

## **Interpreting Welsh law: an interpretation act for Wales**

Consultation response form

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Responses should be returned by 11/09/17 to:

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or completed electronically and sent to:

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Q1: Should we insert a reproduction of Schedule 1 to the Interpretation Act 1978 in the Welsh language into that Act, or should we aim to apply an interpretation Act for Wales to as much Welsh language legislation as possible?

It is submitted that the enactment of an Interpretation Act specifically for Welsh legislation is the better option.

This view is based on the purpose of Interpretation Acts. As their short title suggests, their purpose is to assist in the task of statutory interpretation. The interpretation of statutes seeks to discover the intention of the legislature. The legislative intention is paramount. Traditionally in England and Wales, this has been sought by examining the words and phrases used by the legislature, although in recent decades, there has been a greater readiness to embrace purposive approaches to interpretation. This has some consequences for the use of Interpretation Acts, not least in seeking to discover the legislative intention.

Given that statutory interpretation seeks to discover the intention of the enacting legislature, an Interpretation Act states what that legislature ordinarily intends

when enacting a statute both in terms of certain technical matters regarding the operation of the legislation and with regard to its general intention with regard to the meaning of words and phrases employed by it when legislating. The legislature is not bound by these statements regarding its general intention; that would be inconsistent with its sovereign nature. Instead, the statements with regard to its general intentions are made without prejudice to its being able to intend something different if it so wishes. Thus, repeatedly throughout the 1978 Interpretation Act, for example, the statements made are specifically said to yield to a contrary intention. An Interpretation Act does not displace the general approach of seeking the legislative intention. It is meant to assist in achieving that, but is not meant to dictate a result. It should not be prescriptive. For it to dictate a result, the Act would have to be placed within a hierarchy of legislative provisions, to which other items of legislation would be subordinated.

Given therefore that the 1978 Interpretation Act was enacted well before the advent of devolution in Wales and given that its contents express the general intentions of a particular legislature, the UK Parliament, when enacting legislation, it would be incongruous to insert into it a schedule concerning the intentions of a different legislature, particularly if the schedule were to set out the general intentions regarding the interpretation of words in a language in which the original legislature did not legislate. To do so would suggest, rightly or wrongly, a hierarchical relationship within which Parliament was legislating the meanings to be given to words and phrases in Assembly legislation.

Q2: Do you agree with the potential benefits of a Welsh Interpretation Act identified in this consultation paper?

A separate Welsh Interpretation Act would be more beneficial than the insertion of provision within the 1978 Act. It would also be more consonant with the Welsh Government's policy of avoiding placing Assembly legislative provisions in pre-existing Westminster statutes where the provisions would appear in English only. An Interpretation Act for Wales would have benefits which are wider than that identified by the Law Commission. Of the list of benefits identified in the consultation paper, it is submitted that (a) (b) (d) (f) and (g) are the most obvious and beneficial.

With regard to (b), a major benefit of enacting interpretation provisions in both Welsh and English is that it engages section 156(1) of the Government of Wales Act 2006 whereby the English and Welsh texts of Assembly legislation are to be treated as being of equal standing, provided the legislation is enacted in both languages. This would not be the case with the insertion of a Welsh language reproduction of Schedule 1 into the 1978 Act as the two versions would not have been in both languages when they were enacted.

This could therefore affect the manner in which the words and phrases set out in the Schedule were subsequently interpreted in later Assembly legislation. For instance, if a provision containing a Welsh word corresponding to an English word to be found in the Schedule required interpretation, then if a translation of the Schedule had been inserted it would be legitimate to argue that, as the Welsh version was a later reproduction in Welsh of the original English schedule, the meaning of the English word would have to dictate the meaning of the Welsh word. In the absence of such an insertion, if a question arose regarding the meaning of Welsh and English provisions enacted together in a bilingual Assembly Act, then under section 156 the two texts must be treated as of equal standing. If therefore the Welsh term did not bear the meaning given to the English term in the 1978 Act, this would be evidence of a contrary intention with regard to the meaning of the English word. Inserting a Welsh version of Schedule 1 into the 1978 Act could therefore weaken the status of the Welsh text. The result would be more or less the same as if all of the terms in the Schedule had been the subject of the kind of order envisaged by section 156(2) of GoWA allowing the Welsh Ministers to decree that a Welsh word was to have the same meaning as an English word in a piece of Assembly legislation, but making the equivalence of general application to terms defined in the 1978 Act throughout Welsh legislation.

This raises another issue regarding Schedule 1 to the 1978 Act. Being a Schedule which deals with words and phrases in one language only, it does not need to differentiate, and therefore does not differentiate, between two categories of terms within it. These are, first, terms which are in effect the creation of the law and government – such as ‘Crown Court’, ‘PAYE income’, ‘Secretary of State’ – and secondly words which are simply part of the English language but are generally used with a technical meaning in legislation – such as ‘land’. It is this second category which has given rise to misgivings about the usefulness of such interpretation provisions and to worries about their capacity to cause serious misunderstanding.

