



## Attorney General's Office

Jeremy Miles AC/AM  
Counsel General  
Cardiff Bay  
Cardiff  
CF99 1NA

**Robert Buckland QC MP**  
Solicitor General

Attorney General's Office  
5-8 The Sanctuary  
London  
SW1P 3JS

Tel: 0207 271 2432

[www.gov.uk/ago](http://www.gov.uk/ago)

25 April 2019

Dear Jeremy,

### **Legislation (Wales) Bill**

In December the Secretary of State wrote to the First Minister to flag that the UK Government has concerns regarding an aspect of the Legislation (Wales) Bill. Since that letter was sent, further work has been carried out to understand the implications of the Bill and assess its legislative competence.

It is the view of the UK Government that the application of the Bill to subordinate legislation made by Welsh Ministers under Acts of Parliament is outwith the competence of the Assembly. Furthermore, including such legislation within the scope of the Bill has the potential to cause confusion and legal uncertainty as to how that legislation should be interpreted. This would frustrate a key aim of the Welsh Government in promoting the Bill, which is to simplify the understanding and interpretation of laws that apply in Wales.

In view of these concerns I would ask that the Welsh Government amend the Bill to remove from its scope subordinate legislation made by Welsh Ministers under Acts of Parliament. This would be consistent with the approach taken by the Scottish Parliament when it passed the Interpretation and Legislative Reform (Scotland) Act 2010 and would avoid the unwelcome implications for legal certainty that may otherwise arise.

I have set out below the specific concerns that the UK Government has in relation to competence. I would ask that you reflect on these and recommend to your Ministerial colleagues that a simple amendment be made to the Bill. I am of course happy to discuss these concerns with you at any point.

#### Concerns of the UK Government

Our concerns with the approach of the Bill go to its legislative competence in three respects. First, Section 3 applies the rules in Part 2 of the Bill to all legislation within its scope. This includes, under subsection (1)(c), subordinate legislation made by Welsh Ministers where the enabling power is contained in primary legislation made by the UK Parliament.

Officials from the Welsh Government have set out the position that because the interpretation of legislation is not a reserved matter under GoWA 2006, it follows that the Assembly has competence to legislate with regard to the interpretation of all legislation that applies as regards Wales. I do not share this view. It is my view, and the position of the UK Government, that the interpretation of legislation does not form a distinct subject matter for the purposes of GoWA 2006. The interpretation of legislation is not

properly divisible from the legislation being interpreted and therefore whether the interpretation of a particular piece of legislation is devolved or reserved will depend on the subject matter of that legislation.

As you are aware, the competence of the Welsh Ministers is wider than the legislative competence of the Assembly in that powers, including powers to make subordinate legislation, are conferred on the Welsh Ministers in relation to some matters that are reserved. As drafted the Bill would affect the interpretation of such legislation despite it being outwith the competence of the Assembly to legislate with regard to the underlying subject matter. Therefore it can be said that the Bill relates to those relevant reserved matters and is outside the legislative competence of the Assembly.

So far as section 3(1)(c) of the Bill applies to subordinate instruments which form part of the law on reserved matters, the Bill is an impermissible modification of the law on reserved matters contrary to paragraph 1(1) of Schedule 7B and outside of legislative competence by reason of section 108A(2)(d) of GOWA. This again is because the interpretation of legislation on reserved matters is indivisible from the legislation on reserved matters itself. As such, the interpretation of subordinate legislation made under an Act of Parliament, the subject matter of which is a reserved matter, also forms part of the law on reserved matters within the meaning of paragraph 1(1) of Schedule 7B.

Finally, the UK Government is of the view that section 3(2)(b) of the Bill modifies section 107(5) GOWA, contrary to paragraph 7(1) of Schedule 7B, and so is outside legislative competence by reason of section 108A(2)(d) GOWA. Imposing rules of interpretation places a limit on the full scope of Parliament's law-making powers in respect of Wales. All Welsh subordinate instruments made under an Act of Parliament (as opposed to under an Act of the Assembly) will, without more, be subjected to different rules of interpretation to those of their parent Act, thereby qualifying the power of Parliament to make laws for Wales and for those laws to mean what Parliament intended that they ought to mean.

The drafting and interpretation of provision made under a power, and how it will fit with the wider legal landscape, is something that is considered carefully by those who draft legislation when deciding how to frame an enabling power in a Bill; particularly where the substantive provision in a Bill is to be fleshed out by regulations. It would, for example, be both inconvenient and a source of legal uncertainty if the effect of the law on a person can only be determined by reading both the primary and the secondary legislation but different interpretation legislation applies to each and it is not entirely clear as to which applies.

Considering the above concerns, I would request that subordinate legislation that is made under an Act of the Parliament of the United Kingdom be excluded from the scope of this Bill.

I am copying this letter to the Chair of the Constitutional and Legislative Affairs Committee, as I understand that the Committee will be giving further consideration to the Bill in the near future.

A handwritten signature in black ink that reads "Robert Buckland". The signature is written in a cursive, slightly slanted style.

**ROBERT BUCKLAND QC MP  
SOLICITOR GENERAL**