent and frank communication between bill teams and their ministers, and between bill teams and PBL Secretariat, is critical. During the drafting phase, PBL Secretariat will want to meet regularly with bill teams to monitor progress in preparing the bill. Bill teams should always alert the Secretariat to any significant changes to the bill delivery plan, such as delays in delivering instructions to Parliamentary Counsel, any political changes that may impact on the bill, and any other emerging risks. This information will assist the committee in planning for the session ahead.

[2022-08 Guide to Making Legislation \(Emphasis added\)](#)

- 3.14 In New Zealand, the annual bidding process from departments for Bills in that year's programme (and now extended out into years 2 and 3) is always routed through Parliamentary Counsel Office so that comments from the drafting team can be made (including early identification of resource and policy/legal issues). The "crucial thing is it has to come through PCO. So, we get to have a say". All jurisdictions contacted reported a natural tendency towards what one of them described as "optimism bias" in the bidding/programming process. In New Zealand this has been ameliorated to an extent by the categorisation of Bills into 5 levels of priority (with an

understanding that the Parliament would be unlikely to be able to process more than the bills in the first two priorities with some 3rd category ones in some circumstances). In Wales, with such a small programme (of medium and large) Bills it is far more difficult to operate such a priority ranking system which, together with non-publication of the programme, gives more flexibility for the New Zealand government to manage their legislative development process.

3.15 This means that dedication of resources to the Bills which are announced in the Welsh legislative programme and indeed substantive policy development work in advance of announcement are even more crucial since the scope for moving Bills around the programme is much more limited. Having more, smaller, more manageable Bills may provide a little more flexibility but the underlying issue of having clear policy developed in advance of announcement and resources dedicated to that and the associated legal work remains.

3.16 There appears to be early evidence that the Permanent Secretary's Recovery Plan is having a positive impact in terms of strengthening the governance process at official level. But the review received continuing concerns about the number, benefits and real outcomes from the current reporting and monitoring processes. The results from the Recovery Plan of tightening of processes and making links to direct "accountability" for slippages and impacts on others are still at an early stage. The survey report indicates that some respondents considered the process to include "unclear and over-engineered governance, resulting in multiple reporting through different lines of accountability, and indirect communications with delivery teams with confusion about escalation routes". And other comments indicated similar views: "I think there is a lot of bureaucracy and little to show for it. It is not effective."

3.17 I remain concerned that the "optimism bias or culture" I have noted before, continues to persist even in a recent Cabinet Committee paper about the legislative programme. That paper noted that Year 1 had 2 Bills already in the Senedd – (Tertiary Education Reform – where significant government amendments would be needed, and the Welsh Taxes Acts) and 2 new Bills being introduced. For Year 2, after recommended decisions are considered, the programme will comprise 5 Bills (assuming that Optometry was dropped).

This then left Year 3 with a programme of 8 Bills. All of these are large, complex reforms and/or politically sensitive (eg. a Senedd Reform Bill, a 2nd Agriculture Bill, a Council Tax Bill, an Electoral Reform Bill and a Bus Bill). In an earlier officials meeting of the Legislative Programme Board none of these had a green RAG Rating, 4 were Amber and 11 were Red. As I record in paragraph 1.15, I was told in interviews that “Year 3 is not deliverable” currently which is the inevitable conclusion a reader would eventually reach after reading all the qualifications and *caveats* in the LPB paper and the Cabinet Committee paper. However, this is not explicitly given even as a possibility. I return to this need for “honest conversations” in chapters 6 and 7.

Linear development versus more collaborative processes:

I am yet to understand why it is that policy officials are discouraged from engaging directly with OLC drafters in developing primary legislation. In my experience the two-stage process of policy instructions/legal instructions slows down drafting, causes issues between LS and policy colleagues, and appears to add an unnecessary additional lawyer of complexity and bureaucracy to the process (and in practice OLC drafters will often contact policy officials directly to discuss issues that they need to better understand in any case).

The divide between policy and legal services often leads to quite confrontational, rather than constructive, approaches to iterative development of legislative policy. There's quite an attachment, in my experience, to precedent and current law, which can be prohibitive to innovation in legislation. There's also a lot of risk aversion and worry about innovating. A significant amount of policy and legal time is often devoted to minor, edge case details, which can distract from ensuring that legislation delivers on key policy outcomes, and policy innovation in legislation is sometimes discouraged from the scepticism it receives when getting legal advice.

“I accept that it is important to have rigour and challenge in the process [of Bill development] but don't necessarily do it through separate and sequential processes – are there more “blended” or parallel ways of doing things?”

From Review Interviews

- 3.18 A significant amount of commentary in both written submissions and in several of the interviews focussed on a perceived distinction or conflict between the "classic" sequential or linear¹⁹ and more mixed or collaborative approaches towards developing Bills. In particular, many at all levels of the Welsh Government (Ministerial, Adviser, Official) commented positively on the collaborative way in which the Welsh Government responded to the need to develop and deliver legislation in respect of the Coronavirus pandemic.

"It takes policy officials, lawyers, drafters and translators to produce a Bill but those components don't always function as a team. People still think of their respective roles as compartmentalised. Perhaps this is because of the clear divisions in the organisation between those roles and because some parts of the Bill team continue to carry out day to day business at the same time. You need a strong SRO and Bill Manager to transcend those lines to foster a sense of team."

"Substantial problem is lack of appreciation of just what is involved or necessary to turn a bright idea into legislation. Bill might be proposed and get high level stuff – a page or so of thoughts. Not developed policy instructions."

"I struggle with separation we have between lawyers when it comes to legislation, and requirement for policy instructions. Isn't there a more collaborative way? [Understand] LS will say policy instructions are rubbish and policy teams will say they don't know what is needed. Don't need to merge lawyer and policy teams. But resource challenge and size mean we need to do it differently."

"So we had to work from scratch, working directly with OLC – did the whole Bill like that. We didn't do "instructions". I wrote broad stuff for drafters who then came back with memos. [The Bill manager] then responded to memos as the policy official except when it got to really complicated stuff. Admittedly this was an unusual set of arrangements [following the breakdown of traditional arrangements and time pressures]."

From Review Interviews & Written Submissions

- 3.19 I recognised in many of these comments and responses and the spirit of co-operation, joint approaches to problem-solving, provision of putative drafts for consideration etc. my own experiences of legislating in the immediate aftermath of the devastating Christchurch earthquakes.²⁰ But I

¹⁹ See Slide 9 of the OLC Presentation 2020 at Annex 10.

²⁰ Despite significant academic and some political criticism at the time about the breadth of the first Act's powers and subsequent litigation about the second Act's regeneration planning processes the whole of government report on lessons learned from the Canterbury earthquake sequence recorded, essentially, only one legislative policy lesson and one legislative drafting lesson. See para.6.5 Whole of Government Report:

want to emphasise that collaborative legislative drafting is not a *panacea* for a legislative programme that appears frequently to be incapable of delivering the programme initially published.

- 3.20 It is often said that emergencies bring out the best or the worst in people and institutions. Viewed from the outside as a reviewer, and with the benefit of hearing from participants, my own assessment is that the legislative response by the Welsh Government fell within the “best” category. But this does not mean that the options chapter will recommend preparing all Welsh Government legislation on an emergency-style, roundtable, rapid decision-taking, footing! “Heroic efforts by relatively small numbers of individuals”, “working extraordinary hours including weekends and nights”, “making rapid decisions” based on quick oral briefings are not models for the sustainable delivery of high quality legislation over a full legislative programme.

“Although the Bill process is often seen as very linear, adopting a “shared endeavour approach” and working closely across professions can help ensure delivery. Bill teams should agree the best method for preparing instructions, recognising the different approaches available.”

“Senior leaders have a key role in supporting staff and maintaining morale.”

From Lessons Learned Exercises

- 3.21 The essential qualities of “team-working”, shared-enterprise, honest and open and (crucially in my view) speedy, identification of issues/problems brought to the attention of Special Advisers and Ministers for decision are fundamental to successful development of legislation. The current, fairly inflexible-looking linear development model which reflects how legislation has been developed certainly since at least the 1980s in my experience, appears to have produced too fixed a definition of roles and functions and boundary “fences” for a small administration such as the Welsh Government effectively to develop legislation with its current resources.

3.22 I say more about resources in Chapter 5 so this part, concentrating on structures and processes, requires a re-examination of those linear processes and boundary “fences” without discussing the separate issue of resources. I comment in Chapter 4 on the apparent absence of references in the guidance materials to “policy instructions” to lawyers and “legal instructions” to OLC Drafters but these “boundary fences” over which one artefact was passed to the next group in the “Bill assembly line” [my phrase] were frequently commented on in interviews and in submissions. Indeed, the issue of the adequacy of the “artefact” was also raised with some commenting that it had been necessary to hand it back for further work or simply to declare it was useless in performing its task. It is self-evident that this is counter-productive and time-consuming.

3.23 The “Guiding principles for collaborative working on government legislation” document, agreed by the Legislative Programme Board and endorsed by the First Minister²¹ provides a very sound model for a more collaborative approach to the development of legislation without, in my view, compromising either the specific skills of the participants or compromising on the quality of the outcome. My only concerns are that it is perhaps not as specific or as prescriptive as it needs to be in paragraph 2 about the need to demonstrate collaborative working in practice by shared approaches to problem solving rather than a strict adherence to professional “boundaries”. I provide some options for strengthening this aspect of the principles in Chapter 7.

Lessons Learned Exercises/Processes:

3.24 There is plenty of evidence that these exercises are being carried out at the end of a Bill project (albeit with some differences in practices) but there remains a large question about whether the lessons are actually being “learned” within the administration (and by whom). Are they simply being written up as a “compliance activity”? Is there “self-editing” in their production? Certainly, there were comments made during the interviews and in the written submissions to this review that do not appear in terms in the lessons learned exercises but were expressed in that vein.

²¹ Published in Chapter 4 of the [Legislation Handbook on Assembly Bills](#)

Responsibility and Accountability:

"Feel involved but not sure that processes contain enough accountability when things are not going in the way they should. There are programme Bills around Boards and SROs."

Not sufficient accountability for failure to comply with timetables. To do with structure and people wanting to say things are OK – healthier to say it's all very difficult.

[If you could have one thing what would it be] "Timetable discipline and accountability"

"Strong reflection coming in is that governance has not been lined up with accountability on the legislative programme."

"Some Bills have been seen as a way to fix other problems outside of the initial intended scope of the Bill which can delay development of instructions and add another layer to scrutiny."

Interviews and written comments

- 3.25 The role and effectiveness of existing Cabinet and civil service structures and processes to ensure that assessment is done before a widely drawn Bill commitment is made need to be reviewed and strengthened. Who does this analysis and when in the organisation, at what point and with reference to whom and with what information? There are examples throughout the legislative programme where a thorough analysis of the need for primary legislation, an assessment of the size, complexity and sensitivity of any Bill that would follow that analysis and then an evaluation of the resource demands to deliver it have not occurred or have been done too optimistically.
- 3.26 Reflecting on accountability discussions during the interviews it was interesting that only a couple of those interviewed raised or discussed this issue unprompted (and one of those was the Permanent Secretary since accountability was one of the themes in his recent Recovery Plan). As the Recovery Plan has moved responsibility and accountability for delivery of individual Bills in the legislative programme up to the Director General level (at least temporarily) there are inevitable questions for the future about whether it stays at that level given that those "Bill DGs" do not have control or authority over Legal Services and Office of the Legislative Counsel Groups/Directorates. How is accountability effectively shared without an

almost inevitable “blame-throwing” culture (re)-developing? Would the Director of LS oversee the programme? Would OLC have the final call on quality/timetable?

- 3.27 Having said what I have said about the benefits of the “shared endeavour” model (not necessarily the pure collaborative development model) it is important to recognise that the concomitant is that there is less easily obtained clarity about individual accountability. Holding Directors-General, Director of Legal Services and First Legislative Counsel jointly responsible and accountable is an alternative that could be actively managed and delivered. Currently, the Recovery Plan also has a lead policy Director-General responsible for the overall Legislative Programme but that also seems to be difficult in pure accountability terms.

Bill programme & project management, and Assurance processes

- 3.28 In many of the interviews and written submissions for this review repeated questions were raised around the number of requests for progress updates/briefing on progress and about the clarity of any results or benefits from these “commissions”. This was not universally the case since, in some cases individuals recognised that a “commission” had, at least, provided them with another opportunity to raise the issue about unachievable timetables or lack of resources etc. However, what remained, even in these cases was any feeling by those “commissioned” that remedial action was being taken to deal with the issues they had flagged up. At worst, I was told that it was better not to raise issues too soon or too often since this was not news that was welcomed.

- 3.29 Are the structures and processes capable of delivering what Ministers (and indeed, those tasked with developing, advising and drafting Bills) need? My initial view was that the Welsh Government had all the necessary reporting, monitoring and programming processes for an effective delivery of a full legislative programme. But, over the course of the review I heard so many comments about the failure of these processes actually to deliver the end result. For example when discussing how to resolve problems with legal resource allocation I was told that it was usually resolved by escalation to the Minister rather than the LPB (at least before the recent changes) because although the required processes would be followed as part of standard

governance and reporting the quickest way to resolve the issue “is to wind up Minister”. This both undermines the official governance structures but also reveals a widespread view (not limited to a single contributor) that these are not effective in resolving Bill management issues.

- 3.30 As I note, this may already be changing as the changes introduced by the Permanent Secretary’s Recovery Plan are being implemented and their effects are being felt but this review is concluding still in the early days of those changes. As my options in Chapter 7 set out, there is probably a need for further work on tightening the amount of monitoring and ensuring it is not just “passive reporting” but leads to “active changes” in order to keep Bill projects on track and delivering the intended policy outcomes.

“Legislation is not of itself significant; it is what it introduces by way of a new set of arrangements in the real world [that is important]. So, you need to work backwards from that.... It is the opposite end of the spectrum from just coming up with a Bill title.”

From Review Interview

Implementation

- 3.31 As many have said during interviews and in written submissions, this topic could justify a separate review of its own. There are many aspects to “implementation” of enacted Bills which have impacts on the outcome of the legislative programme underlying a Programme for Government. Clearly, timing will be critical since some very large system-changing primary legislation will inevitably involve a substantial and/or long tail of secondary legislation and guidance to implement the legal changes. Add to this funding and structural changes flowing from the legislation and it is easy to see that any one Programme for Government commitment to make fundamental changes can easily outlive that political administration. There is an inevitable risk that this will not be made sufficiently clear at the outset, leading to over-optimistic public statements and commitments about the dates when the system will have changed for Welsh people. Renting Homes (Wales) Act 2016 is possibly the best example of this. The current position indicates that 1 December 2022 is the date from which the law will “change the way all

landlords in Wales rent their properties”.²²

3.32 With large framework Bills (obviously) and with other Bills where consequential amendments, repeals and supplementary provisions are not fully specified in the Bill there will be very significant amounts of secondary legislation to be instructed upon and to be drafted and made (with associated Senedd processes). From the initial Bill bidding process through the Bill management process itself I have not seen enough clarity of reporting to indicate that the extent and effect of this “implementation tail” has been appreciated by Ministers, Special Advisers and possibly others *from the very start*. With all Bills in the programme there should be a commencement strategy in place when developing the Bill’s policy options. With framework Bills there is also the serious risk that the refinement of detailed policy development and indeed some difficult political choices are merely postponed for the “benefit” of achieving an early headline Act. As one interviewee said: “[The] whole system is predicated on kicking the can down the road”.

3.33 In addition to these issues, implementation work also increases the policy development, legal advice and legislative drafting resource pressures already noted. Often implementation work will be happening in parallel with the Bill receiving Senedd scrutiny which, in the absence of a resourced implementation team merely exacerbates the pressures on the Bill team (in particular the legal and policy resources in delivering the Bill, briefings to Ministers, Impact Assessments and any amendments during the Senedd procedure). In some jurisdictions a separate implementation manager is appointed during the course of the Bill’s progress so that they are both up to speed and able to plan implementation post-Royal Assent.