In truth, the number of terms in this second category in the 1978 Act is very few in number – possibly only ‘land’, ‘oath’, ‘person’ and ‘writing’. In drafting a bilingual Interpretation Act, it is of the utmost importance that the definition of these terms, including the choice of term in the second language, does not entirely contradict normal usage. It needs to be borne in mind that words do not correspond exactly to one another in terms of their meaning across language divides, and they should not be forced to do so by legislation, thereby making vocabulary in a legal context alien to the speakers of that language. One may need to concentrate more upon equivalence of *meaning* in regard to the second category rather than equivalence of words, and draft definitions accordingly.

With regard to the first category, there will be technical terms used frequently in Welsh legislation which are not relevant to the law as it applies in England and *vice versa*. In both cases, this reinforces the case for a separate Welsh Interpretation

Act to avoid irrelevance. Care should be taken not to incorporate terms with a short life expectancy requiring frequent amendment to the Interpretation Act and thereby undermining its usefulness. Care should also be taken to consult widely regarding such terms. There has been a long history of different organizations in Wales independently 'settling' terminology for themselves with no reference to the endeavours of others in the same fields. The introduction of a Welsh Interpretation Act could resolve this problem. Equally, in the absence of a thorough consultative process, it could exacerbate or aggravate it.

Q3: Which of the potential solutions to the "two-Act issue" would you consider to be most helpful to users of the legislation?

As long as it is borne in mind that Interpretation Acts are meant to assist in finding the legislative intention, that that intention remains paramount, and that an Interpretation Act's provisions are not meant to be prescriptive, potential difficulties regarding there being more than one Interpretation Act are avoidable provided the legislative intention is clear. Where in a piece of legislation reliance is placed upon meanings given in an Interpretation Act, it is submitted that that should be made clear in the Explanatory Notes. Such explanation should not preclude a clear statement in the legislation itself whether the provisions of an Interpretation Act are being engaged and, if so, which one. This could vary from one part of an Act to another, but ordinarily an interpretation provision could simply begin or end with a statement that terms defined in the Welsh Interpretation Act, for example, were to bear the same meaning in the particular Assembly Act in question. This would simply make it clear that no contrary intention existed. It would, in other words, simply remove any doubt. The intention would be clear.

This option has the great advantage of clarity and it points any reader of Welsh legislation (however well or poorly informed) in the correct direction. The fact that each piece of legislation would need to contain a provision as to the applicable Interpretation Act is a small price to pay for that level of certainty.

Q4: Do you consider there are any practical issues arising from any of the potential solutions to the two-Act issue?

It is submitted that option (c) does not pose practical difficulties if it is adopted. The consultation paper itself identifies the practical difficulties with other options. The aim must be to ensure as far as possible that people reading Welsh legislation understand that it is subject to the provisions of a specific Interpretation Act and that is best achieved by a statement to that effect in the particular piece of legislation.

Q5: What are your views on the potential changes to the 'core rules', set out in Chapter 7?

Broadly speaking, the proposals to change some of the core rules of the 1978 Act, especially those which are likely to be irrelevant to interpretation of Welsh legislation and those which have now become anachronistic, are appropriate. There is no reason why the Scottish model would not be appropriate for Wales in this respect.

However, the bilingual nature of Welsh legislation makes a crucial difference.

While gender neutral drafting may obviate the need for 'masculine includes the feminine'-type provision with regard to the English text, the position is not so easily resolved in Welsh where the gender of a signifying noun is not necessarily connected with the sex of the subject signified. In particular, Welsh unlike English, has neither a common gender nor a neuter gender. Nouns are either masculine or feminine, and their gender affects the manner in which other components of the language, such as adjectives and pronouns, behave. For the Welsh text to read naturally, therefore, it should not be interpreted or translated as though it were English 'using Welsh words'. A clarification in the Interpretation Act, supplied to prevent such misinterpretation of gender issues between the two languages, and therefore clarifying the legislative intention, would do no harm.

Q6: What are your views on the potential new provisions that could be included in an interpretation Act for Wales, set out in Chapter 8?

Many of the items listed in paragraph 80 of the Consultation Document seem eminently sensible to include in a Welsh Interpretation Act as they turn on what the Assembly may be taken to intend when conferring certain powers and draw upon good practice adopted in England and Scotland in particular.

Thus, subject to a contrary intention, the grant of a power to make subordinate legislation could be taken generally to intend that the power might be exercised differently in relation to different cases or purposes or, in the case of a commencement power, that it should be taken to permit different days for different purposes.

However, an Interpretation Act should not itself confer powers to alter legislation. To permit Acts to be amended by the insertion of a date is not interpretation and should not be treated as such. It is the conferral of a power to amend primary legislation, and should not be confused with interpretation.