3.34 I came across no examples of this sort of forward preparation and resourcing for implementation when discussing the previous and current legislative programmes (although it may be that in certain specific cases some elements of implementation were already being passed to other individuals or teams to begin to develop). Indeed, most of the commentary through interviews and in the written submissions concerning implementation noted that “the people working on a Bill disperse”. This was certainly noticed

²² [Housing law is changing: Renting Homes Wales | GOV.WALES](#) (accessed 9 September 2022)

by Ministers. Clearly in career terms it is not possible to “shackle” officials to a particular job forever but the need for some continuity and for proper hand-over from Bill teams back to “business as usual” policy and legal advisory teams in the relevant subject areas is essential. Although even here, I was told that “policy teams don’t see Bills as at the core of their policy agenda so aren’t exactly ready and waiting to implement [them].”

- 3.35 As an example of the need for a “results on the ground/whole of life” approach to legislation I was told about a team tasked with a major policy area reform Bill which had asked for advice about what might be involved. The adviser, with significant legislative policy development experience, began by asking when did the team/the Minister want the new scheme to come into force? “[This] came as a revelation because focus had been how to get the Bill into the Assembly. Nothing about the implementing legislation, budget, new bodies etc.” I was assured that once the team understood this “results on the ground/whole of life” analysis the programming and scheme was more effectively thought through. But there is still evidence of a concentration purely on Bill introduction and enactment dates in the programming and thinking rather than a concentration on the “results on the ground” timetable which forces everyone to consider the full extent of the task. This is particularly important where there is substantial implementing legislation and indeed consultation with, and lead-times for, those affected by the legislative changes. There is continuing “optimism bias” in the papers I have seen where these elements are covered.

4. Guidance& Training:

[The] biggest gap in knowledge is understanding the instructing process from the initial policy idea: [There is a] challenge keeping the guidance up to date because of staff resource available"

"Guidance and training is pretty extensive and comprehensive – a challenge in terms of how accessible it is possibly. The LEP [Legislation Education Programme] is 7 days. The Handbook on Bills [is] very long – intended to dip in and out and structured so you can find information at the point you need it."

"..started [the LEP] course three times but not finished [because of Bill work]."

"... there is such a breadth of [material] that needs to be covered, we need to decide what the training should cover. Concepts? Process? Everyone working on the Bill goes through the same training. It is difficult to draw the lines [for modular training] and offer bespoke training to all though. Wonder if a pick and mix approach might help. But it depends on whether you want a certificate or if it is for choosing bits that individual people need."

"Learned how to do legislative policy development on the job. Not sure it can be taught in a short training course. Available materials would help – have been sharing example instructions with a year 3 Bill. Doesn't need to be more training – access to examples."

"Ministerial training – good idea but there will be resistance because won't necessarily want to contemplate the whole burden."

"Ministers need training or better understanding about role in relation to a Bill – it's their project, they should be involved from beginning and should be tracking progress."

From Review Interviews and Written Submissions

Guidance

4.1 From the documents submitted as part of this review or accessed during the course of it my initial assessment was that this guidance material was sufficient, and (with the exception below) mostly sufficiently helpful and accessible to officials. During the course of the review, inevitably, elements of some of the published and intranet guidance were noted as needing updating and this maintenance is critical to ensure that the latest advice and guidance is available. This in turn raises questions of responsibility for this maintenance of documents, web and intranet—based resources and ensuring that there is sufficient time and resources to do this work. Currently, most of the relevant guidance is the responsibility of LPGU and their efforts to maintain it are a significant demand on their resources.

4.2 I raised a question about how "authorised" the "guidance" is or needs to be. This arose from a comparison with some other jurisdictions such as

Queensland and New Zealand which have very or fairly prescriptive rules and guidance, which in turn link back into their governance and control structures and processes. Dependent upon which options are pursued from this review, it may be necessary to revisit some of the guidance on procedural matters to strengthen the “rules” which work to ensure that draft Bills are properly prepared before introduction to the Senedd.

4.3 Annex 6 to this report contains an extract from the report to the Legislative Programme Board about the work of the “Instructing Working Group” (IWG) for which I am grateful to LPGU. This provides a helpful short draft checklist for instructing on a Bill and a draft outline of how a good approach to instructing for a bill might look. I have added at Annex 9 a copy of the checklist provided by LDAC in New Zealand given the more detailed and extensive work that committee has carried out in developing principles to guide good legislative development. Clearly, some of those principles are unique to the New Zealand jurisdiction (eg references to Māori and Treaty of Waitangi issues) but the format is more thorough than the current IWG draft and could easily be adapted to the Welsh environment. Working on this basis could help to clarify and strengthen the “rules” for good legislation (mentioned in the paragraph above). Similarly, as commented elsewhere in this report, I see considerable benefit in ensuring that there are examples of “good” or “model” instructions to OLC and policy instructions as well as the “draft outline of how a good approach to instructing on a Bill”.

4.4 Generally, as regards the current and proposed guidance, I have found it difficult to separate out the “process” guidance from the “substantive” guidance. The Handbook on Assembly Bills mixes both aspects and there is a danger that the “substantive” guidance on how to do particular tasks properly is less clear and gets lost in the “process” guidance (eg the policy development and consultation “how to do it” elements are subsumed in the “process” chapter of preparing a Bill for introduction). It may be worth recasting guidance so that it provides information relevant for Bill management and separately sets out what policy development and legal instructions for a Bill actually require to assist those officials.

4.5 Continuing with the Handbook for a moment, it is interesting that Chapter 7 of the Handbook entitled “Process of preparing a Bill for Introduction” provides an illuminating (perhaps accidental) insight into the issue raised by

many in the course of this review, and covered under the heading “linear or more collaborative processes” in Chapter 3. The section on policy development and consultation is 18 paragraphs long but, removing the 3 short paragraphs on “legislative competence” which I was told frequently is the preserve of Legal Services to advise upon (possibly with views from OLC) and the 3 paragraphs of procedural advice about changes in policy and/or extent of the Bill it totals 12 paragraphs. Very few of these, with the exception of paragraph 7.21 “Useful thinking tool” provide very much substantive assistance to a policy official in actually developing policy towards legislation. I fully accept that Chapters 5 and 6 provide full advice on Impact Assessments and Regulatory Impact Assessment and even the role of the Treasury when working on policy with public purse consequences. However, nowhere in this chapter is there direct reference to “policy instructions” then being followed by “legal instructions”.

4.6 Instead, the guidance emphasises the joint nature of instructions to OLC drafters:

“The production of instructions to OLC is a co-operative effort between the instructing officer (who is often a subject lawyer) and policy officials. Subject lawyers bring legal expertise and policy officials bring policy expertise, **but there is no rigid demarcation line between both roles.**” (emphasis added)²³ And yet, this approach – and indeed the contrasting “sequential” policy instructions followed by legal instructions approach has been the subject of much positive and negative comment during the course of this review.

Lessons Learned

4.7 I was concerned, when reading the original “Lessons Learned” exercises that I was supplied, prepared usually at the end of the Bill process (although not necessarily at the end of full implementation) that it was unclear who they were addressed to and who would actually be “learning the lessons” for the future. The reports contain a number of common threads and lessons which implies that over time the same lessons were not being learned or not in time. I was grateful therefore when the Secretariat arranged for these to be

²³ Paragraph 7.29 of [legislation-handbook-on-assembly-bills.pdf](#)

collated into a single composite document.

- 4.8 With the collated version of the Lessons Learned exercises over recent Bills, produced for this review, it should also be possible to provide an update to the Handbook (or an addendum at the least) so that a wider audience of future Bill development officials will be able to access those lessons in advance. Some interviewed in the course of the review, or who submitted written submissions pointed out that some of the lessons learned exercises can be “self-editing” in omitting some of the more difficult lessons to be learned from a troubled legislative project. I make a suggestion in Chapter 7 designed to counter this natural tendency when reports are prepared by officials concerned not to cause offence/controversy.

Training

- 4.9 Following up on the Instructing Working Group’s interim report I was understand that since October 2020 OLC have managed to run at least one workshop of the kind mentioned in the report (for the Agriculture Bill No. 1). It appears that it has not been possible for those in OLC who were leading on this in the working group to schedule any more workshops with them or a video presentation unfortunately. OLC have said the workshops should be happening but it is not clear whether these would be targeted or available for every Bill.
- 4.10 This is unfortunate, given the results of the IWG who concluded that these sort of training workshops would be helpful but I understand that organising and running this type of training takes resources – which are also being used to draft Bills. Of course, I am aware of the limits placed on capacity and delivery by the pandemic and by the demand of the legislative programme on both LPGU and OLC officials so this “pause” in tailored training is understandable.
- 4.11 As regards the LEP course, it seems that views are mixed. Many found it to be helpful but there has been a lot of commentary over the course of the interviews and submissions about the fact that for some it has not been possible to complete the course because of pressure of actual Bill delivery work, that the course is overly long/difficult to digest in one session, that it might benefit from a more modular programme, that because of the amount of information transmitted it is difficult for participants to recall

things at points later in the Bill development process where they arise. I have not been able to examine the content of the course or to investigate these comments in the time available to me for this rapid review but I make suggestions for further work to investigate these issues in Chapter 7.

5. Resources:

"This is an organisation that does primary legislation so resourcing needs to be treated reasonably and responsibly."

"You need policy officials who understand what you use legislation for and can instruct. Should be supported by people who understand the policy area and law in detail. That's our biggest problem."

"People don't have the time to be dedicated to Bills – but if we carry on as we are doing we are going to repeat the same issues. In some cases we will be lucky because there will be good knowledge, expertise, relationships. But on others we won't."

"Resources are fully stretched and there is no reward for the long hours worked on Bill development."

"Three years for the current Bill. Takes over your life. Timetable that the Senedd has in place for scrutiny is not at all work-life balance friendly. During the amending stages everything stacks up and comes so quickly that there is no time. You know that you will be working weekends during the amending stages."

"Tensions if there aren't sufficient numbers of capable staff or if there are overall resource pressures."

"Reality is that if you lose experienced lawyers, it will escalate to Minister. Problems with legal resource are resolved by whichever Minister shouts loudest. There is LPB. But haven't had much out of it. Processes will be followed as part of standard governance and reporting. But quickest way is to wind up Minister."

"There is seemingly a lack of ability to retain 'good Bill people' in legislation roles. This often leads to increased strain on all parts of the process, culminating in LS and OLC engaging more in the policy development stages than might otherwise be desirable."

Interviews and written comments

Sufficiency/Insufficiency of Numbers

5.1 I am personally reluctant to conclude²⁴ that the Welsh Government currently has sufficient/insufficient numbers of capable staff to develop policy into

²⁴ This is because it would be a judgment based upon only a very short review exposure and the fact that I have struggled to find reliable data about the number of "pure" policy officials/policy officials with expertise and skill in legislation development work, beyond rough figures extrapolated from a self-assessment survey. However, from interviews with and responses from Ministers and SPADs it seems clear that they have identified a small number of officials who they seek to obtain to manage

legislative proposals at the level of detail needed either for legal instructions to then be developed or for direct instruction to legislative counsel: I was consistently told, in interviews and written submissions by a variety of Welsh Government officials (and some Ministers), that there is currently only a small cadre of people with real expertise (and crucially, the collaborative problem-solving team-player attitude) needed to undertake the various aspects of Bill work and that there has been a failure to redeploy those people swiftly enough to Bill teams.

Others commented that some of the reasons for this were that:

- 5.1.1 there has been (and still is, in some areas) a lack of recognition of the scale of the task of preparing a Bill from initial policy development through to Introduction to the Senedd (let alone, full implementation of the resulting Act);
- 5.1.2 securing Legal Services input at the right time could be difficult;
- 5.1.3 resources were tied up with other Ministerial priorities;
- 5.1.4 difficulties were encountered in attempting to stop/reduce investment in other work; and
- 5.1.5 bottlenecks caused by delays to other large Bills, then have an impact on central resources required by all Bills (such as legislative counsel/ translation service/ economists/ social researchers).

5.2 Beyond the legislative policy development capacity/capability issue it seems, at least from the results of the survey and interviews that the Welsh Government has the lawyers and dedicated teams of legislative drafters and translators who, if properly deployed, should be capable of producing a significantly greater number of Bills to a high standard, than is currently the case. The Bills which I have seen during the course of this review are drafted to a high technical standard (with the inevitable *caveat* about framework Bills and Bills which leave very substantial and complicated transitional and consequential amendments and repeals to be "done later").

their Bills and a slightly larger group of policy officials and lawyers who they consider to be skilled, experienced and successful at working with them to deliver policy into law".

5.3 It is generally accepted, I believe, that Legal Services' role should continue to be 'solutions focussed' but this clearly cannot mean that they have to solve all the problems in developing policy and legal instructions. But, they should be expected to provide options to Ministers and policy officials of ways to achieve the changes and results desired. This is very much a core role for government lawyers and I was a little surprised to read submissions which expressed a contrary view. As I say in chapter 2 (paragraph 2.18) the number of lawyers being allocated to Bill work seems more than adequate to perform both the purely "legal instructions development" work but also the inevitable work assisting Ministers and policy colleagues with problem solving and options. Clearly government lawyers are not policy specialists nor necessarily experts about how the law operates at a practical level 'on the ground' (although I would expect that those who have developed an in depth knowledge and expertise in, say, education law, would have considerable knowledge about its operation on the ground from their advisory work to those tasked with operational activities).²⁵ This is one of the unique experiences that government legal service can provide to lawyers when working on new legislation.

5.4 Given the reservation I express in paragraph 5.1, my impression, gained over the course of this review, is that the current arrangements (and even some of the proposed changes) will not ensure that adequate resources (in terms of numbers of people with necessary expertise and skills) are devoted to the difficult work of developing policy to the level of detail that is required in order to produce legislation. As I say, in the absence of precise figures and a proper skills/capability audit of the policy profession I cannot say that this is because of an insufficiency of those people but it is anecdotally very much the case that Ministers, SpADs and others seem to be competing in a very tight "market" of officials to develop and deliver their legislative projects. That

²⁵ This was certainly my experience as Director of Legal Services for the UK Department for Education, the UK Home Office and the UK Food Standards Agency where lawyers had extensive knowledge about the operation of the legislation and caselaw "on the ground". Interestingly in the current Welsh Government recruitment exercise for lawyers, legislation work is the last item to be mentioned "With more than 100 lawyers and support staff, organised across 15 subject areas, the Legal Services Department is the largest of its kind in Wales. It is responsible for the delivery of all legal services to Welsh Government. This work places government lawyers at the heart of devolved government. They advise on complex matters of public law, employment law and commercial law, on projects of national significance, on major constitutional developments, on addressing the challenges of EU withdrawal and play a central role in the development of Welsh legislation." [Welsh Government Lawyers - Welsh Government \(tal.net\)](http://tal.net)

has been my impression on reading or hearing about problems experienced by some Bills, for which Ministers have had to scale down their policy ambitions and timetables. I was told about recruitment exercises conducted within the administration, approved by the "Priority Resourcing Panel" during the course of my review which produced nil or very limited responses. An obvious question for an external reviewer to ask in such circumstances is whether other methods of finding the necessary resources for these "priority" areas could and should be considered.

- 5.5 I asked the question early in the course of the review: "Does the senior team (ExCo) 'hear' early enough about the need for policy/legal resources for the delivery of the legislative programme/particular Bill development?" I was probably asking the wrong people and possibly the wrong question but most responses were that these issues had, in one form or another, been raised through the governance structure for Bills – culminating with the Legislative Programme Board. This had not, in past experience, led to much if any rapid resolution of those problems I was told. This certainly appeared to be the case from reading the LPGU compiled reports to the Board that I have seen for past Bills where red "RAG" rated issues seemed to remain unresolved from one meeting to the next. With the Permanent Secretary now chairing this Board, and with Directors-General bearing the responsibility for delivery of individual Bills in their policy domains this may well change/have changed. Indeed – this configuration of LPB matches to an extent my naïve early reference to ExCo awareness. With this new configuration, it is clear that the most senior level within the administration must now know the issues and bears responsibility for delivery.

Inadequacy or underestimation of the resources needed for a Bill/implementation Team. Frequent reliance on a small expert group of officials who become stretched at key pressure points, which poses a risk to delivery. Retention issues, high staff vacancies or turnover also pose significant risks to delivery and implementation.

Policy leads having to work on a Bill whilst doing the 'day' job adds additional pressures to small group of people and means that Bill work not seen as core function, resulting in deadlines being missed.

Often insufficient knowledge transfer is in place when resources move: Reliance on one to two key individuals therefore poses a real risk to delivery.

5.6 I am less clear however, about how quickly the “machine” responds to those emerging needs/demands and what HR processes or resources need to be changed to deliver appropriate solutions at the speed needed by Bill teams and Ministers. I hope that some of the options I suggest in Chapter 7 for the management of Bills and the resourcing approach will help.

5.7 UK Legislation and Member & Commission Bills: I am acutely aware that this Review, prompted as it was by reference to the Welsh Government’s programme cannot ignore the impact that servicing these Bills has on policy, legal and drafting teams within the Welsh Government. Although these Bills and enactments were not the focus of this review I have identified some impacts which need to be recorded and considered further:

5.7.1 UK Legislation: I was told by some contributors that there is a lack of recognition within the organisation of the high intensity of work involved in working on UK Bills to very tight time constraints which are beyond the Welsh Government’s control. And that this work is often added to “the day job”. This is particularly acute when Bills with similar subject matter are passing through both the Senedd and the UK Parliament, as this creates additional complexity and, evidently, pressures on the policy teams dealing with that topic in particular. At Ministerial level there is a recognition that in recent years there has been a significant increase in instances of the Senedd refusing consent and the UK Government then legislating regardless. This has meant that post 2019 the Welsh Government (Ministers and officials) must be vigilant in checking every Bill to ensure that they do not erode the devolution boundary. This adds to the resource pressures from this work.

5.7.2 Member & Commission Bills: Similarly, there are resourcing and capacity issues with these Bills. These are not usually Government priorities but the absence of a formal agreement to resource such Bills puts work on them in conflict with other Welsh Government legislative and non-legislative priorities. Challenges arise from the lack of control the Welsh Government has over their timetables, which creates pressure and limits opportunities for quality assurance and exploration of the legal

issues. This is a particular problem where the drafting of these Bills does not take into account fully the existing law, wider ramifications, or Welsh Government policy.

- 5.8 Resolving, as far as possible, these resource, timing and policy demands and conflicts will also be necessary to ensure that those tasked with delivering the Welsh Government's programme of Bills over the course of a Senedd term have the time and capacity to do so. Treating these Bills as falling outside the central management of the legislative programme, as part of "business as usual", (the impression I was given) is not helpful in terms of managing the overall legislative policy and drafting role of the Welsh Government.

6. "Cultures & Organisational Management":

"Really significant issue is a cultural shift around the importance of legislation. What part does legislation play in career of Welsh civil servant? Enthusiasm? Structural thing in the way we think about this business – it is central to what the Welsh Government does. And the impact on their career. Are you regarded as a real asset who could work on future Bills?

"Every week there is a significant problem. LPGU weekly catch up – at every one there is something big."

"Some people have an instinctive feel for navigating a Bill through a legislature. Sometimes solutions require compromises. Some people don't quite see it like that – and are dogmatic."

"UK government-based Bill teams know their law in their policy area. Familiar with purpose, gaps we want to fix – ownership of statute book. That's not really an intrinsic thing here – you may know about particular provisions but there isn't a sense that we own the statute book. Missing from our process – if that was more embedded then people would be in a better position."

"Organisational structures do not reward the development of expertise– the organisation does not value expertise through its promotion system, or through its internal messaging. As a result, it is rare to encounter officials who have a grip on the law in their fields and who can assess what changes need to be made to that law in order to achieve policy objectives. This deficiency leads to an inability to develop effective instructions on Bills, and to the failure to prepare Bills effectively."

"There can be some [resistance to collaborative working]. Experience on previous Bills where lawyers who don't agree with policy end up debating it. Bit of a balancing act – lawyers have also given helpful suggestions on policy. Have also ended up instructing OLC direct."

"Policy is sometimes not as developed as it could be to support political negotiations [in the Senedd or with partners]"

From Review Interviews and Submissions

6.1 This area of investigation was not included in my submitted proposal which focussed very much on the procedural, structural and resource issues I had been made aware of in my pre-reading. But, as the comments above make clear, "cultural and organisational" issues loomed large in both my interviews and the written submissions. So, I have taken the following phrase from the subsequently issued terms of reference; "All aspects of the ways of working are within scope and no assumptions should be made about maintaining any

existing practices or processes.” as the justification for this chapter’s content.

“Honest Conversations”

- 6.2 The first, and perhaps most difficult, element to examine is the “honest conversations” challenge that several submitters and interviewees raised with me (albeit not necessarily using that specific phrase always). As the box of quotations below summarises, this covers a range of issues from the outset right through the Bill programming and development process and beyond.
- 6.3 Associated with this is a noticeable tendency in almost all the briefing documentation about Bills that I have seen during the review, for Ministers to expect/assume, and officials to provide, optimistic timescales for the production of high quality legislation. This does not mean that in every case where a timetable has been produced and then announced or published (for example in an annual Legislative Programme statement) that it was overly optimistic or undeliverable at that point but at the very least it tended to assume the very best of environments to reach that outcome. The recent pattern of revising dates and introducing delays both pre and post Senedd scrutiny reinforces this perception (and some evidence) of the existence of a strong “optimism bias” for the legislative programme within the Welsh Government.
- 6.4 This, in my view, is not helpful. It adds unnecessary and avoidable stress to Special Advisers, their Ministers, Bill teams (in particular Bill Managers, OLC Drafters and Translators) and LPGU. As this guidance from Queensland makes clear:

“It may take a year or more for the pre-drafting steps for a medium-sized Bill (that is, from being originally conceived to obtaining Cabinet’s approval to prepare the Bill). Large, complex or controversial Bills may take a very long time. While it may be a relatively swift task to identify the broad parameters of a Bill, *it is a much lengthier task to identify the detail of a Bill in a way that ensures its objectives are achieved in an effective and efficient way.*”²⁶
(emphasis added)

²⁶ See Chapter 6 Working with the Office of the Queensland Parliamentary Counsel on /Queensland Legislation. [WorkingOQPCQLDLeg.pdf](#)

To a certain extent, this stems from the process of bidding and the absence of substantial policy input early into the candidates for the programme as already noted in Chapter 2. But it seems to go wider and deeper than this.

We are classic at Ministers tying themselves to the name of a Bill which doesn't exist.

This [Primary legislation] is the thing that outlasts people and careers. [But it's] not generally thought of in those terms.

From review interviews and submissions

Unnecessary legislation

- 6.5 In some of the written submissions I was told of an increasing tendency to reach for legislation when it was not strictly necessary. I have already dealt with the case where new primary legislation was promoted without a full recognition or consideration of the existing broad or generalised secondary legislative powers in UK or specifically Welsh Acts. That is not the concern of these submitters. Instead, this is more to do with their concern about legislating around or based-upon "soundbites, and half-digested strings of words and phrases that are simply lifted from legislation in other jurisdictions, or from stakeholders or pressure groups". I was not given any specific examples of this in terms of policy instructions or indeed legal instructions which were expressed in this way but the tendency towards "Aspirational Legislation" to use a more neutral description exists elsewhere in other common-law jurisdictions.

6.6 In Queensland for example, the drafting office has included this specific exhortation in their guidance to instructors:

"Aspirational statements:

It is generally inappropriate to include aspirational statements in legislation unless the making of the statement has some legal consequence."²⁷

I have previously emphasised the need for the Welsh Government to fully understand the extent of its responsibility for "owning the Welsh Statute Book" (with the Senedd). Since legislation can and often does impose duties, obligations, civil and criminal sanctions, this message from one of the Australian jurisdictions is worth enshrining as a principle in the guidance applied to the development of Welsh legislation.

"Fundamental question about the linear way we do legislation – policy to legal services to drafters – when things go wrong, an awful lot of the time is [spent with] people pointing to other people. Could we short circuit – are there other models?"

"The 4th Assembly had a pool of central Bill staff but that was wrapped up because no longer needed. Part of wider move by HR – more responsibility being given to Groups"

Developing a central pool of policy officials and lawyers who develop expertise in the specific task of developing legislation, and deploying them strategically on a case-by-case basis, is probably the single most effective step that could be taken.

From Review Interviews and submissions

Co-operative & collaborative working and centralised control & resources

6.7 I return to this topic, raised at several earlier points in this report when looking at the structures, processes, capabilities and resources, because it has become clear that this is one of the keys needed currently to deliver an effective legislative development programme. Engendering shared goals and a "one team/joint enterprise" approach is essential to break down the policy/legal /OLC silos which have been the subject of adverse comment from contributors to this review (Ministers, Special Advisers, Senior Officials, Bill

²⁷ See page 2 of Working with OQPC on Queensland legislation. [WorkingOQPCQLDLeg.pdf](#)

Managers and officials in all 3 of these groupings). Indeed, I would go further, on the basis of interviews and submissions I have received and say that there are even silos within the first two groupings which need to be recognised as contributing to this problem.

"It is weird because we have had so many new people [but] there is a sort of cultural legacy – [Legislation] is not really regarded as *the* central government function with profound impacts, which it is. This is the thing that outlasts people and careers. Not generally thought of in those terms."

"[The] same policy officials and same lawyers have had issues in the past."

"A good working relationship between all members of the wider Bill Team, including policy leads, Legislation Team, Legal Services, OLC, and LPGU is essential to operate a fluid and flexible environment at key pressure points"

"Attitude is key: Two things happen – LS do help but the reality is that policy thinking isn't done at the level of detail required. Or LS don't help (because don't see it as their role) or can't help."

"Growing legal team but it and policy are working in defined silos."

"Lots done by memo rather than by conversation. Previous legal teams discussed first."

"Need clarity around processes but there are different ways of doing things – rigidity [of sequential approach] can tie hands unhelpfully".

From Review Interviews & Written Submissions

6.8 As mentioned before, there were several shared examples from pandemic/urgent Bills of where this challenge to the fixed and hard boundaries/fences has worked well and indeed from non-pandemic legislation where a Bill timetable had become so compromised by lack of resources or other failings in developing instructions. I was told several times by different people from Ministers through to officials that, in essence, things worked better when the rigid structures could be cut through to ensure that effective and productive conversations were had, for example between drafters and policy officials, between Special Advisers and lawyers and drafters etc. But there appears to be far less acceptance that this could be a possible model and a contribution to improving delivery of individual Bills and the legislative programme in general.

6.9 Why is this? From the submissions and interviews I have identified at least the following reasons or justifications:

- Fear among some groups of a loss of their specialist role and
- Consequent uninformed contributions from other “groups”
- Loss of control over (siloed) staff/resources
- Risk of having to work constantly at top pace (pandemic–Brexit experience)
- Easier to attribute blame for failure in a linear process
- Perception that it is more difficult to manage
- A belief that the “classic” approach is the “best” approach even for a small administration relatively new to full legislative powers and responsibilities.

6.10 Despite the strength with which some of these concerns were put by some individual contributors, I remain unconvinced that maintaining the “apparent” linear approach (actually, more often overridden by the emergency situations which have developed with many Bills in the programme) over a more collaborative and uniform approach will – without a huge increase in sufficiently skilled and experienced resources for each group involved in the process – resolve the issues which have led to this review. Certainly, in the absence of that (most unlikely) huge increase in skilled and experienced resources, maintaining a strict adherence to the classic linear model looks unsustainable and likely to contribute to a continuing failure to deliver.

6.11 This is why I have linked the “cultural” change element of “collaborative” rather than “linear” Bill development with the more “organisational” and “structural” proposal around specialisation of functions and a centralised resource. To make significant (and I hope, urgent) progress in improving the performance of the Welsh Government in delivering good legislation according to published programmes **both** these changes will, in my view, be required together with others (eg the use of more smaller Bills). Choosing only one of them will not deliver the step-change improvement which I believe Ministers, the Permanent Secretary and others are looking for. This is because the weaknesses in the current system arise from both areas:

- An exhortation to collaborative and co-operative working whilst retaining the current “linear” and siloed system of working will not be enough to generate the cultural shift needed (cf. emergency

legislative working model which force this behaviour)

- In the absence of a sudden and very significant injection of additional expert and experienced professional resources (probably into all 3 elements of the process) the current scarce resource of those with the skills, experience and behaviours needed to deliver Bill projects cannot be left distributed around the administration (sometimes in areas without Bills)
- Management of the programme which is currently centrally located (in theory at least) together with the addition of a centrally deployed pool of staff, needs more active oversight, direction and reporting as is the case in other smaller jurisdictions centred in a Department of Prime Minister & Cabinet-type structure.

6.12 Doing things differently will always be a challenge for any organisation (and for certain professional groups or individuals within those groups) but I draw some comfort from the fact that there are already examples of this happening, albeit piecemeal, sometimes in response to a global emergency, sometimes in response to a localised crisis with one Bill in the programme. I also note that the Handbook²⁸ recognises: “The production of instructions to OLC is a **co-operative effort** between the instructing officer (who is often a subject lawyer) and policy officials ... **but there is no rigid demarcation line between both roles.**” (emphasis added). This, to an extent is recognised in the Venn diagram in the OLC Presentation to Bill Teams²⁹. Centralising management, control and indeed resources, is also not unprecedented in the Welsh Government. As I was told, to a certain extent, this was used during the Fourth Assembly. Breaking down fences between and within silos is always easier where there is a centralised pool of expertise that can be deployed with authority to manage and deliver a whole programme of Bills whilst pulling in expert subject-specific advice as necessary.

²⁸ Paragraph 7.29

²⁹ Slide 11 of the OLC Presentation to Bill Teams: Annex 10

6.13 Other jurisdictions which have had longer to develop their legislative capacity and capabilities, but which also still experience the sort of strains and challenges which have prompted this review, have deployed similar solutions. In New Zealand there is very active central management and control with the equivalents of OLC and LPGU being located at the heart of government and with direct involvement with the lead Minister responsible for running the government's parliamentary business. In many of the Australian jurisdictions this is taken one step further with the drafting organisation being part of the Department of Prime Minister and Cabinet (or equivalent) and working closely with the managers of the legislation programme. In New Zealand, the need for strengthening departmental policy development for Bills has led to the creation of the (often) prescriptive Guidelines and then the development of a committee of experts from across government and wider to assist Departments in developing their policy ideas into workable instructions. In some of the Australian jurisdictions instructions go direct from policy to drafters.

6.14 In Scotland the drafting group (PCO) and the central management unit (PLU) are in the Constitution Directorate which means they are both involved in early planning processes, "working out whether Bills are actually deliverable." There is a recognition that the best way might be the traditional (classic) model but drafters may take the policy instructions directly if they are sufficient (but with the government lawyers still checking them rather than converting them into specific "legal instructions"). PCO and PLU work closely with the Minister for Parliamentary Business on an ongoing basis (meeting every couple of weeks) "to make sure Bill timetables are agreed and kept to". This process of tight central control and management (both Ministerial and official) allows their annual programme to develop. Consequently it is quite rare for a Bill to be announced in September and not be introduced as planned.

7. Options

[T]here needs to be a change in the approach to the legislative programme. We will need to be honest about the challenges with each other and Ministers. We must be as assured as possible that the Bills that are announced in July as part of the First Minister's next annual statement on the legislative programme are deliverable and on track, and we must put the legislative programme on a better footing for the future.

Message from the Permanent Secretary – The Legislative Programme April 2022

"Miracle is we do as much as we do, as well as we do. But too much of it is high wire from Ministers' point of view."

"[There is] a need for incentives within the organisation to work on legislation."

From Review Interviews

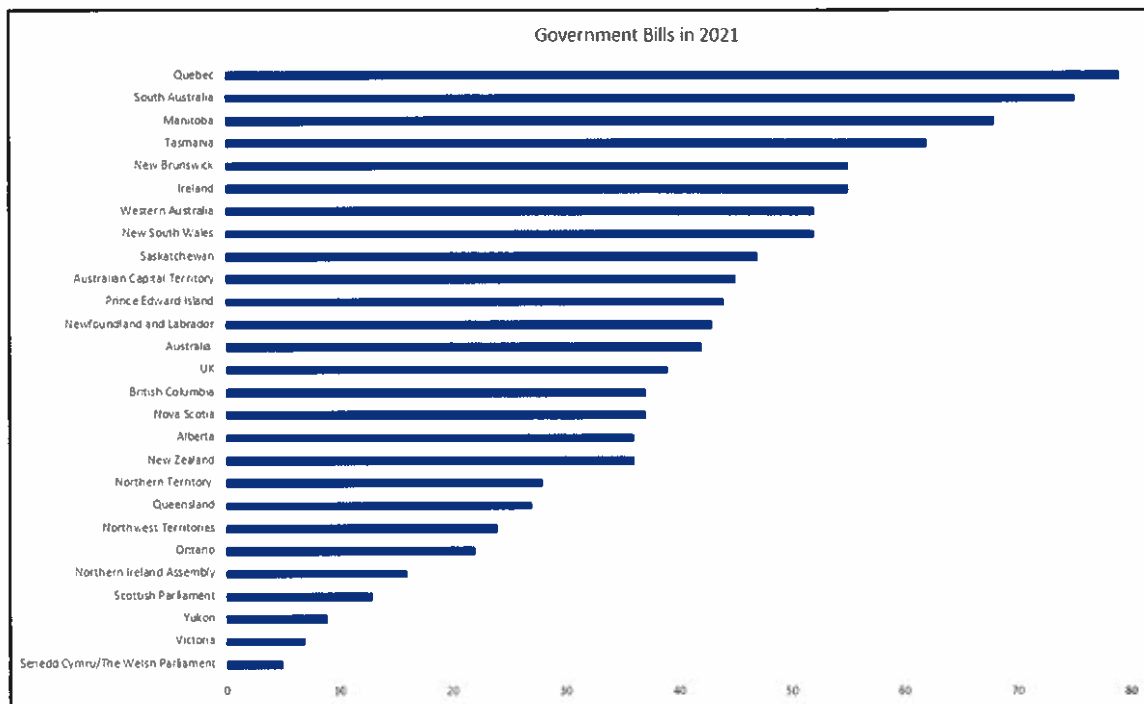
I have headed this chapter "Options" rather than "Recommendations" simply because I recognise that some of these options will be more immediately feasible and likely to be adopted than others. Based on a rapid review which has not been able to deal with the detailed concerns which many raised with me, for example, about the demands of the Senedd and government processes around Regulatory Impact Assessments and Integrated Assessments; I have concentrated on what appear to be the key issues which prompted this review. Clearly, further work will be needed on some of the more detailed areas. At the end of this chapter therefore, I identify the 4 or 5 options which, even on the basis of only this more limited and rapid review, I would class as "firm recommendations" to make significant improvement to the delivery of the Welsh Government's Legislative Programme.

7.1 CULTURE, STRUCTURES & PROCESSES

- 1) **Own the Statute Book.** As other mature legislating jurisdictions have done it makes sense for the Welsh civil service and Welsh Ministers to recognise and embrace the fact that, following devolution of legislative power, they own responsibility for the Statute Book for Wales (and indeed, the Welsh SI Book) and that Legislation is at the heart of Welsh Government now. Consequently, policy and legal teams need to understand their current legislative landscape competently. Constant reinforcement of the "Legislation is what we do" message will help to cement this responsibility from Ministerial level

downwards.

- 2) **Programme more, smaller, tightly focussed Bills.** As comparison with other jurisdictions shows (the bar chart in section 1 is reproduced below) that Wales is a significant outlier in terms of number of Bills per year. As a representative from one of the other jurisdictions interviewed said "If you try to add everything into one Bill you go by the speed of the slowest part."



Following this option would mean that there would be more, smaller, more manageable Bills in terms of delivery and complexity issues. For example, the current Agriculture Bill could have been an Agriculture (Sustainable Land Management and Payments) Bill, an Agricultural Tenancies, Products Etc. Bill, and a Forestry & Wildlife Bill (the last of these could even have been two separate mini Bills). This approach makes delivery of major reforms (Parts 1 and 2 of the current Bill) easier to programme and manage so that they are not affected by emerging policy/legal issues in the other policy areas; gives separate Bills to other responsible Ministers (e.g. Rural Affairs and Climate Change Ministers); narrows the scope of each Bill and provides a better way of managing unavoidable "slippage" in any one of them.

I appreciate that this might *appear* to mean more Ministerial involvement and

time in taking Bills through the Senedd but this should be compensated for in terms of reduction of time to discuss individual parts, reducing the risk of wide-scope additions or amendments and easier programming of debates and votes.

- 3) **Prioritise advance policy development work and Improve bidding and programme management processes.** Policy development and legal analysis should be well-advanced *before* a public commitment to legislating is made. This will require reforming the Bill bidding process and the timetable-setting process so that OLC advice up front is included, involve SPADs, policy, Bill management and LS “team members” as well in the early discussions with LPGU over future timetable and programming so that “standard timetables” no longer feature or are felt to be the case. Identify early the blocks to that programme timetable as it progresses and allocate resources to solving them/separate them off into another small Bill – be honest in reporting.
- 4) **Exert central control through OFM/Cabinet Office Secretariat.** Look at the better-performing jurisdictions (eg. Scotland and New Zealand) where there is a stronger, clearer “Centre” – eg Department of Prime Minister/Cabinet Office type function – either based around the FM or, if that is not feasible, Leader of the House/Counsel General and/or Permanent Secretary (this could be Directorate reporting direct to PS including LPGU, Bill Managers Group and OLC) that ensures interests of the government as a whole are ensured in delivering legislation (see also following option).
- 5) **Create a Centre of Legislative Excellence.** Similarly, look at NZ, Scotland and Australian examples for the creation of “Centres of Legislative Excellence/Competence” with or without a Legislation Design Advisory Committee (LDAC) type activity. Give the experienced (and relatively expensive) legislative specialists the authority to ensure greater consistency of drafting practice – more use of “common legislative solutions” etc. In the other jurisdictions listed (and in the UK Government) the advice from the Parliamentary Counsel on legislation tends to be definitive and I see no reason why the position in Wales should be any different. Why have experienced specialists if their advice is to be treated as on a par with junior generalist lawyers?

- 6) **Reconsider the current governance “machinery”,** as part of “stronger central control” (or even if 4 is not pursued). It appears not to be delivering accurate reporting, responsibility allocation, timely remedial action and accountability. What happens when the RAG ratings consistently remain at Red? Has the reset with Permanent Secretary as Chair of LPB led to better outcomes? Is that because LPB is taken more seriously, can allocate resources, gets better attendance – how can that be reinforced once the Permanent Secretary steps back? Use the Checklist in paragraph 19 below as a “Compliance Tool” to ensure that policy development and legal issues have been thoroughly covered in the instructions.
- 7) **Consider the SRO role and what it actually means/delivers.** What is the point of appointing a person as “Senior”, “Responsible” and the “Owner” of a complex multifaceted (overly-large) Bill project if they are not all of those things. Critically, to what extent do they “Own” the policy, legal, OLC and other resources to deliver the project? It currently provides a veneer of project and programme-management, but things often don’t get done without direct Ministerial involvement (which is usually too late in the day). Whilst the Recovery Plan has taken this role upwards to the Director-General level (meeting the “Senior” description) giving a greater chance of a match between responsibility and control over distribution of some of the necessary resources, accountability remains dispersed. Control of legal resources rests ultimately with the Director of Legal Services and similarly control of drafter resources rests with First Legislative Counsel. This remains an area to be resolved since, over the course of the review, I came across failures to deliver for which it was impossible to attribute accountability or find consequences. Instead there appeared to be a shifting rather than sharing of responsibility culture.
- 8) **Examine the current processes for working with the Lead Minister and SpADs.** Ensure that messages are being passed upwards early enough and policy issues/decisions/options are being presented early enough to Ministers & SpADs to enable Bill development/drafting to stick to timetables. It is critical that the Minister and their SpAd(s) are involved as part of the team from the outset not just in terms of “managing expectations” but ensuring that they have a full understanding of the complexities and realities.

"[P]erhaps it would be more profitable to develop a cadre of lawyers with Bill expertise, or at least have some kind of filtering process for Bill work, rather than assume everyone can do it. [S]imilarly, it might also make sense to develop a group of people who are experienced in doing policy work on Bills, who could then be moved to new Bill projects to support the relevant policy team, rather than expecting all of the policy officials on a Bill to come from the relevant policy team (which can massively disrupt "business as usual" or result in not enough people on the Bill)."

"There needs to be more specialisation, with policy officials who are experienced in working on Bills and know what the process involves. Why not establish a cadre of legislation specialists?"

"There is quite a lot of tension between policy and legal services, partly because we have people who are good at policy development but not legislative policy development. "We just want the Bill to say...." versus demands from lawyers "What do you mean and what are you trying to achieve?"

From Review Interviews and Submissions

7.2 RESOURCES & DEPLOYMENT

- 9) **Centrally manage and deploy legislative policy specialists.** Trial (at least) or move immediately to this model (having first identified these officials from the cadre of policy in the WG) as has already been done with the Bill Managers. Or (in my view less favoured) within DGs.
- 10) **Refine the LS Reset approach.** As currently conceived, will this deliver enough lawyers who are sufficiently experienced and capable to do legislative development work as needed at the time needed? If some of these are not transferred into the centrally managed legislative specialist group suggested, consider secondments or failing that a more flexible "flying task force" across all the proposed LS Collegiate Groups and Divisions (as in 8) to assist with the Legislative Programme. (Compare the rationale given for centralising litigation – in my view this applies equally to Legislation at least to deal with the short/medium term issues with delivery of Bills). Early LS involvement and dedicated support especially in areas where there are likely to be competence or human rights issues is critical – (see impact of 4 above).
- 11) If neither options 9 or 10 are adopted: **Consider, as a minimum, creating a New Zealand "LDAC-light" function within the Welsh Government using those**

experienced and capable policy, legal and OLC staff to do the early challenge work on Bill need, content, size, complexity issues and to then ensure consistency of legislative proposals. Not a complete solution but should strengthen the "front end" of Bill policy/law work.

- 12) **Reinforce the "one team" collaborative approach to Bill work.** Use secondments/detachments even for short periods so that policy officials, lawyers etc. identify early on with their Bill team and inculcate ways of working that avoid "fence-chucking" and "blame". Ensure that legal advice/OLC concerns are communicated early (and directly whenever possible) to Ministers.
- 13) **Engage OLC to assist policy teams with Bill bids/system design.** They can using their experience of what works well in the context of primary legislation projects to avoid potential problems which might only surface after the "drafting window" has opened. This will require confirmation of likely LS and OLC drafter resources earlier than is currently the case (ie pre Bill bid approval)
- 14) **Incentivise working on primary legislation (and staying with a project).** Recognition that the necessary resources are stretched and the long hours worked on Bills can deter people from working on them. Consider the need for a range of incentives within the organisation to work on legislation particularly at lower grades and particularly to keep people in post for continuity.
- 15) **Consider whether the policy function is under-resourced.** The impression I have gained is that it is, particularly in terms of those with the ability, skills, knowledge and behavioural attitudes necessary to turn policy into legislation. However, in the absence of definite figures for the number/percentage of Welsh Government officials who are "pure policy" professionals I'm not able to suggest asking for more.
- 16) **Plan properly for implementation.** Factor into deployment and resource allocation the "implementation needs" post-Royal Assent for (a) further secondary legislation – particularly for framework Bills and those which leave large amounts of consequential amendments and repeals to be done by SI

and (b) complex system changing Acts like Renting Homes, Education etc.

7.3 GUIDANCE & TRAINING

- 17) **Learn lessons.** Use the collated lessons-learned document created for this review to actually learn those lessons across the board, rather than simply identifying them. Consider the use of an independent “external” person to chair and then compile these lessons learned exercises to ensure that there is not (inadvertent) “self-editing” but that detailed and honest lessons emerge which are useful (separately) both for senior management and for future Bill teams.
- 18) **Update guidance and make it easily accessible.** What is needed beyond/instead of the handbook is practical stage-by-stage information matched with detailed training to a Bill team ahead of each stage (aids understanding and planning). As a minimum produce a set of “model policy and legal instructions” to OLC for future Bill Teams’ reference.
- 19) **Enhance the current Legislation Handbook on Assembly Bills.** It needs to be added to with something akin to an adapted version of the LDAC Guidelines Checklist “to assist officials developing policy and legislation, and to support Ministers in meeting the requirements for Cabinet papers and should be utilised as a tool for achieving high quality legislation.”³⁰
- 20) **Ensure adequate induction for Ministers, Special Advisers and (SROs with limited prior Bill experience).** This needs to cover developing policy-based legislation, taking it from statement in the Legislation Programme through to Enactment and on the ground implementation. If not this comprehensive induction and training for particular stages, consider at least the type of compulsory general training as provided in NZ.

³⁰ Annex 9

7.4 LONGER TERM STRUCTURAL CHANGES AND SENEDD PROCESSES

- 21) Re-examine Senedd processes.** As noted above, there was insufficient time in this review for substantive work on this but it was raised by officials, Ministers and SpAds. It needs to be followed up further by examining critically the processes, documentation demanded and timetables currently operating on government Bills once in the Senedd and revising them to be more appropriate and fit for purpose.
- 22) Ensure that the implementation “tail” to a Bill is clearly identified at the outset,** building upon the recommendation/option in 16 above. This will help ensure Ministers, SPADs and officials are aware of the full likely timetable and can manage Senedd/public expectations realistically but also begin to plan resources and “transfers of knowledge” as key individuals handover responsibility.
- 23) Build, retain, incentivise & reward capability and capacity.** This applies across legislative policy/LS Bill lawyer/Bill management and OLC drafting. This is “core business” of the Welsh government and critical for Ministers to introduce policy change.
- 24) Introduce a “Statute Law Reform Bill” or a “Legislation Bill” every Senedd term:** As part of discharging the longer-term responsibility for the state of the Welsh Statute Book, this could pick up minor errors/fix-ups as is the case in Australian and NZ jurisdictions.
- 25) Use OLC for the more substantial secondary legislation projects.** When there is sufficient capacity within OLC (this will need more recruitment over time) they could draft statutory instruments falling out of framework bills or where (unfortunately) consequential amendments and repeals were not done on the face of the Bill. OLC could then move gradually to drafting everything. The worst case scenario would be diluting skills and losing what makes OLC valuable, if it expands too much and too quickly.

CONCLUSION: THE 5 KEY OPTIONS WHICH EMERGE FROM THESE 25

- 7.5 Produce more, smaller, tightly-focussed Bills** even when doing major system changes but especially avoid "catch-all" mega-Bills.
- 7.6 Reintroduce central control by the OFM or a strengthened Cabinet Office Secretariat** taking in OLC, LPGU, the group of officials who comprise Bill Managers, their deputies and team members, Legislative Policy experts/specialists, and the specialist lawyers with legislative expertise and experience.
- 7.7 Revisit the SRO role** to ensure that accountability and responsibility rest with those who also have the authority to make resource and managerial decisions
- 7.8 Ensure that there has been advance policy development work** done on major policy changes before Bill bidding and programme management processes commence
- 7.9 Emphasise the need for early, frequent and honest communication** about Bill development issues, timings etc. and avoid over-engineered reporting/monitoring systems which consume more than they deliver.

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Annex 1: Submitted Proposal & Terms of Reference

Submitted Proposal

Background: In light of issues/difficulties meeting the demands of Ministers/Welsh Government for the primary legislative programme to be taken through the Welsh Parliament in each session it is proposed to carry out a review of the approach taken to the preparation and development of draft legislation, including

- the policy, legal and legislative drafting expertise and resources needed to deliver this programme
- approaches which might be applicable from other similar parliamentary jurisdictions such as earlier legislative design and advice arrangements (NZ [Home | The Legislation Design and Advisory Committee \(ldac.org.nz\)](https://www.home.govt.nz/the-legislation-design-and-advisory-committee/)) or structures (Scotland [Performance and Strategic Outcomes Directorate - gov.scot \(www.gov.scot\)](https://www.gov.scot/performance-and-strategic-outcomes/))
- improvements to existing working arrangements, training, guidance, and other documents (for example [LDAC-Legislation-Guidelines-2021-edition.pdf](#)) and
- standardisation of legislative approaches – for example “Pattern Language” and “Common Legislative Solutions” to ensure commonality of approach and consistency of language.

Proposed Methodology: Using background knowledge from other jurisdictions and from membership of the Commonwealth Association of Legislative Counsel (<https://www.calc.ngo/>)

1. Examine the existing structures, processes, guidance, support and resources to develop and deliver an annual legislative programme and a full term parliamentary legislative programme by;
 - desktop analysis of the current process and issues from documentation supplied by Welsh Government officials and;
 - interviews/discussions with key actors in the system.
 - [Possible interim report back on early findings]
2. Then;
 - consider other approaches from similar jurisdictions
 - test hypotheses/possible alterations and solutions with a reference person with recent direct experience within the Welsh Government (and/or with a larger reference group)
 - develop possible proposals and recommendations (possibility for a few further interviews)
3. Finally:
 - Present report and recommendations as required.

Submitted to LPGU on 4 May 2022



Independent review of the Welsh Government's capability and capacity to develop legislation

Terms of Reference

Introduction and context

Although the Welsh Government has successfully developed new legislation since full law making powers were devolved, full delivery of Ministers' legislative ambitions has been hampered by a combination of skills and capacity issues, as well as possible inefficiencies in process. The combined impact of Brexit and the coronavirus pandemic have placed huge pressures on the organisation, but these factors do not fully account for delays in preparing Bills for introduction and in implementing Acts previously passed by the Senedd.

Issue

The Welsh Government recognises that it may not have adapted fully to the burden of responsibility for the law in devolved areas, and to promoting Bills consistently in a full-fledged legislature with primary powers. Some issues, most likely, arise from the piecemeal and ad hoc evolution of the Welsh Government and Senedd Cymru as law-making institutions. In some respects a legacy culture of administering the decisions of others, rather than generating ideas and developing policy from the bottom-up, may still be embedded in the civil service. The full reasons for the difficulties experienced are likely to be complex and multiple, ranging from capacity and capability to structural issues. As a result the Welsh Government considers that an independent review of its ways of working is necessary to help inform a better way forward.

Purpose

The purpose of the review is to analyse current practices in the development of legislation, in order to determine how the Welsh Government can improve the quality of its legislation and implement its policies more quickly where this is appropriate.

This will involve a full review of the internal structures and processes of the Welsh Government relating to legislation, including the existing reliance by the Welsh Government on a model which mirrors the traditional "Whitehall" ways of working. All aspects of the ways of working are within scope and no assumptions should be made about maintaining any existing practices or processes.

Methodology

The methodology for the review will be developed by the reviewer but should include:

- **A rapid review approach**, enabling lessons to be identified and acted upon quickly, while balancing the need to ensure the exercise does not unduly divert resources from ongoing priority legislative work.
- **A peer review component**, involving counterparts from the Scottish Government and Northern Ireland Executive, to support a comparative analysis of the approaches taken in other jurisdictions, with a particular focus on jurisdictions which are of a similar size, or subject to a unicameral legislature, or bilingual;
- **An internal reference group**, to provide a sounding board and support to the review, with representatives from key players involved in the delivery of Welsh Government legislation, including Legal Services, Legislative Counsel, Legislative Programme and Governance Unit, the policy profession, Special Advisers;
- **Engagement with others across Welsh Government** as necessary, including for example: Legislative Programme Board members, senior officials responsible for Bills, Bill managers, Group Legislation Leads, the Translation Service, economists, Ministers (those with experience of being a Lead Minister for Bills, and members of the Cabinet Committee on the Legislative Programme), private offices, and others as necessary;
- **Process mapping** to consider the approach to planning, resourcing and monitoring the arrangements relating to primary legislation, subordinate legislation and wider Act implementation, from the Bill team level through to corporate strategic oversight mechanisms.

The review will lead to a report setting out key findings and a set of action-oriented recommendations.

Further details, and specific matters for consideration, are set out in the annex.

Reviewer

The reviewer may wish to draw on the experience of an external reference group of other colleagues with specific expertise.

The reviewer will be supported by a Senior Civil Servant from within Welsh Government.

Time frame

The review is expected to report before the Senedd summer recess (i.e. July 2022). The inquiry phase is anticipated to take place over approximately 6 to 8 weeks, with a further 3 to 4 weeks envisaged for preparing and testing a report and recommendations. The exact timing will be agreed upon appointment of the reviewer.

Accountability

The reviewer will report to the Senior Responsible Officer for the review, who will be the Permanent Secretary of the Welsh Government. The SRO is accountable for the governance of the review and ensuring the review is delivered in compliance with these Terms of Reference.

Received 30 June 2022

Annex 2: Methodology employed for this review

Interviews with 3 members of the Welsh Government and a Special Adviser

Interviews and meetings with 21 current and one retired Welsh Civil Servants (including a group of Bill Managers)

An online survey open to all staff in the Welsh Government which elicited 75 responses.

Reviewing a considerable body of Welsh Government documentation and written submissions.

Desk-top research of other jurisdictions and interviews with key officials in New Zealand, New South Wales, Scotland

I have also sought to bring to bear relevant experience from over 35 years as an instructing lawyer on many Bills in the government legal service of the UK civil service; as a policy and legal official developing policy and drafting legislation in the European Commission; and as Chief Parliamentary Counsel in New Zealand leading teams of legislative counsel, editors and publishers of statute law.

Since those roles cover many of the key activities of the Welsh Government civil service in developing and delivering the legislative programme for Wales I hope that this breadth of "lived experience" has been sufficient to reassure those I have interviewed that I understand both their roles in the system and their perspectives. I don't have direct experience of the Ministerial or SPAD roles but I have worked intensively with many of them in all three administrations and hope that also has given me the necessary understanding of their perspectives, frustrations and enthusiasms.

Annex 3: Summary of Office-wide Survey Results

Results of the survey 'Adolygiad Allanol o Ddeddfwriaeth > eich barn | External Review of Legislation > your say'

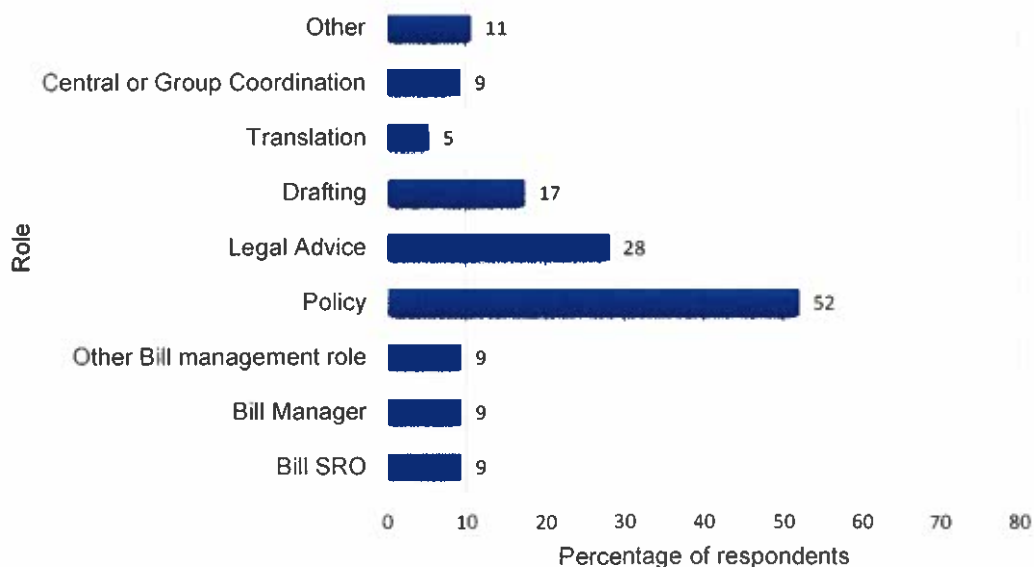
Background

1. The survey was commissioned to support the External Review of Legislation being undertaken by David Noble QSO. It was open to Welsh Government (WG) staff from 8 to 29 July 2022. The survey was created, bilingually, on the Microsoft Forms platform. It was publicised on the WG intranet and to the Legislation Community as well as informally. The full survey can be found at the Annex.
2. As well as being invited to supply information about themselves, respondents were asked to rate the extent to which Welsh Government organisational structures, legislative processes, internal guidance and training, and resources support/enable the delivery of high quality legislation which meets Ministerial needs to agreed timetables. After rating each of these, respondents were invited to explain their answers in free text. Respondents were also asked to share any awareness or experience of other ways of developing legislation, outside the Welsh Government, for example using different structures, processes or resourcing models, which they felt should be considered by the Review. No questions were compulsory.

About the respondents

3. There were 75 respondents. As shown below, the majority had experience of policy work in relation to WG legislation. (Respondents could select multiple categories.) There were respondents with experience in every category defined in the survey, and in addition there were eight respondents who supplied examples of other experience such as communications, managing SI processes, coordination of departmental and Brexit legislation, Private Office, research and evaluation, and working on Regulatory Impact Assessments.

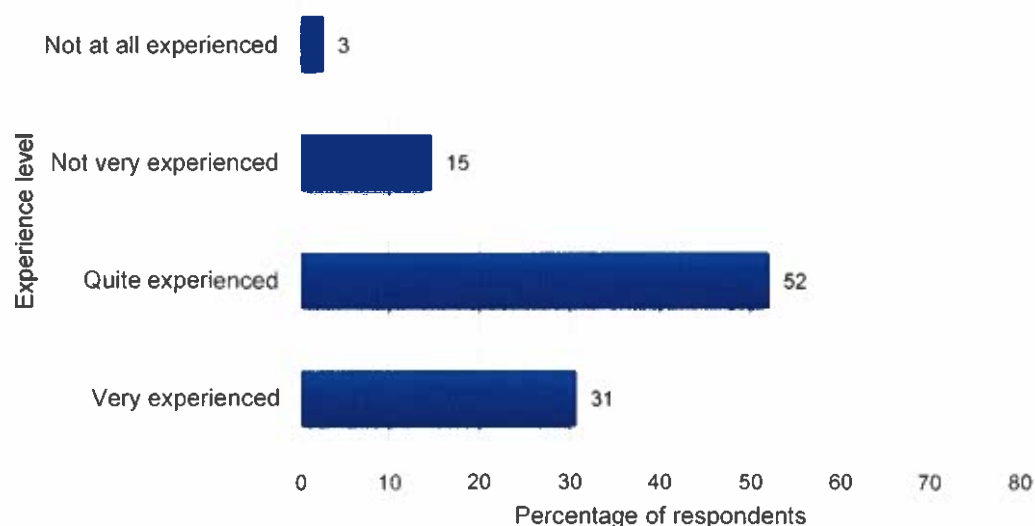
Please indicate which role(s) you have undertaken in respect of Welsh Government legislation



Base: 75

4. Over 80 per cent of respondents (62 out of 75) considered themselves to be "quite" or "very" experienced:

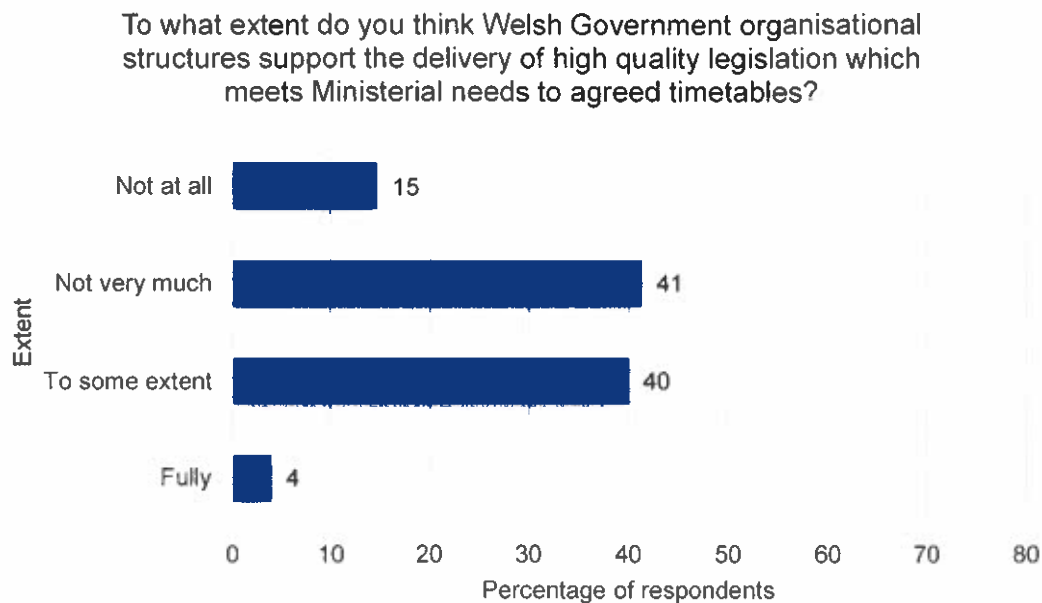
How experienced would you say you are in the Welsh Government legislative process?



Base: 75

Organisational structures

5. There were mixed views about organisational structures, with 44 percent of respondents (33 out of 75) reporting that they supported legislation delivery “fully” or “to some extent”, and over half (56 percent; 42 out of 75) selecting “not very much” or “not at all”.



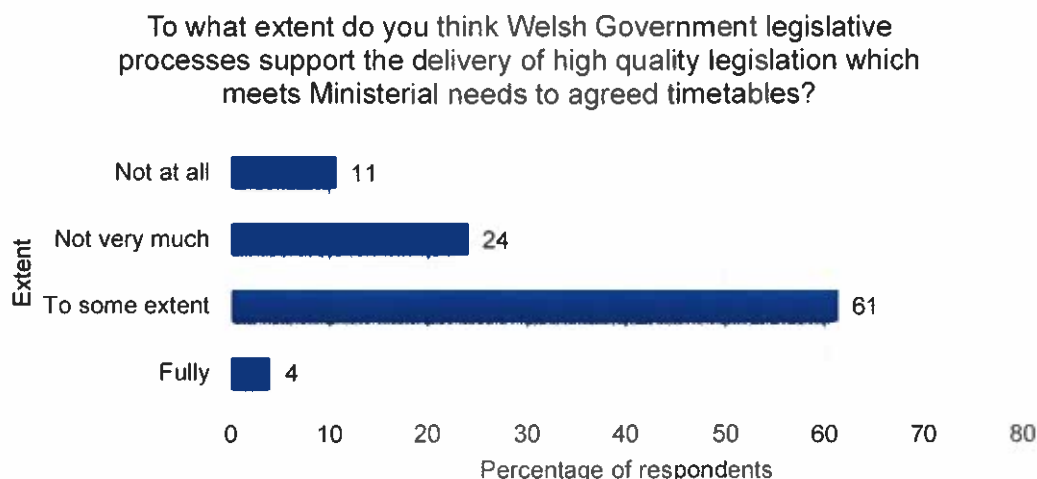
Base: 75

6. Additional feedback provided by respondents highlighted a number of challenges with the current organisational structures, which included:
- silo working, and limited support for Bill teams above Deputy Director level and beyond the main policy area
 - limited long-term ownership of legislation beyond its initial development (for example to evaluate, review and revise)
 - inconsistency across groups, including on how or whether legislation branches are used
 - the removal of Legal Services and the Office of the Legislative Counsel out of the Office of the First Minister, putting their roles and that of the Counsel General at risk of being undermined
 - the remoteness of the structures from policy teams, and a lack of ownership in policy areas for Bills which is seen as separate and the responsibility of Bill Managers
 - unclear and over-engineered governance, resulting in multiple reporting through different lines of accountability, and indirect communications with delivery teams with confusion about escalation routes
 - a blame culture leading to tensions between teams and professions.

7. There was acknowledgement of recent changes such as:
 - centralising Bill management resources
 - the designation of Directors General as SROs for Bills in their groups
 - the Permanent Secretary's decision to chair the Legislative Programme Board.
8. Suggestions around how organisational structures could more effectively support the delivery of legislation included:
 - creating a stronger centre for developing legislation in the Welsh Government
 - greater empowerment of LPB and LPGU
 - expanding LPGU's role to take a more active role in evaluating, monitoring and co-ordinating work on Bills and driving more robust advice to the First Minister
 - considering independent chairs for Project Boards rather than SROs
 - earlier collective Ministerial oversight of the development of Bills
 - embedding LS colleagues in policy teams in certain areas
 - strengthening the Legal Services department and law officer function
 - creating specialist teams to work alongside policy colleagues
 - co-location of policy teams and lawyers.

Legislative processes

9. The majority of respondents (61 percent; 46 out of 75) considered that legislative processes “to some extent” supported legislation delivery:



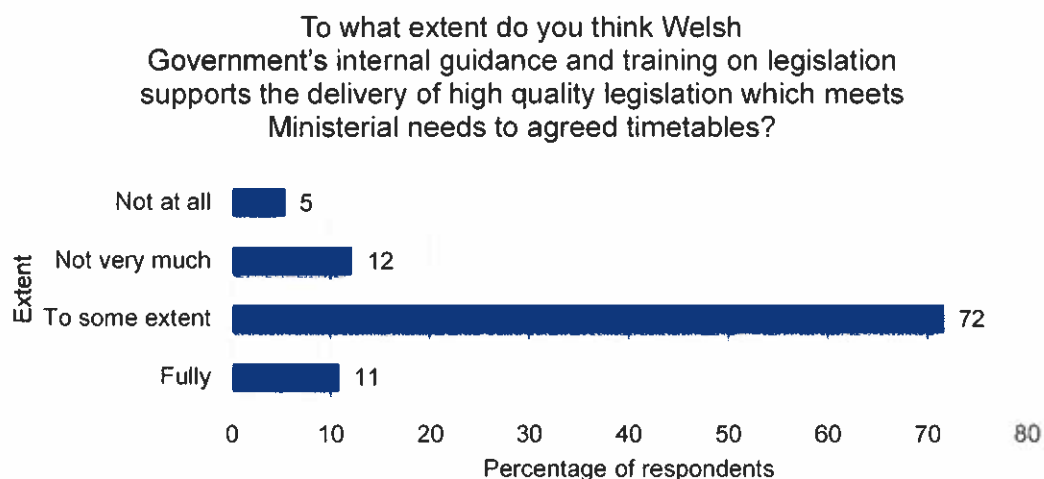
Base: 75

10. Additional feedback from respondents highlighted several examples of successful delivery of good quality legislation. Some also reported that the key legislative processes in place were suitable when they operated as intended. There was praise for teams involved in the legislative process including legislative translators who were reported as delivering an “exceptional” service. There was also praise for lawyers and drafters, though there were also references to obstacles created by legal analysis and to a lack of respect for drafting expertise.
11. However, respondents highlighted a number of areas where processes could be more effective. These included:
- moving away from the Westminster model
 - reducing Regulatory Impact Assessment requirements and tackling them early and properly
 - decreasing the volume of legislation
 - setting more realistic deadlines and more bespoke timetables
 - robustly challenging Bill bids and policy development, including costing enforcement and compliance burdens
 - ensuring the scope of Bills remains manageable
 - coordinating between policies to avoid multiple changes happening simultaneously
 - ensuring lawyers and legislative drafters can influence timetables
 - greater focus on achieving coherent programmes of policy development and implementation, beyond Bill development and drafting

- continuing to improve reporting and governance structures so that they provide proper assurance, escalation and response mechanisms and are synchronised with Bill timetables
- enabling junior officials to have their concerns taken seriously
- genuine consultation, perhaps facilitated by a bespoke call-off contract for green paper/white paper stages and evaluation which would free up policy development resource
- being more open with Ministers, and giving them as much notice as possible when Bills are not deliverable
- avoiding siloed, linear approaches which encourage a back and forth way of working on instructions
- increasing policy capability to work at the right pace to deliver the level of detail needed, both before and after introduction
- undertaking Post Implementation Review
- improving equality impact assessments including undertaking them earlier
- ensuring that legislative stocktake exercises result in solutions or changes when concerns have been raised
- avoiding aspirational or slogan-based legislation which is unenforceable
- streamlining processes, using technology where possible to replace a paper-based mindset, or removing them where not needed, and integrating them with wider policy work
- encouraging the Senedd to consider the purpose of legislation and whether it operates as intended rather than minutiae, and revisiting restrictive commitments made to the legislature
- revising Senedd procedures to provide more time to consider and advise on amendments
- encouraging close contact between drafters and policy officials (whilst recognising the small number of drafters available)
- engaging lawyers early in policy development
- promoting innovation by avoiding attachment to precedent, risk aversion and focusing on peripheral points of detail
- capturing problems fully in lessons learned exercises
- better coordination of subordinate legislation
- ensuring project boards consider risk
- independent challenge/quality assurance of Ministerial advice.

Internal guidance and training

12. Just under three-quarters of respondents (72%; 53 out of 74) reported that internal guidance and training supports the delivery of high-quality legislation "to some extent".

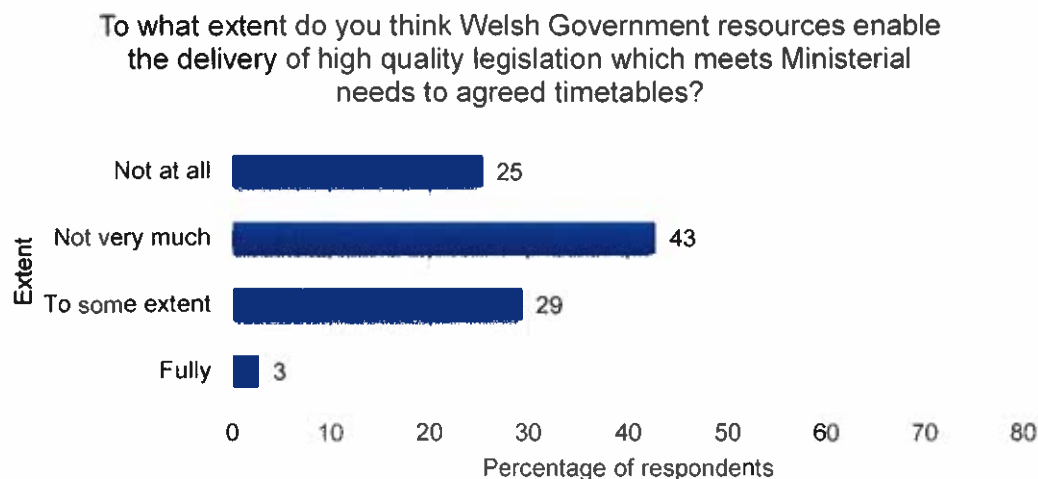


Base: 74

13. Respondents were positive about the support they receive from LPGU, OLC and Codes Office, as well as the LEP and guidance on the intranet.
14. However, recognising that legislation is complex, respondents emphasised the importance of up to date, timely and comprehensive training and guidance. Specific suggestions for improvements included:
- Introductory/practical training and guidance for Bills Teams, which sets out roles, responsibilities, timescales and requirements at each stage of the legislative process
 - Further support for policy teams on the legislative process (It was also suggested that Special Advisors and Ministers may benefit from training on the legislative process)
 - Further guidance and training on the following areas:
 - The structure and scope of the existing law
 - Managing UK Government legislation
 - Secondary legislation
 - Integrated Impact Assessments.
15. It was suggested that the availability of practical case studies, networking and budding opportunities across the legislative community and specialist workshops would be helpful additions, as well as more effective signposting to guidance and training already available.

Resources

16. When asked about whether resources enable legislation delivery, just under 70 percent of respondents (68 percent; 51 out of 75) selected “not very much” or “not at all”:



Base: 75

17. Although respondents gave examples of examples of well-resourced teams of experienced staff being able to deliver well, with good governance and assurance, as part of a collective effort, they also raised a range of acute challenges including:
- general capacity issues in terms of being able to adequately resource legislation, and differing priorities in different professions
 - challenges associated with recruiting to or deploying experienced staff into legislative posts when needed
 - under-resourcing of, and limited scope to recruit, experts to advise on legislation
 - the high turn-over of individuals working on legislation and in policy areas, resulting in dilution of expertise
 - legislative work being added to existing workloads, including intensive work on UK Government Bills, and stretched existing resource – with associated impacts on health and well-being
 - capability / skills gaps amongst those individuals currently working on legislation.
18. Potential solutions suggested included:
- better deployment of existing resources
 - prioritising resources for legislation before it is announced by the First Minister
 - giving more resource levers to SROs

- the lack of scope to recruit external relevant technical expertise to add value to a Bill
- encouraging greater specialisation
- greater focus on implementation
- backfilling resource to undertake bilingual checks of SIs
- using a planned consultation to ensure an appropriately sized and structured Legal Services department
- more Ministerial flexibility
- recruiting and training Bill teams in the run up to a Senedd general election, ready for the incoming government
- supporting interested staff to pursue law conversion courses
- rebalancing resources between delivery and monitoring and reporting, so that quality is not put at risk by an emphasis on project management and bureaucracy
- supporting and promoting people developing legislative expertise
- challenging poor performance
- developing a long term strategy to improve capability.

Other ways of developing legislation, outside the Welsh Government

19. In the final substantive question, respondents were also asked to share any awareness or experience of other ways of developing legislation, outside the Welsh Government, for example using different structures, processes or resourcing models, which they felt should be considered by the review.

20. Respondents highlighted:

- the smaller role of Legal Services in the legislative process in Northern Ireland (and possibly in the UK Government), which relies on greater policy capability
- the reduced RIA model used by the UK Government
- the value, in terms of career progression, placed by the UK Government on working on primary legislation
- the UK Government's more closely defined Bill team roles, ability to call on wider resources – for example central finance teams – and expectation that policy teams will prioritise legislative work
- the impressive UK Government handbook and their Cabinet Office's BED stakeholder engagement database
- good practice in Defra such as the central legislative team, more investment in stakeholder engagement and co-design, and allocation of two Deputy Directors (one policy and one Bill) to each Bill team
- the very active role taken by the UK Government's Parliamentary Business and Legislation Cabinet Committee and its secretariat
- the unhelpful example of UK Finance Bills which require excessive working hours
- the need to find out why UK and Scottish Government legislation processes appear to absorb a smaller proportion of effort, with more social research and other analytical resource available in both governments

- the system in New Zealand, particularly the functions of legislative counsel
- the dedicated Bill teams employed elsewhere
- the need for comparisons with other bilingual jurisdictions
- the importance of developing a bespoke system fit for the Welsh Government rather than simply copying one from elsewhere.

The survey questions

Adolygiad Allanol o Ddeddfwriaeth > eich barn

External Review of Legislation > your say

Mae Llywodraeth Cymru wedi comisiynu adolygiad allanol ac annibynnol o'n gallu i ddatblygu deddfwriaeth. Er ein bod wedi llwyddo i ddatblygu deddfwriaeth newydd, ac sy'n torri tir newydd mewn llawer o feysydd, ers datganoli pwerau deddfu llawn, gwyddom y gallwn wneud yn well o ran cyflawni deddfwriaeth o ansawdd uchel yn llawn sy'n diwallu anghenion deddfwriaethol Gweinidogion i amserlenni y cytunwyd arnynt.

Mae'r adolygiad allanol yn cael ei gynnal gan David Noble QSO, cyn Brif Gwnsler Seneddol Seland Newydd a chyn-bennaeth gwasanaethau cyfreithiol yn Swyddfa'r Cabinet Llywodraeth y DU, a disgwylir iddo gael ei gwblhau ddechrau mis Medi.

Defnyddiwch y ffurflen hon i gyflwyno'ch adborth. Bydd David yn ystyried eich barn ochr yn ochr â deunydd ysgrifenedig arall a chyfweliadau gyda Gweinidogion ac uwch staff.

Ar ôl eu cyflwyno, ni ellir golygu ymatebion. Gan y gall eich adborth ar y ffurflen hon gynnwys data personol, caiff ei gadw'n ddiogel a chaiff ei ddinistrio cyn gynted â phosibl ar ôl cwblhau'r adolygiad.

Os oes gennych unrhyw gwestiynau am yr adolygiad, cysylltwch â Christopher Warner (christopher.warner001@gov.cymru) sy'n darparu cymorth mewnol.

The Welsh Government has commissioned an external, independent review of our capability and capacity to develop legislation. Although we have successfully developed new, and in many cases ground-breaking, legislation since full law-making powers were devolved, we know we can do better in fully delivering high quality legislation that meets Ministers' legislative needs to agreed timetables.

The external review is being undertaken by David Noble QSO, former New Zealand Chief Parliamentary Counsel and former Head of Legal Services at the UK Government's Cabinet Office, and is expected to be completed in early September.

Please use this form to submit your feedback. David will take your views into account alongside other written material and interviews with Ministers and senior staff.

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Once submitted, responses cannot be edited. As your feedback on this form may contain personal data, it will be held securely and will be destroyed as soon as possible following the completion of the review.

If you have any questions about the review, please contact Christopher Warner (christopher.warner001@gov.wales) who is providing internal support.

1. Pa rôl neu rôlau deddfwriaeth Llywodraeth Cymru dych chi wedi cyflawni? | Please indicate which role(s) you have undertaken in respect of Welsh Government legislation.

- ☐ UBC Bil | Bill SRO
- ☐ Rheolwr Bil | Bill Manager
- ☐ Rôl rheoli Biliau eraill | Other Bill management role
- ☐ Polisi | Policy
- ☐ Cyngor Cyfreithiol | Legal Advice
- ☐ Drafftio | Drafting
- ☐ Cyfeithu | Translation
- ☐ Cydsymud canolog neu Grŵp | Central or Group Coordination
- ☐ Other

2. Pa mor brofiadol fydddech chi'n dweud eich bod ym mhroses deddfwriaethol Llywodraeth Cymru? | How experienced would you say you are in the Welsh Government legislative process?

- ☐ Profiadol iawn | Very experienced
- ☐ Eithaf profiadol | Quite experienced
- ☐ Ddim yn brofiadol iawn | Not very experienced
- ☐ Ddim yn brofiadol o gwbl | Not at all experienced

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3. I ba raddau, yn eich barn chi, y mae **strwythurau sefydliadol** Llywodraeth Cymru yn cefnogi'r gwaith o gyflawni deddfwriaeth o ansawdd uchel sy'n diwallu anghenion Gweinidogion i amserlenni y cytunwyd arnynt?

*To what extent do you think Welsh Government **organisational structures** support the delivery of high quality legislation which meets Ministerial needs to agreed timetables?*

- ☐ Llawn | *Fully*
- ☐ I ryw raddau | *To some extent*
- ☐ Dim llawer iawn | *Not very much*
- ☐ Ddim o gwbl | *Not at all*

4. Esboniwch eich ateb i gwestiwn 3. | *Please explain your answer to question 3.*

Enter your answer

5. I ba raddau, yn eich barn chi, y mae **prosesau deddfwriaethol** Llywodraeth Cymru yn cefnogi'r gwaith o gyflawni deddfwriaeth o ansawdd uchel sy'n diwallu anghenion Gweinidogion i amserlenni y cytunwyd arnynt?

*To what extent do you think Welsh Government **legislative processes** support the delivery of high quality legislation which meets Ministerial needs to agreed timetables?*

- ☐ Llawn | *Fully*
- ☐ I ryw raddau | *To some extent*
- ☐ Dim llawer iawn | *Not very much*
- ☐ Ddim o gwbl | *Not at all*

6. Esboniwch eich ateb i gwestiwn 5. | Please explain your answer to question 5.

Enter your answer

7. I ba raddau, yn eich barn chi, y mae **canllawiau a hyfforddiant mewnol** Llywodraeth Cymru yn cefnogi'r gwaith o gyflawni deddfwriaeth o ansawdd uchel sy'n diwallu anghenion Gweinidogion i amserlenni y cytunwyd arnynt?

*To what extent do you think Welsh Government's **internal guidance and training** on legislation supports the delivery of high quality legislation which meets Ministerial needs to agreed timetables?*

- ☐ Llawn | Fully
- ☐ I ryw raddau | To some extent
- ☐ Dim llawer iawn | Not very much
- ☐ Ddim o gwbl | Not at all

8. Esboniwch eich ateb i gwestiwn 7. | Please explain your answer to question 7.

Enter your answer

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9. I ba raddau, yn eich barn chi, y mae'r **adnoddau** Llywodraeth Cymru yn cefnogi'r gwaith o gyllawni deddfwriaeth o ansawdd uchel sy'n diwallu anghenion Gweinidogion i amserlenni y cytunwyd arnynt?

*To what extent do you think Welsh Government **resources** enable the delivery of high quality legislation which meets Ministerial needs to agreed timetables?*

- ☐ Llawn | Fully
- ☐ I ryw raddau | To some extent
- ☐ Dim llawer iawn | Not very much
- ☐ Ddim o gwbl | Not at all

10. Esboniwch eich ateb i gwestiwn 9. | *Please explain your answer to question 9.*

Enter your answer

11. Rhannwch unrhyw ymwybyddiaeth neu brofiad sydd gennych o **ffyrdd eraill o ddatblygu deddfwriaeth, y tu allan i Lywodraeth Cymru**, er enghraifft drwy ddefnyddio gwahanol strwythurau, prosesau neu fodelau adnoddau, y teimlwch y dylai'r adolygiad eu hystyried.

*Please share any awareness or experience you have of **other ways of developing legislation, outside the Welsh Government**, for example using different structures, processes or resourcing models, which you feel should be considered by the review.*

Enter your answer

12. Rhwngwch eich enw yma os hoffech wneud hynny. | *Please enter your name here if you would like to.*

Does dim rhaid i chi roi eich enw, ond os gwnewch hynny bydd Llywodraeth Cymru yn unoŷ â'i thasg gyhoeddus, yn ei phrosesu at ddibenion yr adolygiad hwn yn unig, er enghraifft ar gyfer cysylltu â chi i gael eglurnad neu ymheliadethu ar eich adborth. Bydd unrhyw wybodaeth yr ydych wedi rhannu a ddefnyddir yn adroddiad yr adolygiad yn gwbl ddiennw. Byddwn yn cadw eich data nes bydd yr adolygiad wedi'i gwblhau pryd y caiff ei ddileu. I gael rhagor o wybodaeth am sut mae Llywodraeth Cymru yn defnyddio'ch data, gweler yr Hysbysiad Preifatrwydd Adnoddau Dynol: <https://wales365uk.sharepoint.com/sites/Mewnnydd-Human-Resources/SitePages/HR-Information.aspx>

You do not have to provide your name, but if you do the Welsh Government, in line with its public task, will process it for the purpose of this review only, for example for contacting you for clarification or amplification of your feedback. Any information you have shared which is used in the review report will be fully anonymised. We will keep your data until the review is completed at which point it will be deleted. For further information on how Welsh Government uses your data, see the HR Privacy Notice: <https://wales365uk.sharepoint.com/sites/Intranet-Human-Resources/SitePages/HR-Information.aspx>

Enter your answer

13. Rhwngwch eich cyfeiriad e-bost yma os hoffech wneud hynny. | *Please enter your email address here if you would like to.*

Does dim rhaid i chi roi eich cyfeiriad e-bost, ond os gwnewch hynny bydd Llywodraeth Cymru, yn unoŷ â'i thasg gyhoeddus, yn ei phrosesu at ddibenion yr adolygiad hwn yn unig, er enghraifft ar gyfer cysylltu â chi i gael eglurnad neu ymheliadethu ar eich adborth. Bydd unrhyw wybodaeth yr ydych wedi rhannu a ddefnyddir yn adroddiad yr adolygiad yn gwbl ddiennw. Byddwn yn cadw eich data nes bydd yr adolygiad wedi'i gwblhau pryd y caiff ei ddileu. I gael rhagor o wybodaeth am sut mae Llywodraeth Cymru yn defnyddio'ch data, gweler yr Hysbysiad Preifatrwydd Adnoddau Dynol: <https://wales365uk.sharepoint.com/sites/Mewnnydd-Human-Resources/SitePages/HR-Information.aspx>

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Enter your answer

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Annex 4: Extract from Legal Services Reset: Draft Baseline Review Methodology 2022

Division 1	Division 2	Division 3	Division 4	Division 5	Division 6	Division 7	Division 8
Historic Environment Consolidation Bill YEAR 1 Large 4 Lawyers Buses Bill YEAR 2 Medium 3 Lawyers Infrastructure Planning Bill – Year 2 Large 4 Lawyers Planning Consolidation – YEAR 3 Large 4 Lawyers Taxis & Private Hire Vehicles Bill – YEAR 3 Medium 3 Lawyers	Agriculture Bill – YEAR 1 Large 4 Lawyers Coal Tips Safety Bill – YEAR 2 Medium 3 Lawyers Clean Air Bill – YEAR 2 Medium 2 Lawyers Agriculture Bill No. 2 - YEAR 3 Large 4 lawyers	TER Bill YEAR 1 Very Large 5 Lawyers Local Government Finance Bill Year - YEAR 3 Very large 5 Lawyers Welsh Medium Education Provision - YEAR 3 Medium 3 lawyers Electoral Reform Bill - YEAR 3 Medium 3 lawyers	Optometry – Year 2 Small 1 Lawyer Social Care Bill – YEAR 3 Medium 3 Lawyers	Tax Act - YEAR 1 1 Social Partnership and Public Procurement Bill Year 1 – See Director's office also Medium 1 lawyer Tourism Tax – YEAR 3 Medium 3 lawyers	Single Use Plastics – Year 1 Medium 3 lawyers Electoral Reform Bill - YEAR 3 Large 4 Lawyers Senedd Reform Bill – YEAR 3 Very Large on short timescale 8 Lawyers	Social Partnership and Public Procurement Bill Year 1 (See also DD 5) Medium 2 lawyers Statute Law Repeal Bill – YEAR 2 Medium 3 lawyers	No Bills – no allocation of lawyers for Legislative Programme work
Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills	Total lawyers for Bills
18	13	13	4	4	15 + 3 lawyers for CG assurance work = 18	5	0
TOTAL LAWYERS WORKING ON 6TH EGISLATIVE PROGRAMME	72 + 3 for CG assurance work = 75						

Annex 6: Draft checklist for instructing on a Bill and Draft outline of how a good approach to instructing for a bill might look extracted from LPB (20–10) 05 – the Interim Report from the Instructing Working Group (Official Sensitive)

DRAFT CHECKLIST FOR INSTRUCTING ON A BILL

(For more detailed guidance see Chapter 7 of the Legislation Handbook on Assembly Bills)

Introduction

1. Have you explained in general terms what you want to achieve and why?

Examples might be—

- “We want to establish a new curriculum for 14-16 year olds, in order to enable individual pupils to tailor their learning to meet their own needs”, or
- “We want to change planning requirements so that planning permission can never be granted for a building of over x feet tall, in order to reduce the carbon footprint of newbuild”.

Existing law

2. Have you explained what it is about the current law or any state of affairs that prevents the achievement of what you want?
3. In doing so, have you cited any existing legislation or case law or rule of the common law that is relevant – either because it stops you from doing what you want, or because your new system needs to fit in with it?
4. In citing legislation etc. as described in paragraph 3, you will not generally need to set out a detailed description of the effect of the legislation, case law, etc: have you considered whether in your context this is necessary for some reason? (An example of why this might be needed is because there is uncertainty or dispute about the effect of existing legislation or case law.)
5. If there isn't anything that prevents the achievement of what you want as matters stand (for instance by the exercise of existing powers), have you explained why nevertheless you think legislation is needed?

Detailed proposals

6. Have you gone on to give a detailed description of your desired end state of affairs? This would include explaining things like—
 - who is required to do what, and how and when;
 - who is prohibited from doing what, and how and when;

- who is to have the power to do or choose not to do something, and how and when this power may be exercised;
 - any criminal offences that are required (in respect of what act, nature of penalties, etc);
 - any civil penalties that are required (in respect of what act, nature of penalties, appeals, etc.);
 - any powers to make subordinate legislation that are required;
 - enforcement arrangements for your new system (who, how, when etc);
 - detailed provision for the establishment and functioning of an office or body;
 - any arrangements for dispute resolution.
7. If the policy for the bill has been framed by reference to that achieved by legislation for another territory, for instance in England or Scotland, have you explained this? And if it has, have you explained exactly what the legislation for that other territory achieves, and set out any differences in the objective for Wales?

Technical necessities

8. Have you identified the consequential amendments and repeals that are needed to existing legislation?
9. Have you explained the legislative competence issues relevant to the proposal? These may include—
- issues about whether the subject-matter of the proposals is reserved;
 - issues about whether the proposals apply only in relation to Wales;
 - effects on Ministers of the Crown and other reserved authorities;
 - compatibility with Convention rights (e.g. to property, private life or a fair trial).
10. Have you identified any transitory, transitional or saving provisions that are needed to move smoothly from the current state of affairs to the new one created by the Bill?
11. Have you explained any ways in which the application of the Bill to the Crown needs to be limited?
12. If you have asked for powers to make subordinate legislation, have you specified the Senedd procedures you would like?
13. Have you explained how and when you would like the provisions to be commenced?

Supporting material

14. Have you identified any background material relevant to the proposals and provided copies or links? This may include—

- internal papers (e.g. legal advice and counsel's opinions);
- white papers, green papers and other consultation documents;
- related or relevant legislative proposals such as Senedd or Westminster Bills, draft subordinate legislation;
- Senedd or Westminster reports;
- reports by public bodies (e.g. the Law Commission);
- case reports.

DRAFT OUTLINE OF HOW A GOOD APPROACH TO INSTRUCTING FOR A BILL MIGHT LOOK

Before commencing the drafting of instructions

- The groundwork for instructing should be laid before the proposed Bill is included in the legislative programme.³¹ By the point a Bill is included in the programme, there should be a well-developed policy and set of desired outcomes, agreed by the lead and First Minister, based on substantial evidence and supported by draft impact assessments.
- If the policy is less well developed, a realistic plan for the policy's development (including the necessary stakeholder engagement) needs to be in place, and delivered, before instructing can begin.

The initial meeting

- When instructing begins, there should be an initial meeting between policy officials who will be involved in preparing instructions and subject lawyers from Legal Services (LS) who will be involved in preparing instructions. The involvement of drafting lawyers from the Office of the Legislative Counsel (OLC), who will be receiving instructions, should also be sought.
- The purpose of the initial meeting should be to establish and record an agreed set of expectations relating to drafting of instructions, including a shared understanding of the intended purpose and effect of the legislation, so that instructions will be concise and focussed. This meeting should also cover what will be needed in the instructions, including the level of background detail needed. For drafting lawyers it would be an opportunity to learn about how the current law works, what the problem is and what is being proposed. A checklist of areas which instructions need to cover is available; this should be helpful in structuring discussion at the meeting.
- In addition to any expectations agreed at the initial meeting, there needs to be a shared recognition that while it is the role of policy officials to lead on developing the

³¹ Detailed guidance on the process for preparing a Bill, including the development of instructions, can be found in Chapter 7 of the Legislation Handbook on Assembly Bills.

policy, it will be important for lawyers to inform, support and where necessary challenge policy thinking. The latter is important because probing and testing policy thinking helps to refine the policy, identifies and addresses questions of legal or legislative policy as well as practical difficulties, and helps to develop the policy to the level of detail required during scrutiny of primary legislation and its implementation. Agreed expectations might also include an understanding that matters such as legislative competence, legal policy questions, and consequential and transitional provisions, would be considered collectively at the earliest possible stage.

- Usually the agreed expectations would confirm that officials intend to work together to produce the instructions for OLC. However the appropriate model for a particular project will be dependent on a number of factors including: the nature of the project; the experience and capabilities of those involved; and the time available. Whatever the approach, there will still need to be clarity on who is responsible for what during the process.
- The initial discussion would form the basis for agreeing an indicative legislative timetable among the Bill team, to inform LPGU's advice to the First Minister in agreeing the overall legislative programme.

Providing an overview of the legislative process

- Also, early on in the work to prepare instructions, an overview session on the legislative process should be held, allowing all those involved to have a shared understanding of the whole legislative process and how the instructions contribute to this. This might involve hearing from an experienced policy official and lawyer, allowing space for reflecting on lessons learned from previous Bills. There may also be further learning and development available where needed for staff working on instructions.

Engagement during the drafting period

- Following the initial meeting, there should be regular meetings between policy officials, subject lawyers, and drafting lawyers to ensure engagement, as work on developing instructions proceeds. This engagement should be undertaken in line with the expectations agreed at the start. In addition to wider meetings, one-to-one meetings may also be useful. Continuous engagement should be seen as vital to ensuring that the approach is collaborative. It helps to build relationships and foster a shared sense of purpose.
- Policy refinement might continue right up to the preparation of instructions. During this period Ministers should be engaged as appropriate. Any policy decisions which will inform the instructions need to be put to Ministers formally and in writing, as Ministerial advice (an MA folder). To support this, there should be planned and regular engagement between Ministers and the wider Bill team (policy officials and lawyers).

Resourcing

- The Bill project should be sufficiently resourced to ensure staff who are tasked with developing instructions do not need to devote significant time to other work. This staff resource should be kept in place as long as needed to support the Bill work. This applies to policy officials, subject lawyers and drafting lawyers, as well as other key staff resources such as translators. The Bill project board should keep this under

review and take action where needed to deal with any staff resource difficulties that arise. Where the Bill project board are not able to deal with these challenges locally, the Legislative Programme Board should take action to ensure sufficient resource is available.

- Instructions need to be written by officials who understand the issues they are dealing with and the systems for which they are responsible (whether policy officials or subject lawyers). Officials involved in preparing instructions and drafting legislation should seek advice on these tasks from more experienced colleagues in their profession where needed. This might be through a formal mentoring relationship. In addition officials should turn to written guidance and resources on instructing to help them in their work.

Annex 7: Extract from New Zealand Parliamentary Counsel Office briefing paper

Extracted from the NZ Parliamentary Counsel's Office Briefing to an Incoming Attorney General

Strategic initiative 3: Drafting laws in plain language

24. The use of plain language in legislation is at the heart of the rule of law. PCO focuses on the users of laws. These users are ordinary people who expect to access the law online and, when accessed, understand it, as well as lawyers and administrators. This focus on ordinary users has been a long-held practice of PCO, but we have recently reviewed our use of plain language and developed a plain language standard and checklist. We are now taking further steps to reinvigorate PCO's plain language use through resources, training, and our quality assurance processes. 25. As part of our stewardship role, PCO has made the new plain language standard available to other agencies that draft legislation and has also provided some training. The standard is also available to the public online.

Strategic initiative 4: Using more standard provisions in legislation

26. The PCO is committed to reducing unnecessary complexity in New Zealand's legislation. Increasing the use of standard provisions and approaches in drafting will make it easier for users to understand, and find their way around, legislation. PCO is developing more standard clauses (similar to those used in Treaty Bills) and supporting guidance for both drafters and agencies instructing the PCO.

27. The PCO expects that greater standardisation will also give wider opportunities to build understanding about common concepts across legislation, foster a more systematic approach to resolving legislative issues, lower the risks of unintentional error, and increase efficiencies in producing legislation. This will improve legislation's fitness for purpose. Looking out to the future, greater standardisation may assist use (and re-use) of legislative data through technological developments.

Strategic initiative 5: Improving legislative capability across the Government and more widely

28. The PCO already provides a range of training to instructing departments, agencies carrying out their own drafting, and (together with the Office of the Clerk) in Parliament. The PCO is proposing to develop a strategy setting the purpose, priority, and approach of PCO's education and information activities to build awareness of what makes good legislation within the wider public sector, and to broaden the understanding of legislation by the public generally.

29. The PCO is also continuing to develop and implement its own systems to ensure that knowledge and information can be easily stored and shared across the organisation and with our key partners.

Key Relationships:

Leader of the House

37. **Leader of the House:** PCO supports the Leader of the House's role in managing the House's business by:

- providing up-to-date information on the likely time needed to draft Bills and amendments and the readiness of Bills to progress in the House. This may affect legislation that Ministers are seeking to introduce or progress in the House, but is also valuable in assisting the Leader of the House to settle the legislative programme for the Government at the beginning of each year

- advising if quality assurance processes have not been undertaken on Bills (so giving rise to risks to the Crown)
- advising on other risks around legislation that may impact on the management of the legislation programme or the progress of Bills in the House (for example on proposals to take urgency).

Cabinet Office

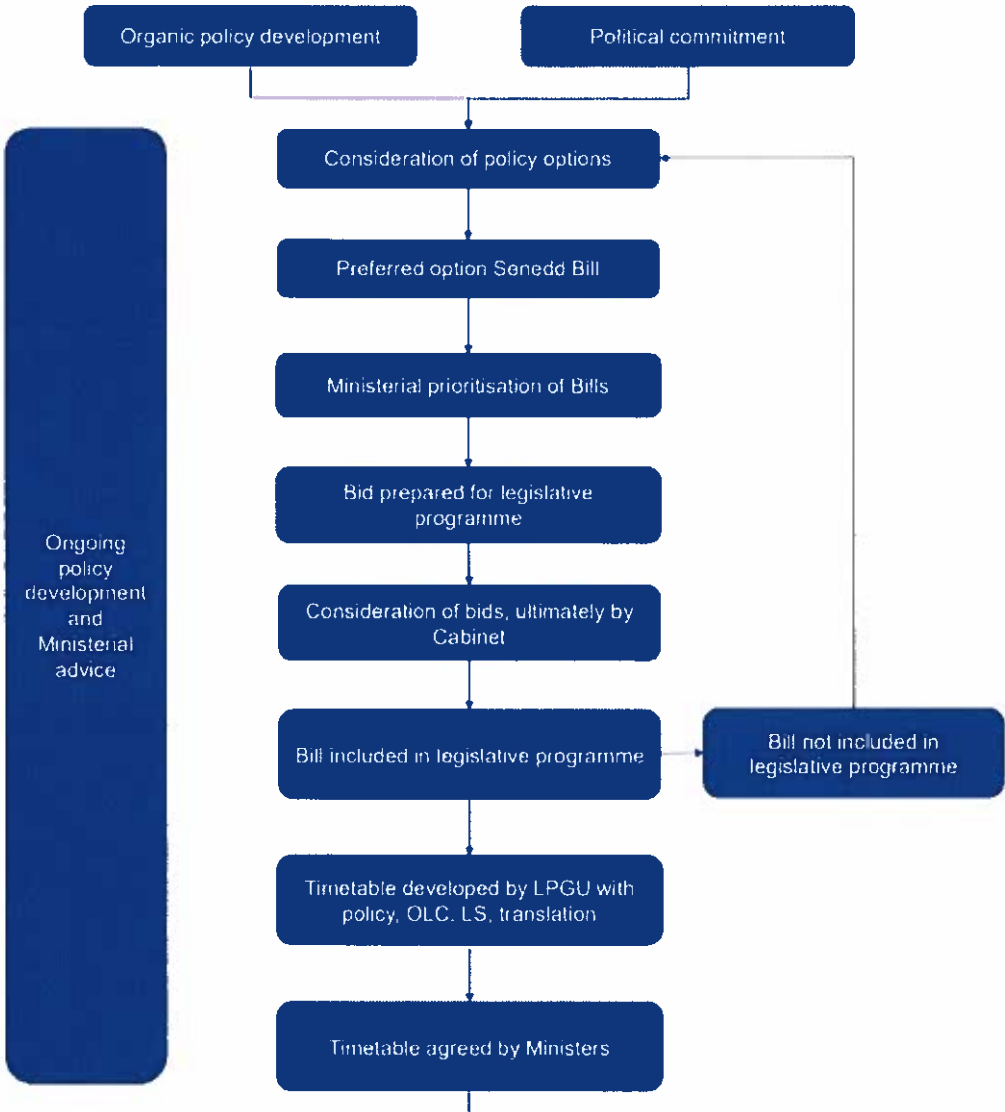
38. PCO works closely with the Legislation Co-ordinator in the Cabinet Office in reporting to the Leader of the House. PCO and Cabinet Office consider that this support for you and the Leader of the House could be further enhanced if senior PCO officials attended the Cabinet Legislation Committee (as senior officials attend other Cabinet policy committees).

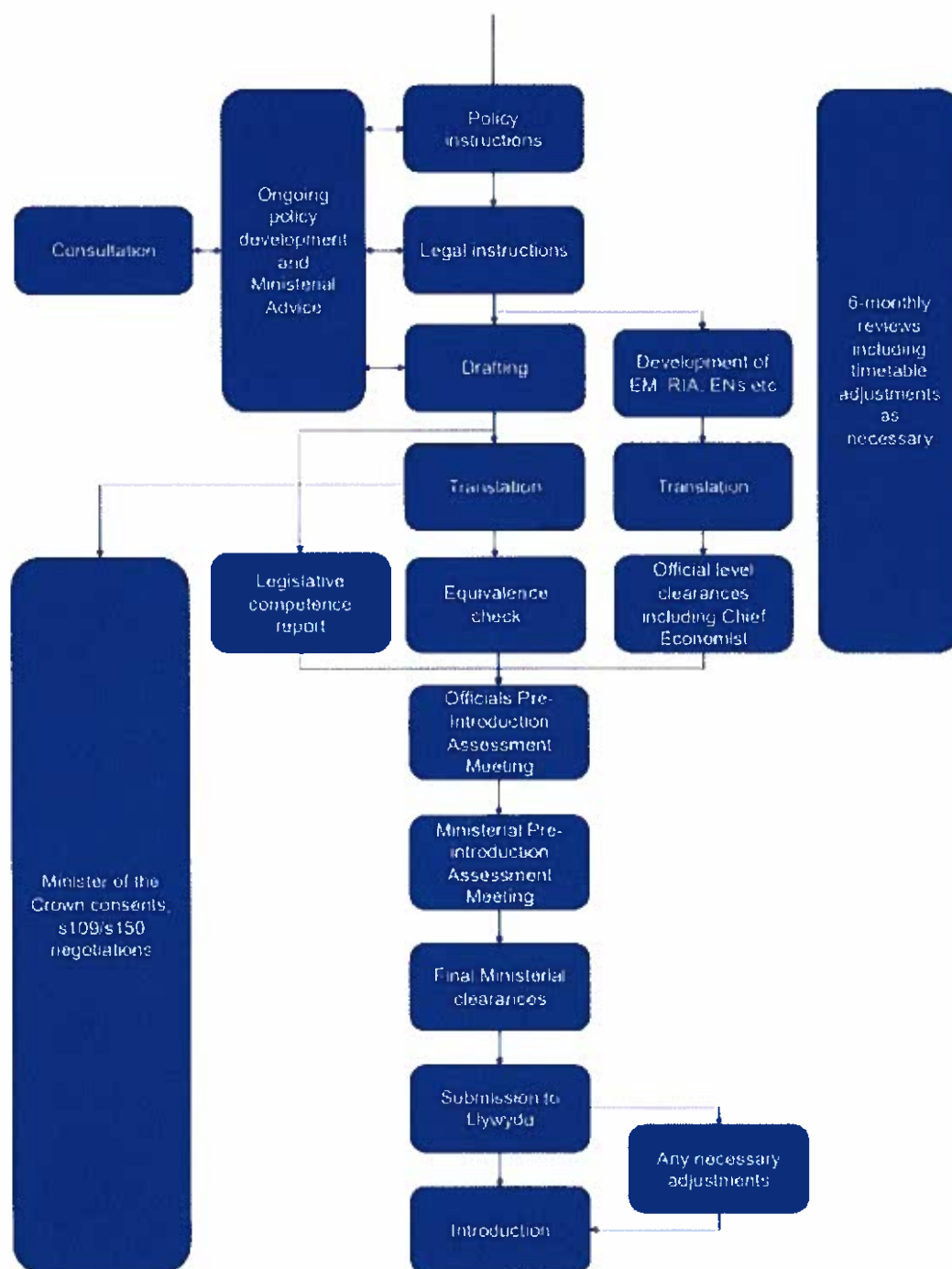
[Microsoft Word - BIM - Attorney-General - 3 Nov 2020.docx \(beehive.govt.nz\)](#)

Annex 8: Welsh Government Bill Development Process

WELSH GOVERNMENT BILL DEVELOPMENT PROCESS

Design: External Review secretariat
Content: LPGU





Annex 9: New Zealand LDAC Legislation Guidelines Checklist 2021 (to be adapted to reflect Welsh Legislation requirements)

[Legislation-Guidelines-Checklist-2021-v2.pdf \(ldac.org.nz\)](#)

Annex 10: Office of Legislative Counsel Presentation For Bill Teams 2020

Working with OLC on your Bill



Structure of today's presentation

- Roles in Bill preparation and ways of working
- Instructing counsel to draft a Bill – content and process
- “Common legislative solutions” and other guidance

Lord Thring



Law drafting offices

- Office of the Parliamentary Counsel, UK Government
- Parliamentary Counsel Office, Scottish Government
- Office of the Legislative Counsel, Welsh Government
- Office of the Legislative Counsel, Northern Ireland Executive

Similar Offices in other Commonwealth countries – some of the other Commonwealth law drafting offices also draft subordinate legislation and are responsible for printing and publishing legislation.

Why is there a law drafting office?

- Legislative drafting and procedure is a specialism
- The necessary knowledge and skills take years to acquire under supervision
- Law is complex and requires specialisation within the discipline to get the best results
 - the discipline imposed by the division of function improves the effectiveness and clarity of legislation
 - specialist law drafting office assists co-ordination and consistency
- The degree of scrutiny given to primary legislation
- Political and financial cost of getting it wrong
- The need to develop legislative drafting policy and keep it under review
- To be advocates for good law and the rule of law

Role of legislative counsel

- Provide expertise in legislation and the process of making legislation
- Analyse and help refine the policy proposal (by reference to the law, logic, law policy and legislative policy)
 - Identify any gaps or flaws in the policy proposal and help with finding solutions
- Express the policy proposal in a Bill and amendments to the Bill in way that is clear, coherent and effective
- Responsible for securing the integrity and effectiveness of the statute book as a whole

Role of advisory lawyers

- Expertise in the legal topics covered by the policy department (health, education, housing, etc.)
- Provide legal advice throughout the development and implementation of legislation (including legislative competence of Senedd)
- Elicit the department's policy for the purpose of providing instructions to legislative counsel on Bills
- Write instructions to counsel to draft bills, comment on the drafts and co ordinate response to the drafter's queries
- Perform challenge function on drafts and policy
- Drafting the implementing subordinate legislation

Role of policy departments

- Provide expertise on public administration of the matters covered by the Bill
- Secure any other necessary expertise
- Develop Bill proposals
- Manage Ministerial engagement with the Bill
- Project and risk management
- Manage internal and external engagement on the proposals

Bill development is organised as a linear process



Butroles and process stages overlap



- Different, but interconnected roles
- Feedback loops in the process
- Iteration – how the system works to resolve issues and produce a Bill
- Each role has a challenge function for the others

The policy interests of legislative counsel

- Is it good law (necessary, clear, coherent, effective, accessible)?
- Whether particular legislative mechanisms will work and be appropriate in each context (e.g. powers, duties, rights, crimes)
- Fairness (not just legality)
- Drafting policy and its consistent application
- Legislative programme design
- System design
- Codification and consolidation

Early (pre-instructing) engagement with OLC

- Could OLC assist you with your Bill bid or your system design? (We have experience about what works well in the context of primary legislation projects and can advise based on previous experience, for instance about size, complexity and time)
- Once a Bill bid has been approved, early engagement with OLC may help
- The drafting window proper opens at a late stage in the process why wait until then to discover potential problems and work through solutions?
- Not all Bills are the same - consider the specific requirements of your Bill

What are instructions?

- They tell OLC what the policy objectives are
- And what needs to change in the law to achieve those objectives
- Delivering instructions is the beginning of a process, not the end

How are they best produced?

- Legal and policy colleagues need to work together to produce instructions – there are different ways of achieving this depending on the people and the project
- Initial general ideas will become more detailed, and legal changes identified: all of us have a role to play throughout this process
- Where there are multiple policy strands in a Bill, how will these be co-ordinated? (Overlap, inconsistencies, etc)
- See the checklist for instructing on Bills

Direct instructions from policy to OLC?

- When might this be needed?
- Need for continuous LS engagement in this context – testing the policy, specialist legal expertise, competence, central view of all of the policy strands
- Recognise this may be needed, but be cautious

The starting point for instructions to OLC: what do you want to achieve and why?

- Setting the context/the headline
- “We want to prohibit bird tables in domestic gardens, to protect birds”
- “We want to set up a new body, to monitor smoke alarm sales and report on them”

What stops you from doing this without legislation?

- Do you already have the power to do what you want?
- If not, why not?
- Is there something specific stopping you? Or do you just lack power?
- For instance, do you need to engage with an existing statutory regime, or with another person, or create criminal offences, or impose duties or restrictions on someone?
- If nothing prevents you from doing what you need, but you still want legislation, why is this?
- Have you considered and discussed the disadvantages of “message” legislation?

Detailed description of end state

- Legislation is about stating rules– so OLC need to know the rules
- Who is to be required to do what, when, where and how?
- Who is to be prohibited from doing what, where, when and how?
- Who is to have power to do or not do something (what?) and how is this power to be exercised and when?
- Criminal offences– committed by whom? Penalties? *Actus reus* and *mens rea*?
- Subordinate legislation
- Enforcement (who, when and how)
- Dispute resolution, appeals
- Detailed provision about establishment and role of any new body

CAUTION!

- Framing policy by reference to that achieved by legislation for another territory, e.g. England or Scotland
- What does that other legislation achieve (by reference to matters above)?
- Is that the right result for Wales?

MORE CAUTION!

- Framing policy by reference to a report making recommendations
- What is the effect of what is recommended in the report, by reference to the matters outlined above?
- Duties, powers, restrictions, enforcement, criminal sanctions, etc?
- Have you considered and tested terminology used in the report?

And more!

- Fuzzy concepts, feel good words and buzzwords
- “We all know what it means”
- What exactly does it mean?
- Can you think of examples of words of this type?
- Come back to the analysis suggested above – identify the rules

Prohibiting bird tables: a can of worms

- What is a bird table? (Functional definition, or essential characteristics?)
- What does it mean to “prohibit” a “bird table”?
 - Can you have a “bird table” in your garden, if you don’t use it to feed the birds?
 - What if you use as a goalpost? Or to feed squirrels?
- Is this actually about feeding birds, not garden furniture?
 - If so, what is “feeding”? Is there an element of intentionality ?
 - What happens if a bird eats the food you put out for a hedgehog? Have you fed a bird?
- What is a domestic garden?
- Why aren’t other spaces (stately homes, parks, etc) caught?
- What will the penalties be?
- Who will they be imposed on? (Feeder, owner of property?)
- How will this be enforced, given that the offence takes place on private property?
- Should the sale of bird tables be illegal?

Common Legislative Solutions

Guidance from UK law drafting offices

- Identifies issues to consider when instructing on legislation adopting a “commonly occurring legislative solution”
- Intended to make instructing and drafting more efficient
 - stimulate policy thinking and increase awareness of options
 - improve instructions and reduce questions from drafters
 - save time for those instructing and drafting
- Not intended to:
 - deal with situations or solutions that are novel or unique
 - replace or constrain policy thinking about how to address a problem
 - cover all the issues that could ever arise

Solutions included in the current guidance

- Establishing a statutory corporation
- Strategies
- Collaboration
- Designation of bodies
- Licensing schemes
- Powers of entry
- Fixed penalty notices
- Preventative orders

Available at <https://gov.wales/sites/default/files/publications/2019/10/common-legislative-solutions.pdf>

Technicalities to deal with in instructions

- “Consequential” amendments and repeals
- Transitional, transitory and saving provision (moving from current state of affairs to new one)
- Beware underestimating the complexity and significance of these
- Legislative competence issues
- Application of the Bill to the Crown
- The procedure applicable for subordinate legislation
- Commencement

Identifying useful background material

- Internal papers (including legal advice and Counsel's opinion)
- White papers, green papers etc.
- Senedd or Westminster reports
- Reports by public bodies
- Case reports
- Related or relevant legislative proposals, e.g. draft Bills

The drafting process: iteration

- The initial response from OLC may be a memo, a note, questions, or a proposal to meet
- Don't expect drafts immediately!
- Drafts are the work of at least two drafters
- Line by line analysis of drafts needed
- Response to draft should incorporate both legal and policy thinking
- Response to draft is generally a document (memo or not) with numbered paragraphs
- Advantages/disadvantages of dealing with instructions and reviewing drafts in meetings
- Maintaining a paper trail of what decisions have been made, when, why and by whom
- The need for flexibility – meetings etc.
- Further revision and refinement of drafts in light of responses

A glimpse ahead: amendments to Bill

- A microcosm of the drafting process: early engagement, instructions, drafting iteration, translation, but

BEWARE!



- **Early engagement with OLC and translators in both policy and timetabling is vital**
- Complex IT and formatting issues to resolve internally and with the Bay
- Discussions with Members of the Senedd