Likewise, the same goes for the suggestion that a power to correct obvious errors should be included. This is not interpretation, and any such power to amend primary legislation should be subject to scrutiny before the legislature. Further, given it is a

power to amend primary legislation which was originally a bill subject to possible amendment, enhanced affirmative procedure should possibly be employed for its scrutiny to enable amendments to be suggested to the proposed changes.

The suggestion is also made that a single Statutory Instrument should be capable of containing provisions requiring different scrutiny procedures. While this may be convenient for those drafting the legislation, it is a reduction in clarity for the legislature regarding its tasks and a source of potential confusion for end-users who may wish to challenge the instrument. The inclusion of all of the relevant provisions in one place, however, would undoubtedly improve accessibility to end-users simply wanting to access the legislation.

There is here the familiar tension between the needs of the legislature and the needs of the end-user. It is submitted that this is best resolved by the development of the suggested Codes of legislation into which the provisions could be inserted by the instruments, and not by amalgamating the instruments themselves.

Q7: Are there any extra new provisions, to those set out in Chapter 8, that you would wish to include in an interpretation Act for Wales?

Other than the interpretation provision suggested above in response to Question 5 concerning the different effect of the gender of words in the two languages upon legislative intentions, there are no additional provisions that we would wish to suggest.

Q8: What are your views on the other matters that could be dealt with in an interpretation Act for Wales, set out in Chapter 9?

There can be no gainsaying the usefulness of the suggestion that certain standard form provisions should be capable of incorporation by reference, with the opportunity if need be for appropriate modification. Again, however, this is not interpretation. The incorporation should be expressly made on the face of the enactment with full opportunity for the legislature to consider its appropriateness and the possible need for the modification of its detail. The seriousness of the circumstances referred to in paragraph 87 – fixed penalties, powers of entry, etc., – should not admit of unfettered executive discretion regarding their application.

Q9: We would like to know your views on the effect developing an interpretation Act for Wales could have on the Welsh language, in particular in respect of:

- i) helping people to use Welsh, and
- ii) treating the Welsh language no less favourably than English.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

The use of the Welsh language in a legal context has undoubtedly been hampered by the absence of a developed legal register in the language, the result of its having been denied a rôle in legislation and litigation for several centuries. There can be little doubt either than many legal practitioners, fluent in the language, are reluctant to undertake formal tasks, such as the drafting of documents, in Welsh for fear of misinterpretation of the terminology used as against the long-standing certainty surrounding expressions in English. Already, the existence of bilingual legislation has begun to change this situation. The provision of legislative definitions of Welsh terms to correspond to English terms in an Interpretation Act can only assist and accelerate that change by enabling confident use of the emerging legal register.

Care however must be taken, as stated above in response to Question 2, to ensure that where technical legal definitions are provided for words which are in ordinary everyday use, no greater violence is done to that usage than to equivalent English terms. Indeed, a Welsh Interpretation Act should aim to limit departures from normal usage in whatever language to a minimum.

Q10: Please also explain how you believe the proposed interpretation Act for Wales could be formulated or changed so as to have:

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

As mentioned earlier in response to Question 2, a thorough consultation with regard to terminology would do much not only to ensure that the terminology adopted reflected current usage in Welsh public life and advertise its existence, but should also lead to the content of the Act being 'owned' by the people of Wales and not just its legal professions. To limit contributions to its content and effective knowledge of its existence to the legal and related professions would consign it to the specialist status of the current 1978 Act – seen more as a trap to the understanding of the unwary than as an aid to citizens' comprehension of the law governing their lives. An inclusive process in developing the provisions could serve well to deliver on the Welsh Government's will to make the laws of Wales accessible.

Q11: We have asked a number of specific questions. If you have views on any related issues that we have not specifically addressed, please set them out here:

Reference is made to the intention to produce Codes of legislation relating to certain topics in line with the recommendations of the Law Commission's report on the *Form and Accessibility of the Law in Wales*.

It is submitted that the creation of such Codes would serve as an excellent opportunity to pilot the concept of Welsh interpretation provisions. Each code is likely to have its own interpretation provisions which will apply to subsequent legislation made regarding it. The Codes will also result, in effect, in a hierarchy of legislative sources in Wales and allow of some prescriptive provision with regard to the Code's interpretation if that is desired.

Reference is also made in paragraphs 75–78 to the importance of realising the impact of on-line publication of and access to legislation. Paragraph 78, however, casts doubt upon the readiness of the Welsh Government and the Assembly to embrace the possibilities. The question must be asked as to whether the concept of an Interpretation Act is not in truth rooted in the notion of legislation published and accessed in print. In short, it is well on the way to being an out-dated mechanism. The possibilities offered by the use of hyperlinks, etc., to clarify the meaning of terms could not merely to change the way that text is prepared and published, but also the legislative processes themselves and expectations regarding accessibility. Wales, particularly with its proposed codifications, could lead the way. It would be a shame to lose this opportunity of being in the vanguard of future legislative developments.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: