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# **Form and Accessibility of the Law Applicable in Wales Consultation Analysis**

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**LCCP223 (Analysis)**

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# **FORM AND ACCESSIBILITY OF LAW APPLICABLE IN WALES: ANALYSIS OF CONSULTATION RESPONSES**

## **SUMMARY**

- 1.1 This document analyses the responses received to the Law Commission's consultation paper, *Form and Accessibility of the Law Applicable in Wales*. This document will provide a summary of the views of consultees in relation to the 73 consultation questions asked in the consultation paper.
- 1.2 Alongside the consultation paper we also produced a questionnaire to support our impact assessment. The questionnaire aimed to gather evidence on the costs and benefits of improving the accessibility of the law in Wales. The questionnaire ascertained evidence on the savings of having more accessible law in monetary terms and the benefits of some of the solutions explored in the consultation paper. Questionnaire responses were anonymised.

## **THE CONSULTATION PROCESS**

- 1.3 The consultation paper was published on 9 July 2015. The consultation period ran until 9 October 2015 and was officially closed at the Legal Wales Conference 2015, at which the Law Commission presented. The deadline was extended to the end of October 2015 to take account of the fact that part of the consultation period ran over the summer.
- 1.4 To launch our consultation period we held an advisory group meeting on 23 July 2015 in the Pierhead building in Cardiff. The advisory group represented a broad range of stakeholders including the Welsh Government, local barristers, legal academics, the Welsh Language Commissioner and pro bono service providers, for example. The meeting was used to present the three Parts of the paper in turn, opening the floor to questions and comments after presenting each Part.
- 1.5 During our consultation period we also held a regional meeting with local government lawyers in North Wales. In addition, we attended a Lawyers in Local Government Wales Branch meeting in Llandrindod Wells. We were also able to hold two focus group discussions at Aberystwyth University in which we received views from academics, students, local practitioners, local government and the third sector. A focus group was arranged with the Wales Council for Voluntary Action's Alliance for Alliance group which included representatives from Royal Society for the Protection of Birds, Citizens Advice Wales and Welsh Women's Aid, for example.
- 1.6 We also attended two conferences ('Administrative Justice in Wales and Comparative Perspectives' at Bangor University and Legal Wales 2015) and the launch of the Law Wales website at the National Assembly for Wales.
- 1.7 In addition, we undertook extensive consultation on a one-to-one basis with a wide range of stakeholders. Stakeholders included non-governmental organisations, public bodies, the judiciary and practitioners, for example.

- 1.8 The views recorded in the above meetings, focus groups and conferences are represented in the consultation analysis, however views were recorded under Chatham House Rules. Stakeholders will therefore be identified as a category of stakeholder rather than as individuals. For example, any views recorded in a consultation meeting with Citizens Advice Wales will be recorded as the views of a third sector organisation.
- 1.9 Finally, we received 45 written consultation responses. Responses were received from individuals, organisations, public bodies and commercial entities, for example. Organisations included the Care Council for Wales, National Farmers Union, Universities Wales and associations such as the Association of London Welsh Lawyers. A full list of consultees will be an appendix to this consultation analysis.
- 1.10 This project is commissioned by Welsh Government and therefore a written consultation response was required by the Welsh Government.

# CHAPTER 1

## INTRODUCTION

- 1.11 Chapter 1 asked only one consultation question, which requested information on the cost and benefits of the proposals made in the consultation paper. Consultation analysis of this chapter will also include general introductory remarks made by consultees.

### General comments

- 1.12 The Lord Chief Justice of England and Wales stated:

This is a real opportunity for Wales to set the bar high and enable the advantages of being a new legislature to be realised. The volume of legislative output, although increasing, is still currently small enough to allow for a different approach to be taken, whether that be codification or at the very least, consolidation of the law. As Wales moves into the next phase of devolution, it is fundamental that the issues are dealt with now and that the future standing of Welsh law is secured.

- 1.13 Many consultees made general, introductory comments on the importance of law being accessible. Dame Rosemary Butler AM (Presiding Officer of the National Assembly for Wales) commented:

I entirely agree with the proposition that the accessibility of the law is a pillar of democracy. This is a natural extension of the efforts I have been making throughout my tenure as Presiding Officer to open up the entire democratic process to the people of Wales. I also agree that form and presentation can hinder or aid accessibility.

I believe it is urgent that we in Wales move to make up-to-date, bilingual, versions of the law applicable in Wales, in all devolved fields, available to the citizen free of charge and in one place. I applaud the efforts that the Counsel General to the Welsh Government is already making in this regard.

- 1.14 The Welsh Government commented:

Welsh Government is keen to grasp the opportunity now presented to provide once again a different and better way of doing things in and for Wales, and in this case in a way which has important cross-cutting effects upon the effectiveness and efficiency of the policy decisions made under devolution. The law, and the clarity and accessibility of the law, is the essential tool for converting the policy aspirations of Welsh Government and the National Assembly for Wales into real benefit to the people of Wales.

- 1.15 The Association of Judges of Wales highlighted that the issues explored in the consultation paper are not relevant to Wales only:

It is clear to us that there is little appreciation in England of the impact of Welsh devolution and the powers of the National Assembly for Wales to change the law as it applies in Wales. Such is unsurprising when law changes are around the margins. They begin to gain more significance and importance when law reform in Wales is introduced on subject matter of core importance to the population generally and we now see that point to have arrived.

1.16 The National Trust explored how the position in Wales affects the position in England:

An issue which faces the National Trust legal team but which is not covered by the consultation questions is the difficulty identifying where there are differences between English and Welsh law. (This issue is picked up in the completed questionnaires accompanying this response). Differences between English and Welsh laws occur when the law in either country is changed. Keeping track of major changes in the law of Wales is easy (for example we are closely monitoring the Renting Homes (Wales) Bill and actively engaging with the Welsh Government) but the implementation of more minor changes and keeping the legal team up to date is more difficult. This applies to changes to the law in Wales and to changes in England, both create divergence and we have to track both to see when and where divergence occurs. Quite frequently the law in England changes and the law in Wales remains the same. For example, the recent Small Business, Enterprise and Employment Act 2015 made some changes to the operation of the security of tenure provisions of the Landlord and Tenant Act 1954 in relation to home workers, it was not straightforward to work out whether these changes apply only to England or to England and Wales.

1.17 Consultees made a variety of comments on why the law must be accessible and what it means to have accessible law. Consultees also offered general comment on why the law applicable in Wales is not accessible. Much of this comment focused on the devolution settlement, including its incremental evolution and consequences. For example, the Association of London Welsh Lawyers stated:

Legal practitioners have to grapple with the sheer volume of primary and secondary legislation and the frequency with which it is amended. In Wales, these difficulties have been compounded by reason of the incremental “*evolution of devolution*”.

For example, functions under a large number of Acts of Parliament have been transferred to Welsh Ministers, but this is not apparent on the face of the Acts of Parliament in question. Further complexity is introduced by the divergence of the law applicable in Wales from that applicable in England; a consequence of a fundamental difference in the political make-up of the two legislatures.

This divergence in the applicable laws will inevitably become more pronounced over time. Now is the time to seize the opportunity to ensure that the form of Welsh law is expressed in a clear and coherent way, and to ensure that there is proper access to the law that is applicable in Wales.

- 1.18 Two consultees also suggested that the law could be made more accessible to the user if Assembly Measures were renamed Assembly Acts. Measures and Acts have the same status but they appear as two different categories of legislation which does not aid clarity.
- 1.19 Similar comments about inaccessible law were broadly echoed in consultation meetings across the length and breadth of Wales. It was these concerns that were shared by the Law Commission's Welsh Advisory Committee, where the idea for the project originated.
- 1.20 Consultees also gave their views on some issues that are outside the scope of the project. Issues included access to justice, professional training for lawyers and judges, co-operation between the legislatures in England and Wales, use of Artificial Intelligence and a separate jurisdiction for Wales.

#### **Access to justice**

- 1.21 At the outset of consultation meetings, it was made very clear by the project team that the project remit does not include access to justice. Regardless, given the prevalence of this issue, it was mentioned by some consultees.
- 1.22 In their consultation response, Citizens Advice Cymru stated:

Cuts to legal aid and the recent and alarming rise in litigants in person, who rely on themselves to navigate court structures and legal language, will mean that the accessibility of legal language (and the legal system generally) will be evermore important to get right. Clerks, lawyers and policy makers will need to keep this in mind when drafting legislation, as well as the explanatory notes which accompany it.

We believe that citizens have the right to understand the law which applies to them - which means that legislatures should always strive towards improving public engagement with the legislative process and the accessibility of the law. Given the current legal climate, in which legal advice and representation have been cut, there is arguably a greater need for information to be accessible to the public... This relates not only to people's understanding of the law - but also their awareness of its existence. A person cannot be knowledgeable about their rights if they don't know what rights apply to them. There is hence a responsibility on all governments - and on civil society - to ensure that the public are informed about legislation and the way in which it affects them.

- 1.23

- 1.24 Citizens Advice Wales commented that it is their belief that the Ministry of Justice “should be monitoring the ongoing impact of the rise of litigants in person on people’s access to justice”.

### **Professional training for lawyers and judges**

- 1.25 Consultees, both in consultation meetings and consultation responses, commented that there should be professional training for lawyers and judges on issues of Welsh language, divergent law and devolution.
- 1.26 An arms-length body informed the Law Commission of the new competencies tested for the recruitment process in relation to Wales. Competencies required for a judicial post might include knowledge of devolution or cultural knowledge, for example.
- 1.27 In a consultation meeting with central government and arms-length bodies it was explained that some training regarding the new Social Services and Well-being (Wales) Act has been arranged for the staff of HM Courts and Tribunals Service. Consultees in attendance stated that it is very important that the judiciary fully understand the changes introduced by the new Wales Act. Consultees referred to judicial training in general and noted that training sessions for England and Wales will usually inform attendees that the law may be different in Wales, but the differences will not be explained. Consultees further informed the Law Commission that divergent law has been added to the Wales Judicial Training Committee remit whereas previously their remit only extended to the Welsh language.
- 1.28 During a consultation event with a part-time member of the judiciary, judicial training was discussed. Similarly, this consultee mentioned a training event which failed to address to position in Wales. This consultee stated that luckily, a Welsh judge gave an impromptu talk on the divergent law in Wales. The consultee explained that there is a separate training course for Welsh speaking judges, which is held annually or biannually only.

### **Co-operation (or lack of) between the legislatures in England and Wales**

- 1.29 Some consultees highlighted the lack of co-operation and collaboration between legislatures in England and Wales. This point was made in consultation meetings and by Universities Wales and the Association of Judges of Wales in consultation responses.
- 1.30 The Association of Judges of Wales advocate setting up a United Kingdom/Wales Government Office to co-ordinate work. This is in line with the Association of Judges of Wales’ wider point that any consolidation and/or codification should be done on an England and Wales basis to achieve the best possible results.
- 1.31 In a consultation meeting, a central government lawyer also noted that there is a lack of communication between Welsh Government and the United Kingdom Government. An example given was the lack of communication between both governments with regard to the Civil Procedure Rules. A lack of communication has meant that the Civil Procedure Rules have not been updated correctly.

- 1.32 The Association of London Welsh Lawyers made a distinct point about the “little appreciation in England of the impact of Welsh devolution and the powers of the National Assembly for Wales to change the law as it applies in Wales”. Although this point does not concern the legislatures specifically, it does make a more general, wider point about continued communication between the legal sectors in both countries.

#### **The use of ‘Artificial Intelligence’**

- 1.33 Consultee Graham Ross (founder of Lawtel) noted in his response how the consultation paper failed to address the “most important opportunity in publication and that is to exploit the opportunity to allow Artificial Intelligence to play an effective role.” Mr Ross commented:

Too much of the paper addresses standard practices for publication mainly geared to informed researchers with a database structured, in traditional manner, by subject matter. There are a lot of sensible ideas in the document to improve searching but surely the challenge is to ensure the uninformed members of the public totally untrained in conducting research can readily access the law. That requires the application of Artificial Intelligence to help create intelligent online robot interrogators who take enquirers through easily understood logic trees of questions to help understand the query and then interrogate the database and produce relevant information from legislation with links to the source material.

#### **Separate jurisdiction**

- 1.34 The project team emphasised that due to the political nature of the separate jurisdiction debate, the Law Commission could not comment on the matter. The project team made clear that any recommendations developed after consultation would work regardless of the devolution model in place.
- 1.35 Regardless, consultees raised the issue of separate jurisdiction, some in detail and others in passing. In a consultation meeting with lawyers working in the private sector it was argued that a separate jurisdiction for Wales would improve the clarity and accessibility of the law. These consultees also questioned how codification of the law would be effective in a joint jurisdiction. Consultees explained that Westminster would continue to legislate for Wales on some matters that may be within a code, but Westminster would not be bound by the code procedure and, as a consequence, legislation would exist outside of the code.

#### **Consultation question 1-1: We ask consultees to provide information and examples of the costs and benefits of the proposals we make in this consultation paper.**

- 1.36 In addition to this consultation question, a cost and benefits questionnaire was produced. Over 30 consultees filled in the questionnaire. Only a limited number of consultees answered this question.



- 1.37 The Lord Chief Justice of England and Wales stated that “there is a strong economic argument for having good clear law”. The Lord Chief Justice noted that accessible, effective legislation is necessary for any effective market economy. The Lord Chief Justice summarised:

As fiscal purses are tightened, careful consideration of how Welsh law can be made easily accessible and navigable online will become increasingly critical if the legal sector in Wales is to continue to attract investment, and sustain itself competitively in domestic and international fields.

- 1.38 The Welsh Government gave a detailed response. It stated that the exercise of quantifying costs and benefits is difficult, but is an important question. The Welsh Government commented that

There is no doubt that much of the benefit involved is not quantifiable in monetary terms. It is probably disproportionately costly to attempt to place a specific monetary value on making it easier for the citizen to understand the law to which he or she is subject. The social benefit is, however, clear. It is a fundamental requirement of the rule of law that the law itself is accessible and as understandable as possible. Effective democracy requires citizens to know what laws apply to them at any given time and as well as how the law is proposed to be changed by the legislature or the executive. This issue can clearly impact upon on the engagement of citizens and civic society in the process of making Welsh laws.

- 1.39 The Welsh Government noted that “this issue is particularly relevant” considering the significant reduction in legal aid and the increase in litigants in person in the courts. The Welsh Government also made a similar point to the Lord Chief Justice about the impact of “complex and inaccessible law can have on the economy”. Finally, the Welsh Government outlined the benefit of time savings for the public sector, private sector and voluntary sector.

- 1.40 Professor Dawn Oliver (University College London) expressed:

Considerations of cost, political commitment, politicians’ and officials’ time, and conflicting opinions among stakeholders all make anything other than incremental progress probably overambitious.

1.41

- 1.42 Dr Catrin Fflur Huws (Aberystwyth University) identified one of the most substantial costs of consolidating the law as tying up the legislative process within the National Assembly:

One of the most substantial costs resulting from the creation of the ideal situation in which all legislation on one subject is included within one statute is the fact that it would tie up the legislative process within the National Assembly. As it is only a small legislature, the process of codifying and re-legislating means that the Assembly would always be looking to the past.

1.43 With regards to benefits, Edwin Hughes (lay Magistrate) took a common sense approach and argued that if the law is easier to find, it will save money for those needing to access it.

1.44 The Association of Judges of Wales made a similar point and commented:

The hourly remuneration of all those potentially affected having to research the law represents a substantial cost burden which would be saved by rationalising the present complexity though we accept that any real financial saving would be difficult to quantify.

1.45 The Association also noted that there would be unquantifiable savings if errors were prevented.

1.46 Dame Rosemary Butler AM (Presiding Officer of the National Assembly for Wales) thought that it would not be possible to quantify the costs and benefits of the proposals. She stated:

It is not possible to quantify the costs and benefits of consolidation and/or codification at this stage. However, I can say with confidence that the time taken for research by Assembly lawyers would be significantly reduced. I am also advised that the same applies to lawyers and officials in other parts of the public sector, and to the private sector. This would achieve resource efficiencies and possibly even cash savings. Codification in particular would have a significant impact in terms of time saving, particularly if secondary legislation, guidance, directions, circulars and other relevant information were all linked to the relevant code.

1.47 David Michael (Neath Port Talbot County Borough Council) noted that it would be easier to identify the costs of the current situation than identifying the costs and benefits of the proposals made in the consultation paper. Mr Michael summarised the cost of the current system under the following headings: additional search time, the cost of mistake, the effect of residual doubt and lack of shared understanding. In regard to additional search time, Mr Michael reflected on his experience and stated:

Research time can now be two or three times longer than should be the case and, sometimes where there has been considerable amendment to an England and Wales statute hours can be lost in piecing together a composite version of the law as it applies in Wales before such version are available from the electronic subscription publishers.

1.48 In relation to the cost of mistake, Mr Michael gave an example where costs had been incurred due to mistake:

One particular case comes to mind is that of a developer who had received incorrect advice from his solicitors and a barrister instructed on his behalf based on mistaken identification of the law which applied in Wales. This got to the preliminary stages of litigation and the error was only identified when the solicitors released their counsel's opinion to the local authority. This one mistake will have cost some thousands of pounds to the private sector client and to the local authority.

- 1.49 In relation to residual doubt Mr Michael explained that previously, when giving advice, lawyers would do a "check of the general reference material and further check to see whether there had been any recent statutory changes" and this would provide a "sound" basis to give advice. He commented that now, that degree of assurance is sometimes lacking:

Lawyers working with inadequate materials against strict time limits will sometimes err on the side of caution or give advice which is so qualified that it is of limited value.

- 1.50 In relation to lack of shared understanding, Mr Michael explained:

If there is lack of clarity in legislation which is produced by the National Assembly, there will be a fundamental lack of mutual understanding between legislators, those civil servants advising the National Assembly and Welsh Government, the local government community and the public at large.

# CHAPTER 3

## INTRODUCTION

- 1.1 Chapter 3 looked at the current legislative process and the Welsh Government.
- 1.2 Only two consultation questions were asked in this chapter. Consultees also offered some general comment on the current legislative process and the Welsh Government.

### General comments

- 1.3 In relation to the legislative process, many consultees made issue of the capacity of the National Assembly as a 60 Member legislature. Huw Thomas (National Farmers Union Cymru) explained that the volume and complexity of legislation passing through the Assembly is significant. Real questions should be asked as to the capacity of the Assembly to adequately scrutinise the legislation. This will be explored further below.
- 1.4 In respect of the Welsh Government, consultees made a range of observations. Huw Thomas commented that National Farmers Union Cymru “is concerned about the length of time it can sometimes take for the Welsh Government to implement the relevant provisions in Acts of the United Kingdom Parliament that extend to England and Wales”. An example given was the Commons Act 2006.
- 1.5 Other comments were made regarding the Welsh Government’s method of implementing legislation. For example, in a consultation meeting with a third sector organisation, the Welsh Government were criticised for not giving any details on legislation which was soon to come into force. The example given was the Housing (Wales) Act 2014, which has a section on mandatory landlord registration. It was stated that the only detail that had been disclosed about this change was that the managing council would be Cardiff. No details were given concerning the price of registration, for example.

### Consultation question 3-1: We welcome consultees’ views on the current legislative processes.

- 1.6 Consultees gave a range of views on the legislative processes in Wales. Consultees identified strengths and weaknesses of the processes.
- 1.7 Keith Bush QC commented on the legislative process:

The Assembly decided, by means of its Standing Orders, to follow the example of the Scottish Parliament by ensuring that a Bill would be scrutinized by a Committee, that would receive evidence from the public as well as from the Bill’s promoters, before the entire Assembly voted in the general principles of the Bill, with the aid of the opinion of that Committee (and the Finance and Legislative Committees). The advantage of that system is that it allows the Minister to receive ideas on how to improve the Bill before it goes too far. Thus, the Minister can yield to sensible arguments without feeling that he is losing his authority.

It is possible, of course, to criticise some aspects of the procedure described. It is not always easy to differentiate between the general principles of a Bill and its details. An the tendency of Government to make far-reaching changes to a Bill after its general principles have been discussed, undermine the credibility of the process. But to avoid this kind of problem, it would be a matter of tightening up the present system, rather than getting rid of it.

- 1.8 The Association of London Welsh Lawyers said that the starting point to consider, when expressing a view on the legislative process, is the nature of the devolution settlement. The Association highlighted the lack of clarity and certainty in the devolution model for Wales. It stated that this lack of clarity means that time is spent exploring whether a subject is within competence.
- 1.9 During a consultation meeting, a third sector organisation identified two main concerns; the way in which Welsh Government bring secondary legislation and its prioritisation of legislation. It was explained that the way in which the Government bring secondary legislation does not give Members the opportunity to scrutinise the legislation. A similar view was also expressed by a lawyer working in the public sector who said that the Assembly often opts for a super-affirmative process for secondary legislation, which seems to be a quick fix to get legislation through, however this causes blockages further down the line when Committees consider the legislation. It was also stated that the lack of prioritisation of legislation means that there have been big framework Acts in the Assembly.
- 1.10 Framework Acts were a concern submitted by other consultees. During consultation meetings we heard on numerous occasions that there is a real problem with the amount of detail being left to secondary legislation. Many argued that this sort of law making creates a democratic deficit. Moreover, consultees complained of occasions where 'random' sections of legislation have been added on to Bills going through the Assembly although they do not share the same subject matter. This seems to be a means of getting particular sections of legislation through as soon as possible.
- 1.11 Another concern expressed in consultation meetings was the silo thinking of the Welsh Government. It was argued that the Welsh Government does not consider the cumulative effect of legislation. An example given was the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016, which both effect the rental market.
- 1.12 Over-legislating was another concern widely expressed and examples were provided. For example, during a consultation meeting a consultee compared the position in England and in Wales in terms of deciding to legislate. In Wales it was not clear if quality frameworks applied to the Higher Education (Wales) Bill. England experienced a similar problem and agreed a protocol with the funding council. The Welsh Government, however, decided to pass regulation on the matter.

1.13 Huw Williams (Geldards LLP) compared the current legislative process in Wales to that of Westminster. He commented that apart from being unicameral “it is the disparity in size between the respective legislative corps that stands out even after allowing for the difference in population size”. He compared how the Planning (Wales) Act was scrutinised by 60 Assembly Members whilst planning reforms by England will be “considered by a combined legislative corps of around 1500”.

1.14 Mr Williams stated that the legislative process in Wales is at its strongest during Stage 1, which is when stakeholders can give evidence to the Committee. He stated that it is during Plenary that the disadvantages of a small legislature become apparent:

During the passage of the Planning (Wales) Bill the Stage 1 debate on the principle of the Bill only allowed time for nine Assembly Member’s in addition to the Minister to speak, while the contributions in the subsequent stages were confined to the Minister and the respective party leads.

1.15 Many consultees commented on the quality of the scrutiny of legislation, including Edwin Hughes (lay Magistrate), Keith Bush QC and Citizens Advice Cymru. Mr Bush stated:

More challenging is the problem of the inability of members, due to their small numbers, to specialise in specific subjects, developing better technical knowledge of the various aspects of legislation. Implementing the recommendation of the Richard Commission to increase the number of Assembly members to 80 would be a considerable step forward towards improving that weakness.

1.16 Some consultees commented that the limited number of Assembly Members is putting pressure on the third sector in terms of scrutiny. However, a lawyer working in the public sector took a more positive stance on this and described the scrutiny process in Wales as “collaborative” and “powerful”, where legislation is “created for the people by the people”.

1.17 Many consultees drew a parallel between the quality of the scrutiny and the number of Assembly Members. Such was the response of the Association of London Welsh Lawyers who described the lack of Assembly Members as “striking”. The Association of London Welsh Lawyers also noted the high turnover in Assembly Members:

It is also noted that there is a high level of turnover in Assembly Members. In the 2011 election, over a third of the Assembly’s membership changed with 23 new Assembly Members taking a set in the Fourth Assembly. This factor further supports the need for proper measures to be in place to give adequate resources to the Assembly Members in their scrutiny role.

1.18 The National Trust commented that it finds the current legislative process to be “clear and workable”. However it noted:

We agree that the rate of legislation in the current legislative period could place pressure on the scrutiny of legislation and put pressure on Parliamentary Counsel and the Office of Legislative Counsel's resources as well as on Assembly Members' workloads. This is true especially at the committee stages (Stages 1 and 2) where much of the thorough scrutiny takes place. The rate of legislation also places a demand on organisations such as the National Trust, which wish to engage with the legislative process. In the National Trust this usually takes the form of staff time, though to respond to a recent consultation on the Renting Homes (Wales) Bill, the National Trust felt it important to engage some support from external solicitors.

1.19 Similarly, Citizens Advice Wales expressed that the legislative process would benefit from more time given to scrutiny. However it made clear that this was "in no way a criticism of the sitting Assembly Members, which we believe are restricted by the current number of backbenchers in the National Assembly".

1.20 Citizens Advice Wales argued:

It can be argued that this can make it difficult for specialisms to develop across the breadth of policy areas required, or indeed to hold the Executive to account. Assembly Members will be called on to sit on several committees, in addition it may be argued that not enough Committee time is given to the scrutiny stages of legislation. This can mean that legislation is not always as robust as it could be, as a result. As the maxim goes, "legislate in haste, repent at leisure". We believe that more time and resources should be given over to the legislative process in Cardiff Bay. We are aware that the Commission on Further Devolution for Wales has looked at this area and has suggested increasing the number of Assembly Members. We would support this recommendation.

1.21 A lawyer working in the public sector also commented on the issue of resources in a consultation meeting. The consultee made the following two observations about the Welsh Government:

1.22 Speaking from experience, the consultee commented that there are capacity issues in the Bill team, legal team and translation team within the Welsh Government. Often capacity issues cause delays.

1.23 Cardiff has tried to imitate how law is made in Westminster where there are distinct offices for departmental lawyers and drafters, for example. It was stated that this sort of set up had not necessarily worked in Wales and it has been realised that it is much more effective to work collaboratively.

1.24 Universities Wales considered the resource implications and stated “the current process in general appears to strike a balance between efficient enactment of policy and effective scrutiny”. Universities Wales regarded its experience of the Committees as “very positive”. However, Universities Wales added that the pre-legislative process could be strengthened. Universities Wales commented in respect to its experience of the Higher Education (Wales) Bill noting the following concerns: “late publication of consultation responses”, “lack of sufficient clarity on detail in the consultation” and “lack of continuing dialogue between the Welsh Government and the sector”. Universities Wales contrasted this to their experience of the Higher Education (Wales) Act 2015 Regulations where there was a “constructive and meaningful dialogue” with the Welsh Government. Consequently, “the regulations incorporated a number of changes explicitly in response” to Universities Wales’ comments.

1.25 With regard to the legislative process Universities Wales gave detailed comment:

Our experience of the role of the National Assembly for Wales in the process of scrutiny of primary legislation has been positive, and in particular we found that the Constitutional and Legislative Affairs Committee (CLAC) and the Children Young People and Education Committee (CYPEC) both played a vital role in ensuring that Higher Education (Wales) Bill was properly considered and improved. However there are number of aspects of the process that call for comment based on our experience.

In relation to the Higher Education (Wales) Bill, the Stage 1 Reports of both the CPE and Constitutional and Legislative Affairs committees appeared to share many of our concerns with the Bill as introduced, and set out a series of recommendations which we felt able to support in full. The Welsh Government, in the end, responded to sufficient number of these to address our most critical concerns, including bringing forward important amendments to address issues regarding the impact of the Bill as introduced for charity status and national accounts classifications of universities in Wales. A parting view expressed in Plenary, with which we strongly agree, however, was that the Higher Education (Wales) Bill could have been improved further.



A key issue is that in practice, despite much careful scrutiny of the Bills, amendments only have a realistic chance of being agreed if the Welsh Government chooses to support them. As was also commented in Plenary in the Stage 4 proceedings, a significant number of proposed amendments to the Higher Education (Wales) Bill, for instance, had the full support of all opposition parties in Stages 2, but with votes equally divided on party lines the motion to agree the amendment fell on the Chair's casting vote as required by standing orders. We would question whether the current process enables the National Assembly to apply similar levels of pressure on government to make or concede amendments as the longer bicameral process in Westminster which requires agreement to be reached between the two Houses.

While it could be argued that matters of policy are rightfully for the elected executive to determine subject to due scrutiny, we would question whether the current process gets the balance right when it comes to determining constitutional or legislative matters. The selective acceptance of the Stage 1 report recommendations of the Constitutional and Legislative Affairs Committee bears further consideration in this context. It is difficult to see why for instance the Welsh Government should be the final arbiter about what level of scrutiny the Assembly should apply to regulations when the Welsh Ministers seek to exercise powers they have conferred on themselves in a Bill. Decisions about whether provisions should be included allowing the Welsh Government to amend primary legislation by means of statutory instrument (i.e. Henry VIII clauses) also raises constitutional issues – and we expressed our concerns about the inclusion of three such clauses originally included in the Higher Education (Wales) Bill which seemed to provide unnecessary latitude for future amendment with limited scrutiny. If a Bill seeks to reserve too much policy detail to be determined by regulations, rather than placing it on the face of the Bill - as we felt was the case with the Higher Education (Wales) Bill and we gather has been a criticism of a number of other Bills - not only does this deprive stakeholders of the opportunity to comment on the Bill meaningfully it lessens the scrutiny of the National Assembly. On the face of it these should be matters for the legislature, not the executive, to determine.

- 1.26 Moreover, Universities Wales emphasised how the legislative timescales for the Higher Education (Wales) Bill were “extremely challenging at times”. It commented that “more time for consideration and or additional stages could potentially afford a better opportunity to ensure that a fuller range of issues could be deliberated in detail”. It noted that there also seems to be a lack of legislative counsel in Wales as it is often referred to by Welsh Government officials.
- 1.27 Universities Wales also gave its view on the negative resolution procedure in Wales:

Firstly, we would welcome guidelines that ensure that this not being used routinely for regulation-making powers: one of the key criticisms of the Higher Education (Wales) Bill as introduced was that it delegated too much policy detail to regulations with the lowest level of scrutiny, although a number of the procedures were amended to affirmative resolution procedure in the Bill as finally enacted.

A second issue is that the current arrangements enable regulations to come into force before there is an opportunity to consider and table a motion to annul them if appropriate. For instance, three sets of regulations were made under the Higher Education (Wales) Act 2015 following this procedure, and laid with their accompanying documentation between 9 and 13 July 2015, the final week that the Assembly was in session. They came into force on 31 July 2015 during the summer recess, but currently still fall within the period for potential annulment which will not expire until the end of October 2015. As they apply to Wales the provisions require that notification/explanation must be given if the instrument is not laid at least 21 days before coming into operation but we question whether this safeguard goes far enough (no such notice was presumably required in this example, despite the Assembly being in recess). We would welcome guidelines that ensure that in normal circumstances regulations do not come into force until the expiry of the period for annulment, providing an opportunity to prevent issues in advance of coming into force and for stakeholders to prepare for the implementation timetables that these effectively set.

- 1.28 Finally, Universities Wales noted the lack of process for scrutinising commencement orders during the passage of the Higher Education (Wales) Bill.
- 1.29 The Wales Local Government Association referred the Law Commission to its evidence to the Constitutional and Legislative Affairs Committee which comments on the current legislative process in Wales. It noted that the 'Making Law in Wales' report recommends improvement to the Welsh Government's legislative planning and preparation process. The report also made recommendations on the Assembly's legislative process, such as having consolidation procedures.
- 1.30 The Presiding Officer of the Assembly, Dame Rosemary Butler AM, also referred to the 'Making Law in Wales' report and reiterated her view that the Government and the Assembly have improved in terms of capacity over the course of the Fourth Assembly. The Presiding Officer commented that:

A core strength of the Assembly's committee system as implemented at the start of the Fourth Assembly is that committees are responsible for scrutinising both policy and legislation with their remits.

- 1.31 The Presiding Officer gave her view of some improvements that could be made in the current legislative system:

It would assist committees in planning their scrutiny of Government Bills (and stakeholders in engaging) if more information was made publicly available (including on the Welsh Government website) earlier in the development process. It would be helpful to investigate in due course how effective legislation is in achieving Welsh Government objectives (such as Programme for Government commitments and wider outcomes) compared with other policy *levers*.

1.32 The Welsh Government also referred the Law Commission to its response to the 'Making Laws in Wales' inquiry. The Government also stated that the Government's focus in the Assembly's first full term as a legislature was Bills that reformed the law by making substantive changes to policy.

1.33 The Association of Judges of Wales recognised their constitutional position which limits them from commenting on matters of a political nature. However the Association offered some comment as to what would be helpful for the judiciary. It suggested that there should be an expansion on the scope of criteria featured in the explanatory memorandum. For example:

The first of those criteria is a requirement to "outline policy objectives". We suggest that it would be helpful to indicate, in relation to proposed Welsh legislation, how those policy objectives differ from the objectives of the current legislation and how attaining the new objectives will impact upon existing primary and secondary legislation.

1.34 The Association of Judges of Wales also suggested that the third criterion, "details of any consultation" should be expanded and the consultation should be expanded to include reference to the Civil Procedure Rule Committee and, where necessary, the Family Procedure Rule Committee. The Association gave justification of why this expansion in scope is necessary:

The lack of any such consultation to date is a lacuna in the Welsh legislative process. For example, the introduction of the new Housing legislation implemented and proposed for Wales has at no point to date been referred for consideration by the Civil Procedure Rule Committee. As a consequence, there are currently no Court Rules drafted to lay down the procedure required to bring cases before the Courts under the Welsh legislation. Substantial amendment of the current Court Rules and Procedure is going to be required to accommodate the Welsh legislation (more likely the provision of a separate part to Civil Procedure Rule 55 applying solely to cases brought under the Welsh legislation – so radical will be the differences between housing law in England and Wales).

1.35 David Michael (Neath Port Talbot County Borough Council) did not comment on the legislative process itself, but focused his comments on pre-legislative scrutiny from the perspective of local government. Mr Michael emphasised the usefulness of local government seeing Bills in draft form before going into the legislative process. However, he commented:

There is a lot of expertise in local government and I question whether full use is being made of responses when the principles of legislation are being discussed. A workable scheme must lie behind all legislation and no amount of drafting skill will make up for its absence.

- 1.36 Other consultees gave a more political perspective to the current legislative process. For example, a policy person working in the public sector stated that there should be a presumption of draft Bills because normally, by the time legislation has been introduced in to the Assembly, Members have to adopt a party line because they are tightly whipped.

**Consultation question 3-2: Do consultees think that a special procedure for non-controversial Law Commission Bills should exist in the National Assembly?**

- 1.37 The majority of consultees supported having a special procedure for non-controversial Law Commission Bills in the National Assembly. Consultees that supported having such a procedure included the Presiding Officer of the Fourth Assembly, the Welsh Government, Law Society Wales, Wales Local Government Association, Marie Navarro and Keith Bush QC.

- 1.38 Professor Thomas Watkin agreed that when consolidation Bills are not changing the law, stating “the level and kind of scrutiny required for Bills changing the law is not needed”. The Association of London Welsh Lawyers agreed with Professor Watkin. The Association commented that procedures that apply in Westminster and Scotland in relation to the introduction of Law Commission Bills should also apply in Wales.

- 1.39 Dr Catrin Fflur Huws (Aberystwyth University) took a slightly different approach and questioned whether it would be problematic:

Is this not problematic due to the fact that there is no scope for debate, how could it be argued that it is noncontroversial? However if a draft bill has been prepared by the Law Commission, it is sensible not to duplicate its activity.

- 1.40 The Association of Judges of Wales agreed that a special procedure should exist but argued that this is a process that should be led by Westminster:

Reform of the legislative process is required to produce a composite Statute Book clearly defining the law of England and Wales with special procedures being introduced to facilitate the passage of Technical Bills aimed at legislative reform including non-controversial Law Commission Bills.

However, this is not a process to be left to the NAW alone but should be led by Westminster. In that way, there is some prospect of being able to consolidate or codify the laws of England and Wales to achieve the clarity required to enable the population to find the law and the judiciary to apply it wherever they are required to do so throughout England and Wales.

- 1.41 The National Trust acknowledged that if such a procedure was adopted it could make it easier to work with Welsh law in specific areas. However, the National Trust stated that “there must remain some opportunity for consultation” adding:

New or amended legislation can sometimes affect these powers in unintended ways, and it is important that the National Trust can engage with the legislative process to ensure against unintended consequences.

- 1.42 Similar caution was expressed by Universities Wales, who thought that a special procedure “could potentially promote a more efficient and effective scrutiny of consolidation Bills which simply attempted to re-frame the existing law”. However Universities Wales highlighted that there are also dangers in providing a process that could be used more widely. They described their experience with the Higher Education (Wales) Bill:

We highlight in particular the discussions in committee on the Higher Education (Wales) Bill reflected in the Constitutional and Legislative Affairs Committee’s Stage 1 Report which highlighted the very different understanding between the Welsh Government and others of what was meant by “technical” and the level of scrutiny merited for such provisions. Similarly, there may be issues over agreeing what is non-controversial. For a Law Commission Bill we would not expect there to be issues of general principles that require Stage 1 debate, but conceivably issues which require a consideration of general principles to resolve may arise in practice from the process of consolidation and a means of escalating any such issues for consideration should be available.

- 1.43 The Residential Landlords Association did not support establishing a special procedure in the National Assembly:

We would express concern with any mechanism that would allow a “non-controversial” Bill to pass through the National Assembly with a special procedure. Any Bill should have the opportunity to be subject to the same scrutiny process as any other piece of proposed legislation. If a topic truly is “non-controversial” it may expect to pass through the National Assembly relatively quickly under the normal process.

# CHAPTER 4

## INTRODUCTION

- 1.1 This chapter focused on drafting and interpreting legislation. We considered the specialist nature and practice of legislative drafting. We looked in some detail at the Legislative Drafting Guidelines issued by the Office of the Legislative Counsel and asked how far the Welsh Government's drafting practices achieve clarity. We also looked at the question of whether Wales needs its own Interpretation Act.
- 1.2 The Lord Chief Justice of England and Wales made valuable comments on drafting legislation:

I have for a long time spoken about the drawbacks of the Westminster model of drafting legislation and its inflexibility to allow the user to easily appraise changes. There is no reason to believe that the legislation that is drafted in Cardiff cannot equal, if not improve, on that drafted in Whitehall. Just because something has been done in a certain way for so long does not mean that it is infallible, nor that it is best suited to the polity and people of Wales. While Wales should look at what is produced by Westminster, it should not necessarily follow the model of legislation it produces; rather, it should seek to identify best practice and use it to develop a pioneering form of law.

- 1.3 The Lord Chief Justice also mentioned the distinction between primary and secondary legislation and commented that arguably there is little reason to maintain the distinction in a system of devolution "which already has complex governance structure at both a national and European level". The Lord Chief Justice suggested moving towards a system of codification where legislation is "set out comprehensively and systematically in one place".
- 1.4 Some other drafting issues that were mentioned by consultees were the use of non-textual amendments. A lawyer working in the private sector stated that they should be forbidden as they are "wrong, not ascertainable and not accessible". In contrast, Professor Inge Backer (Oslo University) stated that he was "intrigued by the strong general advice against cross-references in statutes":

While «double references» should be avoided, I think it may well be argued that «single references» (by that I mean references which do not end up in another reference) are sometimes useful in order to shorten statutory texts and, indeed, they are a logical result of the fact that any legislation tends to be a fragment of the relevant law. In my view, this may apply to global cross references as well; if, for example, a statute contains specific procedural rules, it might sometimes be helpful to include a reference to the general procedural rules which also apply lest they should be forgotten by the reader. Multiple single references may, however, hamper easy reading.

- 1.5 William Robinson suggested that the European Union model of drafting should be looked at as it has experience of drafting legislation in more than one language.

**Consultation question 4-1: Do consultees think that the current practice strikes the right balance between simplicity and precision in legislation passed by the National Assembly?**

- 1.6 There was a spectrum of opinion among consultees on whether the legislation strikes the right balance between simplicity and precision. Some consultees argued that overall the position is satisfactory, whilst others thought that there is room for improvement.

- 1.7 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM acknowledged the importance of clear and accessible legislation. The Presiding Officer was of the view that legislation drafted by the Welsh Government met the balance between simplicity and precision. The Presiding Officer acknowledged that there is room for improvement and she reiterated the concerns heard by the Constitutional and Legislative Affairs Committee inquiry, *Making Laws in Wales*:

1. Use of unfortunate terminology (for example, the use of the terms "half-blood" and "illegitimate" in relation to family members in the Mobile Homes (Wales) Act 2013);
2. Definition of terms by reference to UK legislation ;
3. Reliance on previous UK legislation as a model ;
4. Lack of consistency between English and Welsh versions, and within Welsh versions, of Bills on introduction;
5. A Bill being introduced with errors (in drafting and/or policy), which require substantial amendment and therefore impede scrutiny;
6. Errors in amendments tabled by the Government;
7. Imbalances between primary and secondary legislation, and between use in the latter of the negative, affirmative and super-affirmative procedures.

- 1.8 The Welsh Government shared a similar view to the Presiding Officer:

The Welsh Government is not aware of any significant concerns regarding the drafting of its legislation, which has been commended by the Constitutional and Legislative Affairs Committee of the National Assembly, a Supreme Court Justice and others, though that is not to say that there is no room for improvement. We consider, however, that the issue of most importance is how structural issues (the complexity of the statute book as a whole) can impact upon the clarity of drafting, not the drafting itself.

- 1.9 David Michael (Neath Port Talbot County Borough Council) at a local authority gave his experience of interpreting Assembly legislation:

In my experience of interpreting National Assembly legislation, I would say that the balance between simplicity and precision in drafting is generally appropriate although, self-evidently, that balance will vary between provisions. Where legislation is sometimes vague I think that this may sometimes arise out of the policy or scheme that the draftsman has been asked to put into effect rather than the skills of the draftsman him or herself.

1.10 A similar point was made by Huw Williams (Geldards LLP) who highlighted:

The influence of the policy behind the legislation must also be recognised. No amount of clear, modern drafting will compensate for a badly thought out policy. An example is the confusing policy development and legislative history of the Public Audit (Wales) Act 2013. The result is an unnecessarily complex and obscure Act. This is illustrated by examining the Act to attempt to establish the powers of the Wales Audit Office and its relationship with the Auditor General, for example the interrelationship between section 14 – Powers and 19 – Provision of Services.

By way of contrast the Higher Education (Wales) Act 2015 is a clear reform and restatement of the relationship between the Higher Education Funding Council for Wales and universities bringing clarity to arrangements spread over several different pieces of legislation.

At the same time, the contrast between these two pieces of legislation could also be indicative of the rapid progress in drafting technique and clarity during the First National Assembly with full primary legislative powers.

1.11 Angela Williams (Law Commission's Welsh Advisory Committee) thought that the legislative drafters in Cardiff had clearly been trying to write clearer law, but there remains room for improvement. Ms Williams suggested that the law could be made clearer by being subject to a more extensive editing process, which would be time-consuming but rewarding.

1.12 The Care Council for Wales gave its experience of the Social Services and Well-being (Wales) Act 2014:



Because of the recent law making powers of the National Assembly, we have limited legislation upon which to comment and our primary experience relates to the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Bill currently being scrutinised. The Social Services and Well-being Act (Wales) 2014 was a major body of legislation seeking to unify a significant number of existing Acts and also developing legislation to reflect current priorities. This resulted in a very complex and unduly weighty document which was not simple and, at times, imprecise. However whether this legislation is typical of previous National Assembly legislation and future Acts is unlikely.

- 1.13 A similar view was echoed by Catrin Fflur Huws (Aberystwyth University) who commented that legislation is getting “longer and longer”:

No, in England and Wales, legislation is getting longer and longer, with more and more secondary legislation associated with it. Primary legislation should emphasise the basic matters namely rights and entitlements and who is responsible. The Welsh Language Act 1993 compared to the Language Measure is an example of legislation where the important matters are in the primary legislation. On the other hand, the Language Measure includes a number of matters together with the administration and regulation of bilingual services in a manner which causes the relevant rights and entitlements to be dispersed. Primary legislation that placed more of the details in schedules would make the law easier to find.

- 1.14 Marie Navarro (Your Legal Eyes) warned against making general statements, as Assembly legislation comes in a variety of forms. Ms Navarro acknowledged that drafting in the Fourth Assembly has improved but stated that non-textual amendments are the “biggest source of inaccessibility as they are so difficult to ascertain even for trained lawyers”.
- 1.15 Universities Wales also commented that Assembly legislation varies. It stated that the legislation it has dealt with has been “largely” successful in striking a balance. However, Universities Wales gave a detailed account of an occasion where legislation could have been much simpler:

An instance of where we believe drafting could have been significantly improved – preferably before the Bill was laid – is provided by section 3 of the Higher Education (Wales) Act 2015. This aims to provide a potential process for designation of ‘other providers of higher education’ where they do not meet the criteria set out in section 2 of the Act. During the passage of the Bill through the National Assembly for Wales, we had lengthy dialogue on this section to clarify how it was intended to operate. We had received two separate legal interpretations from highly respected firms which were at variance with each other. The Explanatory Notes did not appear to illuminate the interpretation very far. Moreover, the Welsh Government’s further explanations did not appear to match the guidance in the Explanatory Notes very well. We pressed for amendment of the section and/or the explanatory notes, which could be taken into account in judicial interpretation. As a result, the Welsh Government added a further example of the type of situation that was meant to be covered by the provision in to the Explanatory Notes accompanying the Bill.

However, this did not fully resolve matters. As we commented in response to the Welsh Government’s consultation on the first set of regulations made under this section, a continuing lack of clarity over what provider of these provisions in the Act made it difficult to respond to the consultation meaningfully.

The definition of an ‘institution’ for purpose of the Act continues to cause problems and consume scarce resources in seeking to reach a workable clarity. With the transitional arrangements of the Higher Education (Wales) Act 2015 having already come into force, there is still a need to clarify when a provider which is part of a larger corporate structure should be regarded as an institution in its own right or an external provider. While this may be something that the Welsh Government issues further guidance about, it will remain for Higher Education Funding Council for Wales to ensure that it has taken its own legal advice on this issue before adopting a policy. Our view is that many of these issues could have been avoided in drafting, and that further consideration of the section prior to the Bill’s introduction could potentially have obviated the need for the significant time and resource spent in clarifying and compensating for this.

- 1.16 Keith Bush QC stated that the Assembly legislation does not achieve the right balance:

Although the Welsh Government's legislative drafters do their best to establish practices that make it easier to understand legislation, they are bound to the Westminster tradition which has, over the centuries, placed more emphasis on precision than clarity. The fact that so much of the legislation that is applicable in Wales is still England and Wales legislation means that it is not possible to break free from that tradition.

The clarity of Welsh legislation is also seriously undermined by the practice of changing the law in Wales by amending the statutes of England and Wales (as discussed in detail in the consultation document). A statute book that tries to serve the two countries, whilst legislation applicable in both countries develops in different directions, is a recipe for confusion.

- 1.17 Legal Wales agreed with the view of Mr Bush QC that Assembly legislation does not achieve the right balance.

**Consultation question 4-2: Would there be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines?**

- 1.18 The overwhelming majority of consultees thought that there would be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines.
- 1.19 The Welsh Government informed the Law Commission that the guidelines have been published on the Law Wales website.
- 1.20 The Care Council supported publishing the guidelines. It thought that the guidelines would be useful for reading and deciphering legislation. This view was echoed by other consultees such as David Michael (Neath Port Talbot County Borough Council), Huw Williams (Geldards LLP) and the Residential Landlords Association that commented:

Publishing the Office of the Legislative Council's Legislative Drafting Guidance would be of help throughout the policy process. Understanding how a Bill has been drafted and how civil society can engage at other stages of the policy process would be greatly helped by having this insight. Having this information would give civil society a greater understanding of how to approach and engage with Bills. This information would help increase the accessibility of the law without compromising the need for the law to be precise.

- 1.21 Keith Bush QC also thought that the guidelines should be published:

Doing so could be a good thing, by helping legislation users to better understand how legislation is drafted in a specific way. It could also give rise to discussions between solicitors and other users regarding the propriety of some of the guidelines. But the problem of ensuring the clarity of legislation runs much deeper than the technical guidelines and conventions of drafting.

- 1.22 Dr Catrin Fflur Huws (Aberystwyth University) thought that publishing the guidelines would be useful for researchers but less useful for lawyers and the public, as their interests lie in “finding what they can do and what they can’t do”. Sarah Nason (Bangor University) also considered how the guidelines would be beneficial for academic research and commentary as well as accessibility of legal materials for law students.
- 1.23 Universities Wales also thought that there would be merit in publishing the guidelines but noted that “more importantly, there needs to be consistency between the National Assembly’s approach and the guidance used in drafting”. Universities Wales gave the example of the Higher Education (Wales) Bill in which the Welsh Government “claimed to have followed Counsel General’s guidelines”; the Constitutional and Legislative Affairs Committee “however, clearly highlighted systematic differences in approach to its own”.
- 1.24 Local authorities from North Wales did not perceive a benefit in publishing the guidelines.

**Consultation question 4-3: Do consultees currently experience difficulty reading amended legislation?**

- 1.25 All consultees stated that they experience difficulties reading amended legislation. Consultees that agreed included Keith Bush QC, the Wales Council of Voluntary Action, Legal Wales and Marie Navarro.
- 1.26 The Welsh Government acknowledged the difficulty of reading amended legislation. It stated that reading amended legislation even presents a challenge for Government policy officials who need to understand the areas of law in which they work. The Welsh Government emphasised that understanding amended legislation is more difficult when there “is a need to make separate, and sometimes complex, provision for England and Wales”:

This is particularly so where there is a need to make separate, and sometimes complex, provision for Wales and England. It is for that reason that the Welsh Government has sought to restate the law rather than merely amend existing laws where practicable. It is important to note however that the impact of amending existing legislation rather than starting again varies depending on the complexity of the existing legislation that is to be amended and the significance and breadth of the amendments. There will always be a need to amend existing laws, the key is to ensure that it is not done in a way which adds to complexity and to ensure that the amendment is incorporated into the existing law in publication.

- 1.27 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM acknowledged that amended legislation can present difficulties. The Presiding Officer gave the experience of the Assembly with Bills that are particularly amendment heavy:

During the Communities, Equalities and Local Government (CELG) Committee's consideration of the general principles of the Historic Environment (Wales) Bill, it was suggested that making extensive amendments to existing legislation could add to its complexity and make it less accessible for users. The Constitutional and Legislative Affairs Committee considered that the Bill "would have been significantly better if introduced as a consolidation Bill." Likewise, the CELG Committee considered that a consolidation Bill "may have been more resource intensive... [but]... could have been more cost-effective in the longer-term."

- 1.28 The Care Council for Wales answered that it did experience difficulty reading amended legislation. It explained that the problem of reading amended legislation meant finding the original legislation, the amending legislation and then interpreting how the two pieces interacted. The Care Council for Wales suggested having links to the different pieces of amending legislation to make locating them easier. Angela Williams (Law Commission's Welsh Advisory Committee), previously of Citizens Advice Cymru, also agreed that amended legislation is difficult to read. Ms Williams commented that it is difficult to know if legislation has been amended at all. Ms Williams described trying to read amended secondary as "trying to do a jigsaw without knowing what the picture is or how many pieces there are".
- 1.29 Similarly, Dr Catrin Fflur Huws (Aberystwyth University) identified several problems with amended legislation:

Commercial publishers do not publish Welsh-medium forms of the legislation at all. Therefore, the service they provide is incomplete.

It is not always obvious whether the legislation has been updated.

Legislation for England and legislation for Wales have been included in the same legislation – an example of this is the Education Act 1996 where some clauses are relevant to England and others are relevant to Wales.

The National Assembly for Wales does not have the right to legislate on matters that are outside its remit. A specific example can be found in the clauses of the Welsh Language Act 1993 which is still in force (specifically section 22-27). The legislation would be much more comprehensive if this legislation had been included in the Language Measure, but as section 22-27 of the 1993 Act has not been included within the Measure, both acts are now incomplete.

Westminster makes amendments to English laws, but cannot change the legislation that is relevant to Wales. Thus the amendments to Section 45 of the Wildlife and Countryside Act 1982 are an example of this – where English law has changed, but the change has not been made to the corresponding law for Wales. Such amendments tend to fall between a rock and a hard place – Westminster is not likely to take responsibility, but neither is it given attention by Cardiff as they have not implemented it. Thus, what is needed is to decide who has that responsibility.

- 1.30 The Law Society Wales agreed that amended legislation can be difficult to read but stated that “there is a particular concern regarding ‘in force’ dates”. It described that amended legislation makes matters difficult but that this is the question of when a provision will be in force that causes further greater concern.
- 1.31 Consultees provided examples of amended legislation that is difficult to read.
- 1.32 Huw Thomas (National Farmers Union Cymru) gave the National Farmers Union Cymru’s experience of having to deal with amended legislation. He noted that the list of marshalled amendments to the Agricultural Sector Wales Bill ran to 38 pages in length. Huw Williams (Geldards LLP) voiced a similar concern and gave the example of the Planning (Wales) Bill.
- 1.33 The Association of Judges of Wales drew attention to the field of social care law. The Association analysed Part III of the Children Act 1989. For example:

The Children and Young Persons Act 2008 section 8(1) inserted the amended sections 22A-22F to the Children Act 1989. This relates to the provision of accommodation for children in care by local authorities.

Those sections were brought into force in England only. Those sections were not brought into force in Wales.

Accordingly, section 22 and 23 of the Children Act 1989 (pre-amendment) remain in force in Wales.

Furthermore, the revised secondary legislation which accompanied the implementation of those amended sections also applied to England only namely:

The Care Planning, Placement and Care Review (England) Regulations –applies to England only – [see Regulation 2(1)]

The Fostering Services (England) Regulations 2011 is applicable to England only [see Regulation 1(2)]

In Wales, the pre-existing Placement with Parents Regulations 1991 and the Fostering Services Regulations 2003 remain in force.

The Family Court Practice 2015 makes a passing reference to these different provisions in a footnote only at p577 (inserted after the General Editor Judge Cleary was so reminded by judicial colleagues in Wales). The “statutory instruments” section of Hershman and McFarlane on Children Law and Practice has omitted reference to and has not re-printed the above regulations which are still in force in Wales.

This situation is of the utmost concern because apart from (a) the difficulty in locating the still applicable provisions in Wales and (b) the substantial risk of applying the incorrect statutory provisions, there are also practical implications.

For example, the provision of interim placements or final placements of children with parents/holders of parental responsibility/holders of child arrangements orders - residence orders, being subject to the 1991 regulations permit a local authority to allow a child to live with such a person (in excess of 24 hours) only in accordance with the regulations i.e. they are of mandatory effect. Therefore, assessment under regulation 3 and schedule 1 is required subject to the regulation 6 provision.

1.34 The Association of Judges of Wales highlighted that the social care landscape in Wales is soon going to be changed drastically by the Social Services and Well-being (Wales) Act 2014. It was emphasised that this will be against the constitutional backdrop of family law not being devolved to Wales. The Association of Judges of Wales conclude by stating that the Children Act 1989 “is now a ‘patchwork’ in relation to Wales that clarity and public safety required some corrective action”.

1.35 Universities Wales gave examples of difficulties encountered with the Higher Education (Wales) Bill in relation to amending legislation:

In the case of the Higher Education (Wales) Bill, a number of highly important changes were contained in the section on ‘minor and consequential amendments’. Paragraph 2 of the Schedule, for instance, amended the Further and Higher Education Act 1992:

2(1)Section 70 (assessment of quality of education provided by institutions) is amended as follows.

(2)In subsection (1), for “Each council” substitute “The Higher Education Funding Council for England”.

A common issue with such schedules, as the Law Commission highlights, is that the impact is not obvious on the face of the Bill, and can only be found from investigation. The new Act contained a new duty in respect of regulated institutions – which the Explanatory Memorandum highlighted clearly. From the Technical consultation prior to the introduction of the Bill, it was not clear whether Higher Education Funding Council for Wales's (HEFCW) current duty to assess of the quality of education of the institutions it funds would continue under the new arrangements. The effect of the consequential amendment, however, was to remove HEFCW's existing statutory duty in relation to funded institutions altogether. This meant, and still means, that certain types of providers who were formerly potentially covered by HEFCW's quality assurance duty were no longer covered. It raises the possibility that HEFCW could fund an institution but not have a statutory duty to assess the quality of the provision it funded. A second consequence was that, as a result of the different formulation of the duty, provision outside of Wales was no longer covered by the quality assurance arrangements (although provision in England is now covered by a reciprocal arrangement with England).

The key point in this context is that the consequences of this were not widely recognized in State 1 scrutiny of the Bill before Universities Wales gave evidence to the Children Young People and Education Committee and were invited to submitted additional evidence on this topic. It became one of the key areas of concern in Stage 2 proceedings, with several amendments introduced by opposition parties attempting to rectify the apparent deficiencies in the legislation.

- 1.36 The National Trust commented that amended legislation is made more difficult to understand when the legislation is being amended differently for England and Wales.
- 1.37 The National Archives shared its user research with the Law Commission. One of the finding was that up to date revised legislation is essential for reader understanding. The National Archives commented:

It is clear from our research that with the exception of especially trained experts, it is not realistic to expect readers to find and piece together all the information needed to interpret an amended piece of legislation. The work to revise the legislation needs to be done for the user, in advance, so they can concentrate on understanding the text of a current version of the law. We do this work at The National Archives.



- 1.38 The National Archives (TNA) acknowledged updating legislation as a challenge. It described how TNA has developed “editorial tools and processes for much more rapidly revising legislation”. TNA described its Expert Participation Programme which enables TNA to bring people in from outside TNA who receive training to use the editorial tools and update legislation on legislation.gov.uk. This work is subject to a review process by in-house editorial experts.

**Consultation question 4-4: Should Keeling schedules be produced alongside Bills, where the Bill amends other pieces of legislation, and be published alongside the Bill in the explanatory notes?**

- 1.39 The overwhelming majority of consultees were, in principle, supportive of keeling schedules, however some questioned their true usefulness and whether they are the best use of Government and/or Assembly time. Consultees that supported this included the Care Council for Wales, Marie Navarro (Your Legal Eyes), the Residential Landlords Association and Universities Wales.
- 1.40 David Michael (Neath Port Talbot County Borough Council) thought that there would clearly be an advantage to publishers and practitioners if keeling schedules were used. However, Mr Michael questioned whether it would be possible to enact a consolidated Act instead. Mr Michael also considered an alternative model to consolidation and a keeling schedule:

An alternative modest proposal would be to disapply in relation to Wales certain sections or parts of UK statutes and simply insert parallel Welsh provisions incorporating the original and amending text. The practitioner would still have to ensure that he or she was looking at the Welsh provisions rather than the English only provisions in a UK statute – and some mistakes have been made by looking at the English provisions of the Local Government Act 2000 as opposed to the Welsh provisions – but this would still be a step forward. The practitioner would be able to work with a comprehensive set of amended provisions without having to look back on the previous or original version and the electronic library subscription service could simply slot in these provisions without laboriously amending the original provisions which would remain in force in respect of England.

- 1.41 Huw Williams (Geldards LLP) questioned whether keeling schedules exploit the full potential of online technology:

Notwithstanding the value of Keeling Schedules it is questionable whether they fully exploit the potential of online technology to produce text showing the additions and deletions to the original text. This also facilitates viewing the amendments against the original text and a clean version of the amended text. As a practical tool to understand what is intended this is the most useful and convenient approach for consultees.

- 1.42 Similarly, Keith Bush QC questioned whether something more radical could be possible with technology:

But perhaps the time has come to be even more radical. A piece of legislation should be as easy as possible to read. In the digital age, why should an act not indicate the text that is to be amended, the proposed amendment, and the amended text, *as part of the Act itself*? What reason is there for not developing new methods of presenting the effect of legislation that ignore conventions that developed when laws were published on paper and printed by hot metal technology?

1.43 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, considered keeling schedules as an alternative possibility to codification or consolidation. The Presiding Officer stated that two versions of keeling schedules should be published:

- (1) a "tracked change" version, illustrating changes to the original legislation; and
- (2) a "clean" version, illustrating the amended legislation.

1.44 The Presiding Officer stated:

A disadvantage of Keeling schedules is that they are not formal legal documents, and therefore the public cannot rely on them as law. This therefore creates the potential for uncertainty. However, this could potentially be addressed by legislation specifically referring to relevant Keeling schedules, thereby granting them formal legal status, but in a way which avoided them having to be considered as schedules to the amending Bill, as that would necessitate use of Members' limited time. However, such an approach would have other advantage over a consolidation process.

1.45 The Welsh Government thought that there would be a merit to Keeling schedules but it would depend on the circumstance. The Welsh Government reiterated that where practicable it seeks to re-enact legislation rather than heavily amending it. If it is not possible to re-enact the legislation then a keeling schedule would be useful.

1.46 The Association of London Welsh Lawyers took a similar position to the Welsh Government and thought that the additional cost and work of having Keeling schedules could be lessened by only having Keeling schedules for Bills that propose to significantly amend an Act.

1.47 The Legal Wales Foundation stated that keeling schedules "are probably not a good use of resources in the National Assembly". However, Legal Wales did think that the publishers of legislation could complete a similar functions by presenting online text versions of legislation "with strikethrough/underlining or preferable colouring for amendments". The Association of Judges of Wales shared a similar view.

1.48 David Gardner (Administrative Court lawyer for Wales) also questioned whether keeling schedules would be a good use of time:

Whilst Keeling schedules no doubt assist with clarification it would be a matter for legislative drafters to comment on whether their usefulness outweighs the time spent in drafting them. The absence of a Keeling schedule is, to a large extent, mitigated for legal practitioners by the use of online commercial legal services.

- 1.49 LexisNexis UK referred the Law Commission to schedule 5 to the Housing Act 1996 which is introduced by section 87. Section 87 and schedule 5 were never brought into force but remain on the statute book although LexisNexis UK described the schedule as “faulty”. LexisNexis UK considered how a Keeling schedule would act as a useful “checking tool” for an editor but highlighted how a keeling schedule “loses its value over time as amendments to the original material increase unless the keeling schedule is updated as well; and an editor would not update the keeling schedule itself without statutory authority in the form of a specific amendment”.

**Consultation question 4-5: Should Keeling schedules be formal schedules to an amending Bill that become law when the Bill is enacted?**

- 1.50 The overwhelming majority of consultees did not support having Keeling schedules as formal schedules. Consultees included the Welsh Government, Care Council for Wales, Marie Navarro (Your Legal Eyes), the Residential Landlords Association, David Gardner (Administrative court lawyer for Wales) and the Association of London Welsh Lawyers.
- 1.51 A minimal number of consultees supported having Keeling schedules as formal schedules. The National Trust, for example, considered that if such schedules were to be used, it would be important that they could be relied upon and the best way of achieving this would be through having them as formal schedules.
- 1.52 The Law Society Wales supported the use of Keeling schedules but commented that they are a useful tool most appropriately included in the explanatory notes. Marie Navarro (Your Legal Eyes) also thought that Keeling schedules should be part of the explanatory notes.
- 1.53 Dr Catrin Fflur Huws (Your Legal Eyes) suggested that rather than making Keeling schedules formal schedules it would be easier to make the amendments to the original legislation.
- 1.54 Huw Williams (Geldards LLP) took account of the already large statute book and regarded the merit of having Keeling schedules as formal schedules as “questionable”:

The merit of scheduling Keeling Schedules to Bills seems a questionable use of resources. I suspect that the complexities of the existing statute book will anyway preclude this in many cases. Consideration of the Planning (Wales) Bill will show the scale of Keeling schedules that would have been required had the scheduling technique been employed and would surely have been tantamount to a full consolidation. The practicality of managing Keeling schedules on such a scale within the structure of much of the current statute book is questionable.

Accordingly, I support the development of the Keeling Schedule into an “informal” on-line hyperlinked resource.

- 1.55 Universities Wales referred to the Constitutional and Legislative Affairs Committee’s recent report which recommended having “keeling-type schedules” as “separate formal documents accompanying the legislation, or annexed to the Explanatory Memorandum”. However, Universities Wales considered how this may make the explanatory memorandum less accessible and there would be a risk of the schedule being at variance with the Printer’s copy.
- 1.56 Angela Williams (Law Commission’s Welsh Advisory Committee) explained that the schedule need not be “formal” but that it would be useful to see a “working document”, perhaps one created during the drafting process to see what sections were changed and how.

**Consultation question 4-6: What features would consultees like to see in Keeling schedules, or other documents showing amendments, to make the changes as clear as possible?**

- 1.57 Consultees provided a range of options.
- 1.58 The Care Council for Wales stated that it would like changes to be shown as “tracked, with links to any documents referred to”. Similarly, Keith Bush QC commented that a starting point could be a “tracked changes” document. The National Trust and the Association of London Welsh Lawyers also shared this view.
- 1.59 Universities Wales stated:
- Wherever possible these would need to provide as much of the original legislation as is required for a reader to understand the precise effect from the amended extract alone (**Question 4-6**), but some form of introduction to contextualise an extract could be used where more pragmatic and helpful to do so.
- 1.60 Marie Navarro (Your Legal Eyes) argued for a higher standard:
- A commentary of each amendment, why needed and what they try to achieve. Purpose and effect tables are very useful in relation to amendments.
- 1.61 The Welsh Government also thought that there would be some cases in which an explanation of the effect of the amendment may also be appropriate.
- 1.62 LexisNexis UK commented:
- One question is begging to be answered in connection with Keeling schedules. “If the Keeling schedule is accurate, then why not use it to directly substitute the provisions it sets out?”

**Consultation question 4-7: Do consultees find overviews helpful in navigating or understanding legislation?**

1.63 Consultees were generally supportive of overviews. Consultees included Professor Dawn Oliver (University College London), the Care Council for Wales, Huw Williams (Geldards LLP), Professor Noel Lloyd (Aberystwyth University), the Legal Wales Foundation and the Law Society Wales. The Association of London Welsh Lawyers also thought that overviews were helpful but thought that they would be better placed in the explanatory notes.

1.64 Dr Catrin Fflur Huws (Aberystwyth University) explained that overviews can mislead but can also correct presumptions:

They can be, as they can over-sell the purpose of the Legislation. For example, the Language Measure does not include any specific rights relating to the Welsh language – rather, they grant power for the creation of rights. Thus, overviews can mislead, but can also correct presumptions. Also, they can be useful in terms of laying down a pathway regarding what legislation is relevant.

1.65 Angela Williams (Law Commission’s Welsh Advisory Committee) also thought that overviews are useful but suggested including hyperlinks to different sections of the Act to aid users further.

1.66 In contrast, David Michael (Neath Port Talbot County Borough Council) stated that the purpose of overviews are difficult to understand, as if they are included in the legislation, it would seem that they have an effect in regard to its interpretation. The Residential Landlords Association also considered the danger of users of legislation reading the overview sections and using them to interpret the legislation:

There is a real risk for those who do not regularly interact with legislation, that the overviews are used as a direct interpretation of the law. However we believe that because Overviews are contained within the legislation, this risk is mitigated. While we believe that Overviews have more benefits than potential negatives, we do not believe the same would stand for aspiration or “purpose” clauses.

1.67 Universities Wales commented that overview sections are not helpful and can complicate the interpretation of legislation. Universities Wales gave its experience with the Higher Education (Wales) Bill in which two amendments had to be made to the overview at Stage 2 to improve the description of some provisions of the Bill.

1.68 Keith Bush QC presented as more neutral towards overviews. He stated that it does not appear that overviews make a fundamental difference:

If the legislation is logically structured and well-ordered overview sections should not add much to the clarity of the law.

- 1.69 Local authorities from North Wales regarded overviews as “superfluous” and thought that they should be included in explanatory notes meaning there would be less of a risk of them being used to interpret the legislation.

**Consultation question 4-8: Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?**

- 1.70 Many consultees answered consultation question 4-8 as part of consultation question 4-7. Answers that generally discussed overviews are have been analysed together rather than being artificially separated. The concern expressed by most consultees was the possibility of overviews being used to interpret the legislation, as noted by Law Society Wales.
- 1.71 Dr Catrin Fflur Huws (Aberystwyth University) expressed a concern which is that overviews are in fact explaining in writing what has already been written:

This then means that two possible interpretations can be created – or that the overview document explains the same concept in different terms. Would it not therefore be better to spend time ensuring that the legislation itself is easy to understand, and to use the overview in order to explain how the law accords with other legislation in the same area.

- 1.72 Huw Williams (Geldards LLP) suggested that any concern over the misuse of overviews could be addressed in the form of an Interpretation Act for Wales which could “entrench the subsidiary role of overview sections in interpreting the operative provisions of the Act”.
- 1.73 The National Trust thought that wording in the legislation could be included that made clear that overviews are not to be interpreted as part of the legislation. Citizens Advice Wales was of a similar view and referred to the easy read version of the Social Services and Well-being (Wales) Act which made clear on the front of the easy read version that it was not the law.

**Consultation question 4-9: Do consultees find aspirational clauses a helpful addition to legislation?**

- 1.74 Many consultees thought that aspirational clauses are a helpful addition. Consultees included Marie Navarro (Your Legal Eyes), the National Trust and Legal Wales. The National Trust noted that such clauses can be an aid to interpretation.
- 1.75 Some consultees doubted the helpfulness of aspirational clauses. Consultees included David Michael (Neath Port Talbot County Borough Council) and the Residential Landlords Association.
- 1.76 The Welsh Government explained that there can be merit in aspirational clauses:

There can be merit in aspirational clauses (or purpose clauses) as they may have important symbolism; generally speaking however they should be used sparingly and with great care as their effect can be unclear.

- 1.77 The Care Council for Wales thought that aspiration clauses are helpful, although they are difficult to enforce. The Care Council for Wales thought that aspirational clauses should be enforceable because:

They express the underlying policy of the legislation as this provides strength and a legal basis to the policy which may help to emphasise it and to ensure its delivery. Having such aspirational clauses within the Social Services and Well-being (Wales) Act 2014 provided a context to guide the implementation of the technical detail within the legislation.

- 1.78 Angela Williams (Law Commission's Welsh Advisory Committee) thought that aspirational clauses have some use:

Having an aspirational clause does give some potential to use the clause when in dispute with the duty holder.

An aspirational clause may make it possible to challenge any action which suggested a failure to comply. It might also be useful as an argument when an LA consults on cutbacks etc.

- 1.79 Similarly, Huw Williams (Geldards LLP) commented on the usefulness of aspirational clauses:

It is agreed that sensibly drafted aspirational clauses can enshrine the policy aims of legislation and provide a "timeless" reminder for a future reader.

Taken together the use of overview and aspirational sections raises the question of whether there is a continuing role for the traditional "long title" which is of limited relevance to interpretation of contemporary legislation.

- 1.80 Keith Bush QC considered how aspirational clauses can help the courts in interpreting legislation:

Certainly. The task of the courts in interpreting legislation is to apply the will of the legislature to the requirements of a specific case. Any statement that helps to identify that will is to be welcomed.

- 1.81 The Association of Judges of Wales supported the use of aspiration clauses particularly "to draw attention to the fact that the legislation aims to meet the obligations of Government commitments to international conventions".

- 1.82 In contrast, Dr Catrin Fflur Huws (Aberystwyth University) thought that aspirational clauses are not useful:

I do not believe this is useful. Although the objective is to set down aims for those under a duty, they are likely to create an expectation on the user's side, but with no-one to meet it, or it is likely to be met in a very small way. For example, in the Welsh Language (Wales) Measure 2011, the fact that Welsh is an official language creates a substantial expectation, but an expectation that is not justified in a way that is significant to the citizen. Thus aspiration clauses can be a political tool to indicate that the legislature has responded to the citizen's aspirations, but without changing behaviour in any significant way.

1.83 The Residential Landlords Association considered:

While we believe that Overviews have more benefits than potential negatives, we do not believe the same would stand for aspirational or "purpose" clauses. Because aspirational clauses contain no ability to hold the duty-holder accountable for the intention of a clause, they cause misinterpretation and confuse the reader into believing that these clauses can be used to hold individuals to account.

1.84 The Law Society Wales, local authorities from North Wales and the Association of London Welsh Lawyers expressed a similar view.

**Consultation question 4-10: Do consultees find the Interpretation Act 1978 and its Scottish and Northern Irish equivalents useful?**

1.85 We received a limited number of consultation responses to this question. The responses were mixed. The National Trust and the Care Council for Wales, for example, stated that they don't often have recourse to the Interpretation Act and its Scottish and Northern Irish equivalents. Consultees such as David Michael (Neath Port Talbot County Borough Council) and David Gardner (Administrative Court lawyer for Wales) reported that the Interpretation Act 1978 can be a useful tool. The Association of London Welsh Lawyers regarded the Interpretation Act 1978 as "incredibly helpful".

1.86 The Welsh Government commented that in principle there is merit in interpretation legislation and this is something it wishes to explore further after the Law Commission has reported.

**Consultation question 4-11: Do consultees think that there should be an Interpretation Act for Wales at this stage?**

1.87 The majority of consultees thought that there should be an Interpretation Act for Wales. Consultees included the Wales Council for Voluntary Action, Marie Navarro (Your Legal Eyes) and Legal Wales.

1.88 The Welsh Government responded:



As there is no specific Interpretation Act tailor-made for Welsh legislation this is an attractive proposition in principle, though the Welsh Government is not aware of any practical detriment caused by not having such an Act. As a matter of principle it is unfortunate that Welsh language terms are not at present defined, something which is arguably inconsistent with the notion of both language versions of Welsh legislation having equal status. Although not dependant on the creation of a separate legal jurisdiction for Wales, the case for a Welsh Interpretation Act could become stronger if the Welsh jurisdiction is formed.

- 1.89 Dr Catrin Fflur Huws (Aberystwyth University) thought that there should be an Interpretation Act for Wales. Dr Huws explained that it is difficult to “denote a duty in a way that is neutral in terms of gender” in the Welsh language:

Yes, to some extent, especially as Welsh is much more dependent on differentiating between masculine and feminine than English. However, due to this, legislation from Wales needs to be more aware of this fact, as there is more of a risk of excluding females from the legislation, than there is in English.

- 1.90 Keith Bush QC made a similar point. He advocated making an Interpretation Act for Wales a high priority if legislative competence allowed:

For one thing, it would be able to define corresponding terms in both languages. But also, it is obvious that the Assembly would wish to amend provisions such as section 6(a) which allows use of ‘he’ to mean ‘he or she’. (It would be necessary, of course, for that not to be retrospective in its effect).

- 1.91 The Presiding Officer of the Fourth Assembly highlighted how the Interpretation Act 1978 cannot be applied to Welsh language legislation and that this creates “an obvious need to re-enact a Welsh language version of the Act”. The Presiding Officer also commented that an Interpretation Act for Wales could cover Welsh language terminology of existing English Interpretation Act terms and any Welsh legal terminology regularly used in Welsh legislation “for purposes of clarification”.

- 1.92 Edwin Hughes (lay magistrate) similarly argued that there needs to be an Interpretation Act for Wales due to the Welsh language. Mr Hughes explained that the difference in colloquial and formal Welsh means that it would be very useful to have a list of official definitions.

- 1.93 Similarly, Huw Williams (Geldards LLP) considered that there is “probably a role for an Interpretation (Wales) Act that is strictly focused on issues that are specific to Welsh legislative drafting circumstances”. Mr Williams considered the role for an Interpretation (Wales) Act to be the following:

These include the standardisation of the Welsh and English language versions of commonly used terms. As already noted, such an act is also an opportunity to specify the role and interpretative status of aspirational and overview sections.

It is considered that a point during the latter part of the term of the next National Assembly will be the earliest appropriate time for presenting an Interpretation (Wales) Act.

An Interpretation (Wales) Act might also provide an opportunity to tidy up the increasingly anomalous position of Welsh primary legislation passed by the Third National Assembly under the Legislative Consent Order procedure. Continuing to refer to this legislation as “Measures” no longer seems appropriate given that it is primary legislation of equal standing to an Act of the National Assembly. It is suggested that such Measures as remain on the statute book should be re-titled Acts.

1.94 However, Mr Williams concluded that the case for an Interpretation Act for Wales remains to be made.

1.95 The Legal Wales Foundation also agreed that there needs to be an Interpretation Act for Wales that deals with Welsh legal terminology. This was something emphasised by the Welsh Language Commissioner:

As you explain in 4.88 advantages would result from an Interpretation Act for Wales in relation to establishing legal terminology in Welsh as well as definitions of pairs of Welsh and English phrases. You note, however, in 4.87 that you are not aware of the need to add to the English terminology. As the law applicable in England and the law applicable in Wales continue to separate and as more laws are passed by the National Assembly and as new organizations unique to Wales are established as a result<sup>11</sup>, I foresee a situation in which there would be a need to establish defined bilingual Welsh terminology quite soon. Already some specific terms that manifest themselves in Welsh legislation, such as ‘llesiant’ or ‘well-being’ in English are terms for which it would be useful to specify a definition in both languages, for example.

1.96 In contrast, the Care Council for Wales thought that a separate Interpretation Act would only be necessary if the Interpretation Act 1978 did not cover “any key differences between Welsh and English legislation”. Some consultees went further and argued that an Interpretation Act isn’t necessary at this stage. Consultees included David Michael (Neath Port Talbot County Borough Council) and Law Society Wales.

1.97 The National Trust thought that it would be simpler for lawyers across the jurisdiction if there was only one Interpretation Act:

It will be simpler for lawyers, and a legal department, to operate across England and Wales if a single Interpretation Act is retained. Lawyers can then employ the same knowledge and judgement in the interpretation of legislation whether it comes from England or from Wales.

It is conceivable that different Interpretation Acts could lead to a different interpretation of the same piece of legislation, possibly contrary to the intent of the legislation.

- 1.98 Local authorities in North Wales shared the same view and highlighted that the law applicable in England and in Wales is closely bound and it would be “premature to develop a separate body of law on interpretation”.
- 1.99 The Association of London Welsh Lawyers suggested that it would be sensible to have a consultation exercise in respect of a draft document which set out:
- (1) Welsh legal terminology
  - (2) Definitions and/or pairings of English and Welsh language expressions with a view to this document becoming an Interpretation Act for Wales

**Consultation question 4-12: What do consultees think the benefits of an Interpretation Act for Wales would be? What would an Interpretation Act for Wales need to cover?**

- 1.100 The majority of consultees discussed the benefits of an Interpretation Act for Wales in responses to consultation question 4-11. Benefits identified included things such as promoting consistency in bilingual legislation, as highlighted by Keith Bush QC, for example.
- 1.101 The Welsh Government noted three things to consider:
- (1) The scope of the Interpretation Act;
  - (2) How extensive should its provisions be and in particular should the content go beyond providing content that confirms issues that almost go without saying; and
  - (3) Its prominence (how well understood is the existence of such legislation and how prominent is it, for example, on legislation.gov.uk).
- 1.102 Dr Catrin Fflur Huws (Aberystwyth University) offered further comment to that made in consultation question 4-11:

Due to the bilingual nature of Welsh legislation, an Interpretation Act could include different rules of interpretation for the two languages, as there could be differences e.g. as stated above regarding the complexity of expressing clauses in a neutral way in terms of gender in Welsh. Also, bilingual Legislation at present tends to define terms according to the term in the other language. Thus, a decision regarding how to anchor a definition would be useful. Also, presumptions could be included regarding how to decide in situations where the two versions differ. For example, in Canada, there is a presumption in favour of using the version that favours the individual rather than the state, and in terms of interpretation this could also be necessary in the Welsh context.

# CHAPTER 5

## INTRODUCTION

- 1.1 Chapter 5 examined the condition of legislation applicable in Wales. The chapter set out some case studies but it also asked consultees to give their experience of the condition of legislation applicable in Wales generally.
- 1.2 Some consultees made some introductory remarks about the condition of legislation. The Presiding Officer of the National Assembly for Wales, Dame Rosemary Butler AM, highlighted that that the condition of legislation means that it is “difficult and expensive for the public in Wales to obtain up to date versions of all the laws applying to Wales” but that this is “not a problem created by the Assembly or the Welsh Government”. The Presiding Officer explained that even when citizens have obtained the laws it is difficult to understand their application due to the “mixture of UK laws that apply to both Wales and England”. The Presiding Officer also noted that the imbalance towards secondary legislation means that it is difficult for citizens to access the law as secondary legislation is only updated on commercial websites.
- 1.3 The Wales Local Government Association commented that the consultation paper sets out a “number of compelling case studies” that explored inaccessible law. The Association stated the following:

The accessibility of law is a key issue, and is explored in more detail below, but it is further compromised given the complexity of accessing and interpreting statutory implications introduced through both Welsh law and English and Welsh law. Notwithstanding the ‘Keeling’ implications of knowing which legislation or parts of legislation have been amended, repealed or are in force at a particular time, feedback from authorities suggests that in the field of town and country planning, in particular, there is risk of misinterpretation and misunderstanding as drafting, titles and overviews (of subordinate legislation in particular), specifically whether law is applicable to Wales or not, is always clear and consistent.

- 1.4 In a consultation meeting with lawyers working in the public sector the condition of legislation generally was discussed. The lawyers commented that the condition of legislation is affected by factors such as timetabling of Bills in the Assembly, the archaic language of legislation and divergence which makes the applicability of legislation uncertain.
- 1.5 During consultation meetings consultees nearly always expressed dissatisfaction towards the condition of legislation.

**Consultation question 5-1: We ask for information concerning consultees’ experience of working with these areas of law as they apply to Wales. Does the state of the legislation lead to problems in practice? We would welcome examples of the sorts of problems that arise.**

- 1.6 All consultees that responded to this consultation question agreed that the state of legislation leads to problems in practice. The majority of consultees gave detailed examples, which are set out below.

- 1.7 The Welsh Government provided a detailed response. It described how within the Welsh Government there are a number of people whose role requires them to know the laws in areas explored. Officials as well as the 120 or so lawyers within the Welsh Government need to be clear on the parameters of the law in which they work. The Welsh Government stated:

The main effects of the complexity of the existing laws are officials having to spend a considerable amount of time familiarising themselves with the law; policy officials becoming increasingly reliant on lawyers to assist them in this process (in particular in relation to the extent to which provisions apply to Wales); and the potential for misunderstanding the current legal position.

A major concern regarding legal publications currently available is that insufficient effort is spent on setting out or explaining how the law takes effect in Wales specifically. For example, an Act of Parliament may apply in both Wales and England, but any commentaries and interpretations skew toward only discussing the effect in England. The Welsh context is rarely set out.

In addition, the legislative publication resources currently available to officials within the Welsh Government present legislation by Act (or Statutory Instrument) as opposed to by subject. This makes research on what legislation is in effect within a subject area more difficult. A search facility which identified all legislation applicable in Wales which has effect in a particular subject area would be helpful.

There are problems also in relation to the availability of old local acts which occur more frequently than would be expected.

- 1.8 The Legal Wales Foundation commented that the state of legislation has meant that there have been instances in the courts where advocates have not been aware that different provisions exist for Wales. The Legal Wales Foundation referred to environment and town and country planning in Wales as areas of law that are “confusing minefield[s]”.

- 1.9 David Gardner (administrative court lawyer for Wales) gave his experience of the administrative court in Wales. He set out how a single section of an Act could have been amended in relation to England, Wales or England and Wales, or that the law or procedure is covered in various pieces of legislation, which would require cross-reference. Mr Gardner stated that despite this, in the majority of cases that come before the administrative court in Cardiff, the legal representative has identified the correct law. However, Mr Gardner noted that:

I have no doubt this required more research than would be necessary were the legal representative simply representing the law in England. As a result, costs for parties will have risen.

- 1.10 Mr Gardner added that the effect of the Planning (Wales) Act 2015 and the Social Services and Well-being (Wales) 2014 have not yet been comprehensively tested to date in administrative law terms.

1.11 Dr Catrin Fflur Huws (Aberystwyth University) produced a list of practical problems that she has encountered due to the condition of legislation:

- (1) In the context of education, the legislation is included in a number of acts and some of these include acts passed before devolution, as well as those passed after devolution.
- (2) This means that England and Wales have amended e.g. the Education Act 1996 and thus there is a complexity regarding which parts of the act are relevant to Wales and which parts are relevant to England.
- (3) Also, the fact that the law dates back to before devolution also means that it is not possible for the National Assembly for Wales to re-legislate all parts of the law that are relevant to Wales.
- (4) Also, it is necessary for the National Assembly for Wales, in amending, or in passing secondary legislation to accord with the terms used in English – this can cause problems in trying to provide a Welsh form of the legislation as the English term is not appropriate for the creation of a Welsh version.
- (5) This also means, as the National Assembly for Wales amends the law that parts of the law is bilingual and other parts are in English only.
- (6) Another difficulty, of course, is that the relevant legislation is in several statutes.

1.12 Dr Huws identified issues that are a result of the complex progression of devolution with a lack of consolidation. Dr Huws also raised problems that relate to the language of the legislation.

1.13 Lynda Williams (Torfaen County Borough Council) noted that town and country planning legislation is complicated and difficult to access. Ms Williams referred to the fact that the Planning (Wales) Act 2015 inserts section into the Town and Country Planning Act 1990 rather than being a consolidating Act, which would in turn make the law easier to access. The complex statutory framework makes it difficult for legal officers to interpret the law. Ms Williams explained how the complex statutory framework means that ideally, any person trying to access the law need specialist legal resources such as Westlaw. Interestingly, Ms Williams stated that this is not a resource available to all planning officers. Many planning officers rely on the Sweet and Maxwell Planning Encyclopaedia, which does not always show the law applicable in Wales. Alternatively, planning officers use the legislation.gov.uk website, which is not up to date. The evidence provided by Ms Williams shows that in practice, the condition of legislation means that it is difficult to access the law. Further, it is difficult to know if the correct law has been applied. The example provided by Ms Williams was the following:

1. In determining an EIA application an officer would need to know that the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 applied to the application.

2. Regulation 3 (2) states “the relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and they shall state in their decision that they have done so”.
3. “Environmental information” means the environmental statement including any further information any representations made by anybody required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development” .
4. The officer would need to know that for Secretary of State the position of “Welsh Minister” would be appropriate in Wales.
5. The officer would also need to know that the 1999 Regulations have been amended by Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2006/3099. This is significant because it extends the definition of “Environmental Information” to include “any other information” which is defined in the 2006 Regulations as “any other substantive information relating to the environmental statement and provided by the applicant or appellant as the case may be”.
6. The officer would then need to know that 1999 Regulations have been further updated by Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2008/2335. This is extremely significant because it widens the application of the Regulations further than the grant of planning permission but to also include the grant of a subsequent consent i.e. the discharge of conditions.
7. Section 3(2) in the 1999 Regulations is amended to read “the relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application.....”
8. Subsequent consent means consent granted pursuant to a subsequent application. A “subsequent application” is defined as “an application for approval of a matter where the approval (a) is required by or under a condition to which a planning permission is subject; and (b) must be obtained before all or part of the development permitted by the planning permission may be begun.

1.14 Delyth Jones (Conwy County Borough Council) also identified town and country planning as an area of law where the condition of legislation leads to problems in practice. Ms Jones gave the following example:



My experience related to section 237(1)(A) of the Town and Country Planning Act 1990. We wanted to take advantage of this provision to override restrictive covenants on a development scheme. We took (expensive) Counsel's Opinion on the matter and were informed that this provision was available to us. I happened to check the provisions later to discover that although section 237 applied in Wales, section 237(1)(A) did not. Luckily this discovery was made before the development started.

- 1.15 Huw Williams (Geldards LLP) also commented on town and country planning law, however discussed the potential further divergence of town and country planning and noted that there are “strong arguments for a common system” of Compulsory Purchase Order (CPO). This is because there is a “close connection between the CPO system and the law of property generally”.
- 1.16 David Michael (Neath Port Talbot County Borough Council) confined his response to general local government law as explored in case study 5. He noted that the two most important pieces of local government legislation are the two Acts of Parliament, the Local Government Act 1972 and the Local Government Act 2000. The former “established the overall structure of local government in the modern era” and the later “created the fundamental distinction between executive and non-executive powers”. Mr Michael commented:

One can still question the extent to which these provisions were ever properly integrated, but the fact that they are contained in different Acts parts of which apply to England and parts of which apply to Wales certainly does not help interpretation. The problem has been compounded by National Assembly legislation which is sometimes not as well set within the existing structures as it might be. There appears to have been doubt about the status of some of the committees established by Welsh legislation ie Audit and Democratic Services to the extent that specific provision has been inserted importing rules such as public access and proportionality of membership which really should apply automatically to all council committees.

- 1.17 Mr Michael also commented that the regulations that denote which powers are executive and non-executive are not kept up to date by the Welsh Government. This has led to “licensing functions or functions akin to licensing being exercised by the executive (which is the default position) instead of non-executive licensing committees as one would assume should be the case”.
- 1.18 Angela Williams (Law Commission Welsh Advisory Committee) gave specific information on council tax law in Wales:

Until 2013, Council Tax Benefit (CTB), a means-tested benefit, was available under social security legislation to help people pay their bill. From April 2013 local authorities in Wales are required to have a Council Tax Reduction Scheme which, though very similar to CTB, is not a social security benefit but a reduction under the amended Local Government Finance Act 1992.

Since all means of reducing the sum payable are now devolved, it would be helpful if the legislation could be consolidated. The regulations under the 1992 have been much-amended, and are increasingly different in England and Wales. The Council Tax Reduction provision is very different in Wales and England. Council Tax rules have implications for every householder in Wales. It would be much easier to find and understand the various provisions if they were all in one piece of legislation. It would probably be easier for drafters in the longer-term too.

1.19 Huw Williams (Geldards LLP) gave his experience of the law in relation to the inspection of education and training in Wales and the functions of HM Chief Inspector of Education and Training in Wales. Mr Williams listed the following pieces of legislation that appear to contain law related to the inspection of education and training:

1. Initial teacher training - Education Act 1994 s.18C (inserted by the Education Act 2005 ("EA 2005") s.98 and Schedule 14).
2. Maintained Schools – EA 2005 ss.20 and 28.
3. Independent Schools - Education Act 2002 ss.163 and 164 (inserted by EA 2005 s. 54 and Schedule 8).
4. Non maintained early years settings, including nursery education - Children Act 1989 s. 79T and the School Standards and Framework Act 1998 s.122 and Schedule 26 (inserted by EA 2005 s.53 and Schedule 7 Part 1 paragraph 5 and Part 2).
5. Pupil Referral Units – EA 2005 s.28 (applied by the Education (Pupil Referral Units)(Application of Enactments)(Wales) Regulations 2007, SI 2007/1069 (W.109) Schedule 1 Part 1 paragraph 11).
6. Careers Companies - EA 2005 ss.55 – 57.
7. Further Education – Learning and Skills Act 2000 ("LSA 2000") ss.75 (a)-(d) and 76 – 88).
8. Adult and Community Education - LSA 2000 s.75 (a) and (b) and 76 – 88.
9. Work-based learning - LSA 2000 LSA 2000 ss.75 (a) and (b) and 76 – 88.
10. Youth Support Services - LSA 2000 s. 75(e) and the Youth and Community Work Education and Training (Inspection) (Wales) Regulations 2006 SI 2006/2804 (W.243).
11. Local Education Authorities - Education Act 1997, sections 39 – 41 (as amended by the Children Act 2004 and the EA 2005) and the Local Government (Wales) Measure 2009, section 23.

1.20 Estyn's powers are dispersed across 11 pieces of legislation as listed by Mr Williams. He also noted that the legislation often makes different provision for England, which complicates matters further.

1.21 Universities Wales also gave examples from the field of education which depict how fragmented the law is:

A number of universities in Wales are higher education corporations governed by the Education Reform Act 1988 and the Further and Higher Education Act 1992 in particular; older universities in Wales, however, were incorporated by Royal Charter.

All universities in Wales are charities but, unlike higher education providers in England, Welsh universities are directly regulated by the Charity Commission.

The Further and Higher Education Act 1992 provided a shared regulatory framework for institutions in both England and Wales and continues to apply to both in relation to its funding provisions and the role of the Funding Councils (although no longer in relation to quality assurance arrangements for Wales). The executive functions of the Secretary of State have been transferred to the Welsh Ministers and references to the HE Funding Council for Wales (HEFCW) substituted for the HE Funding Council for England (HEFCE) in relation to the exercise of devolved powers.

The Higher Education Act 2004 previously included a complex assortment of joint and separate provisions for England and Wales seeking in particular to provide further regulation in the light of an increase in the maximum fees chargeable to full-time undergraduates, including providing for equality of opportunity (in both England and Wales) and the promotion of higher education (Wales only). The fee plan arrangements have now been replaced by the HE (Wales) Act 2015, but the student complaints arrangements continue to apply to both England and Wales with executive functions transferred to the Welsh Ministers in respect of Wales.

The first primary legislation relating primarily to higher education was the Higher Education (Wales) Act 2015, which introduced major changes to the regulatory system that applied to the higher education sector in Wales and marked the first major divergence in the regulatory frameworks between the two countries. The Act was introduced to provide a means of regulating providers of higher education in Wales which dispensed with the need for attaching terms and conditions to Funding Council grants under the Further and Higher Education Act 1992.

In addition, it is noted that the Teaching and Higher Education Act 1998, with executive powers transferred to the Welsh Ministers, provides the basis for student support provisions in Wales.

1.22 Universities Wales also identified other issues with the condition of legislation applicable in Wales:

1. A continuing issue for instance is the ease of identifying non-textual amendments to the legislation – in particular, where executive powers have been transferred to the Welsh Ministers and where the comparable body in Wales has been substituted in respect of the devolved powers. These are not always easy to identify even after investigation using publicly accessible resources at present.
2. Identifying the applicability of the law, particularly that made by Parliament, can be a challenge. As highlighted in the consultation, the jurisdictional extent of a provision (which is indicated in legislation.gov.uk database) is not a guide to its application for England and Wales. We would welcome further consideration of ways in which this could potentially be addressed. For instance, could a section on extent and applicability be included in future legislation – or even existing legislation? A regular section (perhaps alongside e.g. commencement orders and consequential provisions) could be used and amended/updated as necessary to identify applicability and potentially non-textual amendments. On the face of it this approach would be much less resource intensive than a full consolidation, reform or codification exercise. It is also possible to consider incorporating a table of applicability in the accompanying Explanatory Notes or as a separate document to be published alongside the primary legislation: this would have the advantage of obviating the need for primary legislation but the applicability of the law would still not be clear from the face of the legislation and these may be more problematic to keep up to date.
3. A significant issue for Wales is that much of its legislation is enacted through statutory instrument – in part a legacy of the initial devolution of executive functions only to Wales. Amendments to statutory instruments are particularly difficult to spot and difficult to trace. There is no easy means to discover this through publicly available resources. Our initial discussions with the Welsh Government concerning drafts of the Higher Education (Wales) Act 2015 regulations was hampered by not spotting that a set of regulations referred to had been amended. In this instance, it was resolved through constructive pre-legislative dialogue of the kind that we believe should be the norm for any significant legislation.

4. Another issue which is perhaps of particular significance for Wales is the prevalent use of Henry VIII clauses. In general, you would expect the Welsh Ministers to have to bring forward primary legislation in order to alter the provisions of an existing Act but this is not always the case. In addition to any constitutional issues that this may raise, the application of these provisions can be very difficult to identify. By way of example, the role of Higher Education Funding Council for Wales (HEFCW) was established by section 62 of Further and Higher Education Act 1992. Section 28(1) of Government of Wales Act 1998 as amended by the Government of Wales Act 2006, however, enables the Welsh Ministers to transfer additional functions to HEFCW and alter its membership by order. Section 28(7) includes the necessary 'Henry VIII clause' to allow the orders to make consequential amendments to the primary legislation. Unusually, the orders follow the negative resolution procedure (Government of Wales Act 1998 s.28(7)(A)), i.e. the legislation takes effect automatically subject to a period enabling a potential veto by the National Assembly, rather than the affirmative procedure which is normally used in such instances to ensure that the amending legislation is subject to the greater level of scrutiny. Notably, this set of Government of Wales Act provisions give the Welsh Ministers even greater powers in respect of further education, and these have already been exercised in Wales. Further Education Funding Council for Wales which was also established by the FHEA 1992 (and replaced with National Council for Education and Training in Wales by the Learning & Skills Act 2000) was abolished and its functions transferred to the Welsh Ministers in 2006.
5. Another key issue which has continued to provide challenges is an appreciation of how the devolved powers in Wales interact with UK Law. Most matters in education can also be categorised by another heading, e.g. employment law and education. The consultation paper provides a thorough overview of the key case law in this field. It suffices to note in this context, that there were significant developments in case law in this area very recently, including during and following the passage of the Higher Education (Wales) Bill. The most recent case law poses further questions. Uncertainty about the boundaries of legislative competence continues to be an issue in our work on higher education policy.

1.23 During consultation we repeatedly heard from consultees that education is the area of law most in need of consolidation.

1.24 The Association of Judges of Wales gave a detailed example of how the state of legislation could lead to problems in practice in the field of social care. The Association explained how Welsh legislation has impacted the Children Act 1989, which is the main piece of legislation in the UK concerning children. The Association of Judges of Wales set out how Part III of the Children Act 1989 as it appears in most family law standard works of reference. It was described as a “hotchpotch”.

For example:

The Children and Young Persons Act 2008 section 8(1) inserted the amended sections 22A-22F to the Children Act 1989. This relates to the provision of accommodation for children in care by local authorities.

Those sections were brought into force in England only. Those sections were not brought into force in Wales.

Accordingly, section 22 and 23 of the Children Act 1989 (pre-amendment) remain in force in Wales.

Furthermore, the revised secondary legislation which accompanied the implementation of those amended sections also applied to England only namely:

The Care Planning, Placement and Care Review (England) Regulations –applies to England only – [see Regulation 2(1)]

The Fostering Services (England) Regulations 2011 is applicable to England only [see Regulation 1(2)]

In Wales, the pre-existing Placement with Parents Regulations 1991 and the Fostering Services Regulations 2003 remain in force.

The Family Court Practice 2015 makes a passing reference to these different provisions in a footnote only at p577 (inserted after the General Editor Judge Cleary was so reminded by judicial colleagues in Wales). The “statutory instruments” section of Hershman and McFarlane on Children Law and Practice has omitted reference to and has not re-printed the above regulations which are still in force in Wales.

1.25 The Association of Judges of Wales commented that this is a situation of “utmost concern” as anyone trying to apply to the law must be able to identify which law is still applicable in Wales and deal with the practical implications of applying law that is dispersed across different legislation. There is also a risk of applying the incorrect statutory provisions. An example of the difficulty facing those attempting to apply the law was provided:

For example, the provision of interim placements or final placements of children with parents/holders of parental responsibility/holders of child arrangements orders - residence orders, being subject to the 1991 regulations permit a local authority to allow a child to live with such a person (in excess of 24 hours) only in accordance with the regulations i.e. they are of mandatory effect. Therefore, assessment under regulation 3 and schedule 1 is required subject to the regulation 6 provision.

- 1.26 The Association of Judges of Wales highlighted how the position in Wales will also shortly undergo reform in the form of the Social Services and Well-being (Wales) Act 2014. An example given was of provisions setting out the law on care and support plans. Currently this is set out in 31A of the Children Act 1989 which is thought to likely be replaced by section 83 of the Social Services and Well-being (Wales) Act 2014. Moreover, the Social Services and Well-being (Wales) Act 2014 uses the term “wellbeing” rather than “welfare”, a concept which is the key definition of the Children Act 1989. The Association concluded:

The Children Act 1989 is now such a “patchwork” in relation to Wales that clarity and public safety requires some corrective action.

- 1.27 The Association of Judges of Wales pointed out that under the current devolution settlement, family law is not a devolved matter. This creates problems in terms of any desired consolidation of legislation to make the law more streamlined.

- 1.28 Tracey Elliot (Cerebra) commented on the significant reform of the law relating to special educational needs and carers’ rights in England and Wales. Ms Elliot emphasised that this significant reform, in the form of the Children and Families Act 2014, is made more complicated by social care reform which applies in Wales only. Ms Elliot stated that this sort of wide scale reform makes primary sources increasingly difficult to navigate. Moreover, the lack of secondary material explaining the position of the law applicable in Wales makes the legal position even more difficult to understand. The following example was provided:

1. Under section 17ZD of the Children Act 1989 (as inserted by section 97(1) of the Children and Families Act 2014), local authorities in England have a duty to assess whether a ‘parent carer’ has needs for support, and if so, what those needs are. A parent carer is defined as “a person aged 18 or over who provides care for a disabled child for whom the person has parental responsibility”. This new provision has extended the previous right to request an assessment (referred to below), so that parent carers in England must now be assessed on the appearance of need, as well as on request.
2. Previously, section 1 of the Carers (Recognition and Services) Act 1995 gave carers, who provide a ‘substantial amount of care on a regular basis’ for a disabled child, the right to request an assessment. This provision has been disapplied to ‘parent carers’ in England, who now have the broader rights referred to above.

3. However, it remains in force for the time being for carers in Wales (which includes both parents and other carers, as long as they provide a 'substantial amount of care on a regular basis') and for carers of disabled children in England who do not meet the definition of 'parent carers'. People in Wales who have 'parental responsibility' for a disabled child also have the right to request a carer's assessment under section 6 of the Carers and Disabled Children Act 2000.
- 1.29 Interestingly, one of the research projects by Cerebra is the Legal Entitlements Research Project at Cardiff University. This project, led by Luke Clements, "aims to inform parents about their legal entitlements and empower families to resolve problems in accessing health and social care services".
  - 1.30 In a consultation meeting, a third sector organisation gave an account of legislation emanating from Cardiff affecting the law in relation to carers. The Carers Measure started life as a Private Members' Bill. It was passed in 2010 and implemented in 2012. The legislation made changes to strategic planning and the regulations created health boards as the lead bodies responsible for care. The legislation was quite different to that of England. A year after it was implemented the Social Services and Well-being (Wales) Bill was announced which repealed the Measure. There was no list of repeals when the Social Services and Well-Being (Wales) Bill was first published. The repeals were only published after the committee stage and therefore evidence was given on the basis that no-one knew what the Bill was repealing. When the repeals were published, it became clear that the Carers Measure and 3 England and Wales Acts were to be repealed for Wales. Members of the care profession were unhappy with some of the changes the Bill was making so an amendment was finally agreed. The Social Services and Well-being (Wales) Bill received Royal Assent in May. In June the Well-being of Future Generations (Wales) Bill was introduced which repealed the agreed amendment.
  - 1.31 This account illustrates the difficulties that face those trying to keeping up to date with the law, considering the fast pace of divergence. It also makes representations about the law-making process in Wales which have been explored in chapter 3 of the consultation analysis.
  - 1.32 In comparison, Edwin Hughes (lay magistrate) described how information on waste and environment for farmers is made readily available by organisations such as the National Farmers Union, Farmers' Union of Wales and Welsh Government, meaning that often there aren't any problems in practice due to the condition of legislation. However, Huw Williams (Geldards LLP) suggested that there is some difficulty in accessing some waste and environment law. Mr Williams referred the Law Commission to the evidence provided by Dwr Cymru to the Silk Commission.



- 1.33 LexisNexis UK gave the perspective of a commercial publisher approaching legislation that applies in Wales. Lexis commented that “it is not always obvious which legislation can be said to apply to Wales”. It explained that Schedule 7 to the Government of Wales Act 2006 does not state which Westminster Acts apply to Wales, it only provides subject areas with exclusions. Lexis also highlighted how part of some Acts have “not been consistently amended so as to account for a transfer of functions”. Lexis gave numerous examples of the uncertainty in deciding whether legislation applies in Wales:

Housing Act 1988, s 61(1)

(1) Before making a designation order [in relation to Wales], the Secretary of State shall consult every local housing authority any part of whose district is to be included in the proposed designated area.

The words in square brackets were inserted by the Deregulation Act 2015, s 103(3), Sch 22, Pt 1, para 9, but the reference to the “Secretary of State” has not been changed to the “Welsh Ministers”. To establish unequivocally that the power is exercisable by the Welsh Ministers (and by them alone) requires researching the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672) which was *not* consequentially amended by the 2015 Act. This roundabout way of finding information could have been avoided?

**Consultation question 5-2: Do consultees consider that the law as it applies in any of the areas described above would benefit from consolidation? What would the benefits be? Are there any problems or disadvantages in consolidating the relevant law, including costs?**

- 1.34 All consultees thought that the areas described would benefit from consolidation. Consultees identified some benefits as being able to find the law more easily which would in turn save time and reduce the likelihood of making mistakes, Consultees identified the main disadvantage of consolidation as being the cost and time resource to achieve it.
- 1.35 Dr Catrin Fflur Huws (Aberystwyth University) thought that generally consolidation would be advantageous, however noted:

Consolidation would be advantageous in order to solve the above matters. However, it is accepted that education is a very wide area, and so it is not always advantageous for all the legislation to be in one statute. However, a situation should be created where English law is in one separate Statute and Welsh Law is in another separate statute.

- 1.36 The Welsh Government stated that “in general terms there is a case for consolidating the law in each of the areas”. The Welsh Government referred the Law Commission to the UK Environmental Law Association’s report on The State of UK Environmental Law which highlights stakeholders’ dissatisfaction with the state of environmental law. The Welsh Government further stated:

During the scrutiny of the Planning (Wales) Act 2015, the complexity and the difficulty of understanding planning legislation was touched upon by some stakeholders that gave evidence to the Environment and Sustainability Committee. This Committee along with the Constitutional and Legislative Affairs Committee also questioned the Minister for Natural Resources about consolidation of planning legislation given the issues raised by stakeholders. This is the subject of another Law Commission project.

- 1.37 David Gardner (administrative court lawyer for Wales) referred to the three overarching Assembly statutes that are in the process of being enacted: Planning (Wales) Act 2015, Social Services and Well-being (Wales) Act 2014, and the Housing (Wales) Act 2014:

I would suggest that my role advising on the relevant law, and I would suggest the role of discovering the relevant law for legal representatives and litigants in person, would be easier if these statutes (and their resulting regulations enacted by the Welsh Ministers) acted as a 'one-stop shop' for the law. I would suggest that this would increase access to justice. It would have the added benefit for England of removing Welsh considerations from statutes, thus making the provisions easier reading in England. I acknowledge that there would be a cost involved in consolidation, but I do not have the relevant expertise to comment on that cost.

- 1.38 The Care Council for Wales noted that the Social Services and Well-being (Wales) Act was an Act aimed to consolidate the law on social services. However, the Care Council stated that "the overall impression left by the Act, as a piece of consolidating legislation, is that it did not achieve coherence as a single unified piece of legislation but rather a disjointed series of areas of legislation that did not amount to a coherent whole". The Care Council for Wales' comments illustrate some of the potential problems with consolidation. It added that the Act has had an impact "on resources in terms of work required to interpret and implement the Act in practice".

- 1.39 David Michael (Neath Port Talbot County Borough Council) argued that local government law would benefit from consolidation. However, he stated that the exercise should go beyond mere consolidation for the full benefits to be realised. Consolidation should also seek to clarify parts of local government law that have become overcomplicated:

For example, where a statute or statutory provision is directed at ensuring that a particular non-executive power shall not be exercised by a committee of council, the way that this is done is to disapply the power to delegate the decision instead of simply saying that the power should be exercised at a full council meeting. All Local Government practitioners will indeed know what a full council meeting is but it could be the subject of a simple definition.

1.40 Huw Williams (Geldards LLP) commented that each of the areas mentioned would benefit from consolidation. Mr Williams argued that in relation to planning and education, accessing the statute book in Wales is as difficult in England as both “have to contend with the need to “filter out” provisions that do not extend to Wales or England as the case may be”. Mr Williams referred the Law Commission to Dr Charles Mynors’ paper which documents the extent of a consolidation programme with regard to town and country planning legislation.

1.41 Mr Williams concentrated on education and local government as areas that would benefit considerably from consolidation. However, he advocated different models:

In the field of education, Wales has stuck to a model of education provision that works through local authorities and which has eschewed innovations such as the creation of academy and free schools. A Welsh Education Act is therefore likely to describe a more straightforward and uniform system than that in England and will undoubtedly be more readily accessible and practical than the present situation described in the consultation paper. There does not appear to be the same emphasis on institutional change in Wales as there is in England and accordingly there are good reasons to argue that Education Law is sufficiently stable for it to be a prime candidate if the National Assembly were to adopt a streamlined procedure for consolidation bills.

Local government presents a more complicated picture. Wales appears to be moving towards a major re-organisation of local government, albeit dependant in its details on the complexion of the government that emerges next year following the Welsh General Election. It also remains to be seen to what extent the proposals made in the White Paper “Reforming Local Government: Power to Local People” (Welsh Government 2015) find their way into legislation. Should the proposals be enacted then the common model of a local authority and its governance, founded on the Local Government Act 1972 and extending to both Wales and England will disappear. Overall the picture appears to be much closer to planning law. Consequently a programme that envisages reform followed by consolidation/restatement appears to be the more cost effective course.

1.42 On education, Keith Bush QC emphasised that the law, on his count, is dispersed across 31 pieces of legislation:

The detrimental effect of piecemeal amendments to the law by means of individual acts dealing with limited individual subjects is obvious. The law on education in Wales is dispersed across 31 pieces of primary legislation – Parliamentary Laws, Assembly Measures and Assembly Laws. Unless someone is very knowledgeable on the subject, it is completely impossible to get a complete, accurate picture of the law in this area.

1.43 Mr Bush identified the only argument against consolidation as being resources:

- 1.44 The only argument against the process, therefore, is of course the resources that process would take. But bearing in mind that the Welsh Government's expenditure on education in Wales (for example) is something like £2 billion, the cost of simplifying the law on that subject would be very low in comparison.

A programme of consolidation could also take as much time as the resources would allow. There would be no need to work to any artificial timetable – rather a team of solicitors and administrators could be established and put to work on the task, starting with education and then moving on to another area and so forth.

**Consultation question 5-3: Are there other areas of devolved law where you have identified problems related to the form and accessibility of the law? Please provide examples. Do you think these areas would benefit from consolidation?**

- 1.45 The majority of consultation answers referred to areas of law that have been explored in consultation question 5-1 which referred to the five case studies set out in the consultation paper.
- 1.46 The Welsh Government commented that rather than suggesting specific areas, one should look at which areas of law have been most heavily legislated in and assume that the more legislation created, the more likely it is to benefit from consolidation. It stated:

Older legislation can also be problematic as it is often more difficult to understand. In general terms what should be sought is a systemic approach rather than one based on specific areas of law, since priorities as to those areas, and the complexity of the law developing in them, may change rapidly over time in ways not immediately predictable. The need to consolidate secondary legislation and better publish “soft law” should also be considered.

- 1.47 Catrin Fflur Huws (Aberystwyth University) identified the Welsh Language (Wales) Measure 2011 as an area of devolved law where there is a problem with the form and accessibility of the law. Dr Huws commented that the Measure “is not arranged in the most convenient way for the reader – for example, the grounds for appeal to the Welsh Language Tribunal are dispersed across four sections that are not chronological, and so it is not possible to easily evaluate what the grounds for appeal are”.
- 1.48 The Association of Judges of Wales reiterated their views about problems with accessibility of the law of social care, however, it also mentioned housing. It explained that similarly to social care, the law on housing in Wales is going through a time of change. It emphasised that it is important that these changes are made known to those in England as well as Wales:

For example, many owners of second homes in Wales live in England and many of the 400,000 rented properties in Wales are owned by people living outside Wales. They will rely upon their lawyers in England for legal advice and it will be essential that all concerned are aware that housing law in Wales is shortly to become totally different to housing law in England.

- 1.49 The Association also observed how secondary legislation has been diverging at pace:

An illustration of this being provided by a very recent Statutory Instrument issued at Westminster. The Assured Shorthold Tenancy Notice and Prescribed Requirements (England) Regulations 2015 (S.I. 2015 No: 1646) introduces a new prescribed form which must be used for Assured Shorthold Tenancies granted on or after 1 October 2015 or renewed on or after that date. It takes account of the Deregulation Act 2015. Nowhere in the statutory instrument does it state that it applies only to England apart from in the name given to the regulations which suggests it applies only in England. It is wholly likely that the new prescribed forms will be used by landlords in England in relation to their Welsh properties. When the Renting Homes (Wales) Bill completes its passage through the National Assembly for Wales, Assured Shorthold Tenancies will become a thing of the past in Wales but, until then, how are the judges to interpret the Statutory Instrument 2015 No: 1646 in cases involving Welsh rented property?

- 1.50 The Association of Judges of Wales seem to suggest that the pace of divergence with no attempt of consolidation for England or Wales means that there are parts of the law that should be treated with caution as their application is not explicitly clear. The Association identified further lack of clarity in the devolved law:

For example, under the Housing (Wales) Act 2014 there are provisions providing for prosecution by the licensing authority before a magistrates Court. It might have been considered appropriate to require any such prosecutions to be brought before a court in Wales. Similarly, under the Renting (Homes) (Wales) Bill there are provisions enabling an appeal to the County Court but no indication as to whether such an appeal should be brought at the hearing centre where the property is located or where the defendant resides. As the defendant might reside in England it might have been thought appropriate that the appeals should be heard by a court in Wales. The latter point may be addressed when the Civil Procedure Rule Committee consider the need to amend the Civil Procedure Rules to facilitate cases under the new Welsh housing legislation though earlier consultation would have been beneficial (including with the Civil Procedure Rule Committee).

- 1.51 Citizens Advice Cymru also highlighted housing as an area of law where problems arise. It also made introductory remarks about the accessibility of devolved legislation generally. It commented that the overlap between the law applicable in Wales and the law applicable in England can cause confusion when referring to secondary legislation or case law. Citizens Advice Cymru set out the following in their response:

## Citizens Advice Cymru's Housing legislation experiences

### Housing Act

Consumer Focus Wales (whose statutory consumer responsibilities were transferred to Citizens Advice in April 2013) played an early role in influencing the development of the Welsh Government's proposed Housing Bill (as it was then) and Renting Homes Bill. They did this through undertaking consumer research with tenants in the Private Rented Sector, including testing some of the Welsh Government's forthcoming proposals and seeking tenants' views on these and subsequently making a number of specific recommendations for Welsh Government around this. We recognise and welcome the value of being involved at the very early stages of the development of legislation and believe this can be extremely beneficial to both government and society.

Following this initial engagement there was a break in engagement in the Housing Bill during the transition of consumer responsibilities to Citizens Advice Cymru (due to staffing and the introduction of new policy officer posts). However Citizens Advice Cymru began formal engagement with the Housing Bill at stage 2. It was found that the length and language of the Bill was difficult to navigate, with the number of amendments in excess of 120 at stage 2, and 400+ by the end of stage 3. This made reading the Bill and understanding the implications of the various amendments in order to support local Citizens Advice to influence and campaign with their local AM quite difficult. The final Act itself does not repeal legislation on its face, which while making it perhaps easier to read, makes understanding the impact of the legislation and how it works with existing housing law complex. We would suggest the explanatory memorandum for the Bill is not an accessible document for a layperson to understand. The Assembly Research Service's [Bill summary](#) is considerably more accessible.

Welsh Government information about the Act is quite accessible with regards to language and tone, but appears to be predominantly written for professionals. This can be seen in the information about the registration and licensing requirement on landlords and letting agents under Part 1 of the Housing (Wales) Act [available online](#) which includes specific downloadable information written for landlords and letting agents, but nothing written for tenants or the general public. There has been little active media work by Welsh Government around the Act's effect on housing in Wales and the changes that will happen for landlords, letting agents and tenants alike - which is something which we continue to raise with them. The changes to homelessness legislation under the Act, although publically available, are not well known or understood outside of the statutory

sector and housing specialists.

The Housing (Wales) Act relies heavily on the use of secondary legislation to be written by the Government and subject to the Assembly's positive procedure. An example of this is the Code of Practice for private sector landlords and letting agents under Part 1 of the Act. Within the Act, it is intrinsically linked to licensing requirements of landlords, and achieving the aim of improving standards within the private rented sector. The Code of Practice, when released for consultation ([see here](#)) did not meet our expectations of a Code of Practice, nor did we believe that it met its intended legislative purpose. We therefore did not support the content - and found that partners across the third and private sector shared our view.

Subsequently, it was laid before the Assembly (prior to the consultation response summary being made available) where it was detailed that the Code was widely supported despite our discussion with key players in the sector identifying no support for it. The Code was therefore raised in oral evidence to the Committee about the Renting Homes Bill by ourselves, Shelter Cymru, RLA and ARLA, triggering a [separate evidence session by the Communities, Equalities and Local Government Committee](#) (CELG) on the Code of Practice. Following this evidence session [CELG wrote to the Minister](#) and members met privately with the Minister to express their concerns and those from the sector. A new Code was reissued for further consultation with specific stakeholders during recess - we submitted further comments on content to the Welsh Government as part of this process, however a wider consultation was not conducted. The [final version](#) was not shared with stakeholders prior to it being laid before the Assembly on 6 October with its [explanatory memorandum](#).

### **Renting Homes**

The Communities, Equality and Local Government (CELG) Committee originally invited our organisation to give evidence on the Renting Homes Bill on a panel with three other organisations, including Shelter Cymru, Welsh Tenants and the NUS, for one hour-long evidence session. Through contacting the clerk, we were able to secure an evidence session with Shelter Cymru only, enabling us to have more time to give oral evidence and provide more effective advocacy on our key concerns coming from our research with clients and advisers across Wales about the Bill. This option was not outlined in the invitation, but requested due to prior experience of working with committees. We know that another organisation took part in a panel alongside two other organisations who had

slightly different perspectives from theirs. It may be argued that this did not enable them to provide an effective voice to the issues raised by their members. This highlights the issue of requiring knowledge of working with the Committees to ensure organisations are able to participate effectively and provide detailed evidence.

As highlighted in [our written evidence](#) to the Committee, we did not believe the financial implications of the Bill were accurately detailed in the regulatory impact assessment, and thought that they were underestimated. This view was echoed by the [Finance Committee](#) and within [CELG's Stage 1 report](#) on the Bill (recommendation 37). The Minister and her officials maintain that the financial implications are accurate and revised costs have not been made publically available to date - if these have been calculated.

The Bill as currently drafted does not repeal connected legislation on the face of the Bill, despite considerable evidence and the CELG committee report recommending this to ensure accessibility of the law and a comprehensive approach to revising tenancies in Wales.

As highlighted in our (and many others') evidence, we have considerable concerns that the Renting Homes Bill and Housing (Wales) Act 2014 may be limited in meeting their desired aims due to a lack of investment and support from Welsh Government to ensure local authorities, the courts and individuals can enforce their rights. The Renting Homes Bill as it stands only provides tenants with the courts as an option for enforcing their contractual rights or seeking redress from their landlord. We know from our client base, as well as wider research by the Ministry of Justice that courts are not viewed as accessible, with perceived and real barriers to accessing justice. We called for local authorities to be given greater enforcement powers within the Bill and greater links to Part 1 of the Housing (Wales) Act 2014 with regards to licensing and registration, which would provide an alternative to the courts. These calls were supported by the CELG Committee as shown in their recommendations, but Welsh Government has not tabled any amends to this effect to date. We would certainly like to see further action taken to address this issue.

- 1.52 Similarly, David Gardner (administrative court lawyer in Wales) identified housing and homelessness as areas of law where there have been some problems in practice:



Housing and homelessness arises often in the Administrative Court. It is not uncommon for representatives (especially those based in England) to quote English regulations which have different priorities. For the same reasons as mentioned in the response at paragraph 5-2 above I would consider consolidation a benefit. In essence, it appears that as the law in England and Wales diverges the devolved areas would all benefit from consolidation.

- 1.53 During a consultation meeting, a lawyer working in the private sector gave their experience of public family law in Wales. The example of special guardianship orders was given and described as problematic. The Special Guardianship Order Regulations for Wales refer to the England guidelines, which is assumed to be a mistake. The lawyer also discussed a very interesting case, *Adopters v FB* [2015] EWHC 297 (Fam) where Moor J dealt with an argument that he had to interpret UK legislation in relation to a Welsh adoption case in accordance with and the UN Convention on the Rights of the Child.<sup>1</sup> Moor J interpreted the legislation in Wales as closely to England as Wales.
- 1.54 This illustrates how the courts have been used to looking at how exactly the legislation applies differently, if at all, in the area of public family law.
- 1.55 Another example of difficulties in practice experienced by this lawyer was timetabling cases because of the difference between the regulations. There is a statutory 26 week timetable in family cases for England and Wales, but the regulatory timetable in Wales is shorter for certain kinds of assessment – 16/18 weeks.

<sup>1</sup> See paras 65-71.

# CHAPTER 6

## Introduction

- 1.1 Chapter 6 of the consultation paper looked at the more practical issue of publishing the law via websites, textbooks and other sources. We explored how legislation is published and the current online legislation services available for Wales. Further, we looked at what a legislation website for Wales should look like. Chapter 6 also considered issues such as publishing Welsh language legislation and presentation of legislation. In addition to primary and secondary legislation, this chapter considered materials such as explanatory notes, guidance, commentary and textbooks.
- 1.2 We received a wealth of consultation responses to the issues covered in chapter 6, each of which will be explored in turn.
- 1.3 The overwhelming majority of consultees made general remarks about the importance of accessible law, which was related to publishing. For example, the Law Society Wales identified issues with the availability of published law generally. It stated that the availability of “primary legislation; secondary legislation including statutory instruments and others such as guidance, circulars, decisions etc; textbooks including student and practitioner texts, specialist journals; case law commentary; loose-leaf annually updated subject-focussed publication and online legal research tools” is of particular concern.
- 1.4 Professor Dawn Oliver (University College London) highlighted the point of unpublished laws not being effective and enforceable/justiciable.
- 1.5 Angela Williams (Law Commission’s Welsh Advisory Committee) noted how making law accessible bears a cost, but on the other hand, so does inaccessible law:

Unfortunately, there is also a cost, often less easy to quantify, if it is not accessible. Continuing NHS Healthcare is an example. “Continuing NHS Healthcare (CHC) is a complete package of ongoing care arranged and funded solely by the NHS through Local Health Boards (LHBs), where an individual’s primary need has been assessed as health-based”. The problems of having rules that both professionals, and the public, found difficult to understand resulted in erroneous decisions, and people not seeking help because they did not know they were entitled to it. The consequences included pain and suffering, deterioration in health and a huge problem in trying to correct past mistakes.

People who make decisions need to know the legal framework within which those decisions should be made. Understanding decisions that have been made, or are likely to be made, enable members of the public to make informed choices.

- 1.6 Ms Williams offered a simple but effective breakdown of what is required to enable the public, advisers and practitioners to make informed, accurate decisions:

To do this they need to:

1. know that there is legislation/guidance that applies
2. be able to find out the name(s) of the relevant provisions accurately enough to facilitate searching – see Good practice below
3. have access to the legislation and/or guidance.

Access means being able to:

1. find it and recognise, if changes have been made, which version applies
2. understand it, with help if necessary.

Understanding the existing provision also allows individuals/organisations to seek to change the law, or to contribute to debate about it eg respond to consultations.

I think all this is best achieved by having

1. well written law and guidance - see reply to consultation question 4-1 above
2. available online - see below
3. easy navigation - see below
4. clear indication if changes have been made, and when - see reply to Consultation question 4-3 above.

1.7 Online availability and easy navigation are explored in consultation questions below.

1.8 A large number of consultees offered comment on problems with current websites that publish the law. Unsurprisingly the overwhelming majority of consultees thought that current free, public facing websites are not sufficient. Law Wales received a tepid reaction. Consultees such as the Wales Governance Centre highlighted some of the shortfalls of the Law Wales website, for example, it fails to tackle the issue of up to date legislation not being easily accessible and fully bilingual.

1.9 Consultees also gave views on what a website publishing the law should look like. For example, the Public Services Ombudsman for Wales stated:

Databases should be kept up to date and appreciate the differences in English and Welsh law. All databases or systems used should be controlled and accurate, as well as appropriately resourced so that we can have confidence that what we find is correct. It would also be useful if text books were produced in English and Welsh or at very least note variations in English and Welsh law.

1.10 In consultation meetings, both academics and lawyers suggested that a Halsbury's Laws for Wales should exist. Consultees such as the Wales Council of Voluntary Action also suggested that a website should be a comprehensive source that "could have different areas or streams for citizens, advisors and practitioners, so that each person could access information that is relevant to their need".

1.11 Citizens Advice Wales suggested having legislation available through an "online portal":

The portal should distinguish between those with legal training and those with none. It would therefore be desirable if a portal were to provide separate 'easy read' versions of legislation and versions aimed at practitioners, in order to promote accessible law that is suitable for the audience. Explanatory memorandums should also be made available and easily accessible online.

1.12 The idea of a portal was also suggested in a focus group with academics, local practitioners and students. Attendees of the focus group thought that the following are the most important things for a website:

- (1) Guidance with a link to primary sources,
- (2) A coded system of headings and subheadings,
- (3) Easy read form,
- (4) Plain language,
- (5) FAQ sections with information on legislation that is frequently searched.

1.13 Another concern raised by consultees was the lack of up to date bilingual legislation published. For example, the Wales Governance Centre commented

This move does not tackle a more pressing concern however, namely ensuring that an updated form of the legislation is available in both languages. Given that legislation.gov is not always fully updated it is often necessary to use other legal databases. Both Westlaw UK and LexisNexis only provide English language versions of the legislation of the National Assembly. This is of significant concern. If the law in Wales only exists in both languages then a database that only provides legislation through the medium of one language is not providing an accurate reflection of the law in Wales.

This is a problem not limited to the private sector. Even where legislation.gov has been updated to account for amendments to the legislation, these were only available in English at the time of writing. The original legislation was available in English, Welsh and the combined language format. As such access to fully updated legislation through the medium of Welsh is limited. We believe that this is an issue that must be tackled immediately if the law of the National Assembly is to be fully bilingual and is key component of improving accessibility to the law in Wales.

- 1.14 The Lord Chief Justice of England and Wales made a unique point about the distinction between primary and secondary legislation:

Additionally, the distinction between primary and secondary legislation is one that is very difficult for many to understand. There is arguably little reason for maintaining the distinction between primary and secondary legislation in a scheme of devolution for a system which already has complex governance structures at both national and European level. The solution to these problems may be a move towards the codification of legislation so that provisions are set out comprehensively and systematically in one place.

- 1.15 We received a comprehensive consultation response from LexisNexis UK. The response sketched out editorial difficulties involved in presenting legislation applying in Wales.

### **Presentation of the legislation applicable in Wales**

- 1.16 LexisNexis UK gave a detailed consultation response which looked at various factors that make presenting legislation that applies in Wales difficult.

- 1.17 The first difficulty noted by LexisNexis UK was not being able to present parallel texts. Lexis stated that the history of devolution in Wales has made it difficult to present a “unitary text”. Lexis described a unitary text as “the text of an Act of the Westminster Parliament which is applicable to both England and Wales, or obviously applicable to only one country”. The parallel text will be included in the Act’s annotations.

- 1.18 Lexis made clear that “in order to be confident to incorporate an amendment or repeal into the text of any legislation, that amendment must be clear, specific and unambiguous”. Lexis explained that this is difficult with amendments made in relation to Wales for several reasons. First, a publisher must decide whether the amendment “should be construed narrowly as applying to Wales only” or whether it should be construed more widely as applying to England and Wales. Lexis stated:

This initial difficulty may seem more intellectual than practical, but the Government of Wales Act 2006, s 108(3), (4)(b) together state that an Act of the Assembly is within the Assembly’s legislative competence if it neither applies otherwise than in relation to Wales nor confers, impose or removes functions exercisable otherwise than in relation to Wales.

Further, Assembly Acts do not unequivocally state that an amendment to a Westminster Act is to have effect as regards both England and Wales.

- 1.19 Lexis gave numerous examples, one of which, was the Mobile Homes Act 1983:

Originally the Mobile Homes Act 1983 applied to both England and Wales. It’s not easy trying to unravel the effects of the different amendments that have taken place with the sections, but Schedule 1 is extraordinary.

To start with, Sch 1 was heavily amended by the Mobile Homes Act 1983 (Amendment of Schedule 1 and Consequential Amendments) (England) Order 2011, SI 2011/1003. Explaining the amendments made by this Order clearly requires the qualification “in relation to England”.

In Chapter 2, para 1 of that Schedule there’s a reference to para 5A:

“Subject to paragraph 2 below, the right to station the mobile home on land forming part of the protected site shall subsist until the agreement is determined under paragraph 3, 4, 5 [or 5A] below.”

The reference to para 5A was inserted by the Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (Wales) Order 2012, SI 2012/899, art 3(1), (7)(a). At first sight, explaining that amendment (indicated by the square brackets) requires the qualification that the reference was inserted “in relation to Wales”.

However, para 5A *itself* was originally inserted in relation to England only by the Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (England) Order 2011, SI 2011/1005.

Para 5A(1) (which made clear that para 5A applied only in England) was repealed by SI 2012/899 (the Welsh order). So it now makes sense that the reference to para 5A in para 2 should be read as applying to both England and Wales.

But, to read these SIs strictly, and to *annotate* the amendments they made with the same discipline, would involve using the expressions “in relation to England” or “in relation to Wales” repeatedly. This leads to the somewhat absurd result that in the example of para 5A the words “This paragraph applies in relation to a protected site in England” would be noted as having been repealed in relation to Wales only.

- 1.20 The second point made by Lexis which still focused on not being able to present the unitary text is that many amendments applicable in Wales are modifications and amendments by implication. Lexis stated that this category of amendment is “primarily concerned with the devolution of powers to the Welsh Ministers and the subsequent reading of the text of a Westminster Act”. This category also concerns where the function of a UK body is replaced by a Welsh body. Lexis highlighted that these sorts of amendments are rarely specific. For example, “the effect of the Government of Wales Act 2006, s 162(1), Sch 11, para 30 was to transfer the functions of the Assembly in this respect to the Welsh Ministers” which does not make specific amendments to existing primary legislation.
- 1.21 An example provided by Lexis was the following:

The Wales Act 2014, s 4 renames the Welsh Assembly Government as the Welsh Government. That section explicitly amends the Government of Wales Act 2006. But section 4 does not explicitly amend any other legislation. Section 4(4)(a) provides that “Unless the context requires otherwise, in any enactment, instrument or other document . . . any reference to the Welsh Assembly Government is to be read as, or as including, a reference to the Welsh Government”.

The Explanatory Notes state that this provision “ensures that, where necessary, statutory references to the Welsh Assembly Government (other than those in GOWA 2006), are to be read as references to the Welsh Government instead. It also provides that, where the context requires it, those references continue to include the Welsh Assembly Government (for example, in relation to events which were completed by the Welsh Assembly Government but have continuing legal effect)”.

The amount of bet-hedging here (“unless the context requires otherwise”, “where necessary” and “where the context requires it”) presents an almost impossible position for an editor to take when it comes to justifying changing the text so that “the Welsh Government” replaces “the Welsh Assembly Government” in *every* instance throughout the statute book.

- 1.22 The third difficulty noted by Lexis regarding presenting legislation applicable in Wales was partial commencement of legislation. Lexis commented that a “problem arises where an amendment or a substantive piece of legislation is brought into force, say, in England on a particular date but later (or not at all) in Wales”. Lexis noted that in circumstances of delayed or partial amendments, the difference of how the law applies in Wales and in England will be explained in the annotations.
- 1.23 The fourth difficulty noted by Lexis regarding presenting legislation applicable in Wales was issues with subordinate legislation. One issue with presenting subordinate legislation applicable in Wales experienced by Lexis is deciding where subordinate legislation takes effect under consolidating Acts. Lexis stated that it has “not come across a Destination Tables where provisions of a Westminster Act are re-enacted in a National Assembly Act, which severely hampers our attempts to give a correct transposition”. Lexis commented that some guidance is provided by the explanatory notes, “but in general the matter of what happens to subordinate legislation does not appear to have been considered”. Lexis acknowledged that the problems of how subordinate legislation “takes effect” are equally applicable to England as to Wales. Lexis provided the example of the Local Government Act 2000, Part 2:

A particularly complex situation is the Local Government Act 2000, Part 2. This Part originally applied to both England and Wales, but was amended by the Localism Act 2011 so as to apply to Wales only. The 2011 Act also inserted a new Part 1A in the 2000 Act which applied to England only. So the instruments originally made under Part 2 of the 2000 Act are split between Parts 1A (England) and the amended Part 2 (Wales). There is not, to my knowledge, any official guidance to as to which instruments take effect under which Part.

- 1.24 Another issue highlighted by Lexis was finding subordinate legislation. Lexis described the process employed in Lexis to track subordinate legislation made under primary legislation. Lexis questioned how a database user could search for instruments without recourse to editorial intervention. It stated that the answer would be “with great difficulty”. Lexis highlighted that the authority segment is frozen on legislation.gov.uk which means that searches for subordinate legislation could draw a blank. Lexis further highlighted that enabling powers change and new enabling powers will not be consolidated to be part of the legislation it is amending. Lexis gave a hypothetical example:

Further, enabling powers do not stay still. If there had been inserted a new enabling power in the 1993 Act [Leasehold Reform, Housing and Urban Development Act 1993], say a new s 98A, and a subsequent instrument was made under s 98A amending the Leasehold Reform Regulations, then information about the authority under which the amending instrument was made would only be available by looking at the authority segment of that new amending instrument. The authority segment for the original Leasehold Reform Regulations would not take account of the new s 98A.

- 1.25 Lexis described the process of “self-searching a database for instruments by way of an authority segment” as a “fraught experience”. This was a concern heard during consultation meetings. In a meeting with lawyers working in the public sector it was stated that secondary legislation emanating from Welsh Government is not searchable and often trying to find the secondary legislation is a difficult task. The consultees noted that there needs to be consistency of titling and a system of headings to make secondary legislation searchable.

- 1.26 Another problem with presenting legislation applicable in Wales identified by Lexis was the lack of tidying up of the statute book, for example, there are examples where sections of Acts have been superseded and statuses appear as “repealed as from a day to be appointed”.

- 1.27 The Residential Landlords Association also commented on the presentation of legislation applicable in Wales:

What the RLA would like to see is a better system of interacting between common and statutory law and clearer notification of laws that apply to different geographical regions. Having one resource for all of these would be ideal, however this is not without its risks and draw back.

- 1.28 Consultation analysis of the consultation questions will now follow.



**Consultation question 6-1: Should the Government's responsibility for the publication of statute law free of charge be the subject of a statutory duty?**

- 1.29 All consultees agreed with this consultation question. Some consultees extended the responsibility described in the consultation question and thought that legislation should be published as up to date, authoritative versions. This is similar to the practice in New Zealand as highlighted by Professor Dawn Oliver (University College London).
- 1.30 Professor Oliver supported a requirement for publication of legislation in printed form and electronic form. Professor Oliver compared this requirement to that included in the New Zealand Legislation Act 2012. Professor Oliver thought that this requirement should be extended so that, similar to the New Zealand Office of Parliamentary Counsel, the Office of the Legislative Counsel should be required to publish office versions of the legislation which are presumed to be correct.
- 1.31 Other consultees that agreed that the Government should have a responsibility for the publication of statute law free of charge by statutory duty included the Care Council for Wales, National Union of Farmers and the Presiding Officer of the National Assembly for Wales.
- 1.32 Keith Bush QC stated that that Government publishing legislation free of charge is part of "the constitutional principle of rule of law." This view was also advocated by the Association of London Welsh Lawyers, Dr Sarah Nason (Bangor University) and Daniel Greenberg (Berwin Leighton Paisner LLP). Mr Greenberg stated:

The Paper's observation in para.6.25 that "It is unsatisfactory that updated legislation is not available free of charge" is something of an understatement. It is intolerable that the public should be expected to respect the rule of law, and to commit to compliance with the law, when they are not able to access an authoritative and up to date version of the law that they are expected to obey. Worse, since commercial publications make the up to date text available to professionals and others who can afford to pay for access, there is an inbuilt inequality of arms in the present situation: it is the job of government to protect the citizen from disadvantage compared to the commercial sector, not to perpetuate a system of access to justice that inherently favours those with money.

- 1.33 The Welsh Government stated

Publication is currently undertaken through long standing arrangements with the Queen's Printer - and in relation to statutory instruments the Queen's Printer is already under a duty to publish under section 2 of the Statutory Instruments Act 1946. The Welsh Government sees merit in making the process of publishing Welsh legislation more transparent and in principle a Queen's Printer for Wales should be appointed, who could be subject to a suitable statutory duty. The issue of concern, however, is how well legislation is published not whether it is published at all.

- 1.34 The National Trust explained that the lack of updated, authoritative versions of legislation available for free means that they are forced to subscribe to commercial providers such as LexisNexis UK:

The National Trust currently subscribes to LexisNexis' services, primarily because it provides comprehensive access to up to date legislation. This service costs the National Trust's legal team an annual fee of several thousand pounds, and there is constant upwards pressure on this fee. The fee takes funds which could otherwise be used more directly for the National Trust's charitable purposes.

The introduction of free, up to date Welsh legislation would not mean that the National Trust can save money here because clearly we also need to be able to access English legislation, but if Wales were to set the pace, and show it can work, then England may follow. For this reason, the National Trust would support a statutory duty for the Welsh Government to publish up to date statute law.

- 1.35 The Residential Landlords Association stated:

Access to statute law should always be freely available and should be considered a statutory duty. It is imperative that access to statute law is maintained in an online database.

- 1.36 Other consultees agreed that there should be a requirement to publish legislation free of charge, but were unconvinced that this should be a requirement imposed by statute. Such was the view of Dr Catrin Fflur Huws (Aberystwyth University). She argued that what is required is reliable information on what "Welsh law" is and reliable information on how the law of England and Wales differs.

- 1.37 The National Archives highlighted that there is a precedent in the United Kingdom to impose a statutory duty to publish legislation:

The 1998 Scotland Act created the position of Queen's Printer for Scotland, with statutory responsibility for publishing Acts of the Scottish Parliament. The Queen's Printer for Scotland has a separate reporting line to Scottish Ministers. The detailed provisions for the publication of Acts of the Scottish Parliament (ASPs) by or under the authority of the Queen's Printer for Scotland are set out in section 38 of the Interpretation and Legislative Reform (Scotland) Act 2010.

- 1.38 The Association of London Welsh Lawyers concluded that the various problems with accessibility of the law applicable in Wales are manifested "when one takes into consideration that text or even online legislation is very rarely the authoritative version of an Act of Parliament or subordinate legislation."

- 1.39 The Presiding Officer of the National Assembly for Wales, Dame Rosemary Butler AM, commented that there should be "clarity in law about where responsibility for publishing statute law free of charge lies."

**Consultation question 6-2: If so, should the duty extend to making legislation available online?**

- 1.40 All consultees agreed with this consultation question.
- 1.41 The National Archives provided the statistics on people visiting the legislation.gov.uk website each month. It stated that “most legislation is accessed and read online” and that the website typically receives two million visitors per month.
- 1.42 The National Union of Farmers commented:
- Online sources are often the most convenient to use and cheapest to deploy. We therefore believe that this duty should incorporate making this information available online, although accepting that there will need to be alternative means of accessing such information for those unable to use online sources.
- 1.43 This view was supported by the Association of Judges of Wales who expressed that online access is even more important considering HMCTS is undertaking a reform programme to digitalise the courts:
- This is particularly important at the present time when HMCTS is seeking to implement a massive reform programme designed to make the Courts and Tribunal Service fit for purpose in the electronic age in which electronic gadgetry is quickly supplanting paper books and the traditional writing modes.
- 1.44 The Welsh Language Commissioner noted that access to legislation online is “now essential.” The Welsh Language Commissioner also agreed with the view of Professor Dawn Oliver (University College London): online legislation should be up to date and authoritative:
- If it were possible to ensure that current statute was available on-line free of charge and that there was certainty that this was the authoritative version, then I would welcome it.
- 1.45 Other consultees that agreed with the consultation question included Professor Oliver, the Law Society Wales, the Care Council for Wales and Angela Williams (Law Commission’s Welsh Advisory Committee). Ms Williams stated that the legislation should also make clear what country the legislation applies in, what date the legislation was in force from and ideally, commentary and case-law also to be available through the legislation pages. Ms Williams noted that legislation online must be easy to navigate for it to be accessible.
- 1.46 Consultees identified benefits to making legislation available online. These benefits included convenience accessing legislation, it being cheaper to publish legislation online rather than on paper and the possibility of amending legislation quicker if it is available online. Keith Bush QC stated:
- This [online publication] is the modern means of communicating information and, as it happens, it is a very suitable medium for a body of knowledge that is constantly developing through a process of statutory amendments.

- 1.47 Emyr Lewis (Blake Morgan LLP) was very supportive of having legislation published online, and thought that creating a database of up to date legislation should be the Welsh Government's focus before consolidation and codification. Mr Lewis thought that publishing up to date legislation would give citizens access to up to date law in the short term, compared to consolidation and codification. The Law Commission is aware that the consultation question does not comment on whether this duty would be prospective or retrospective too. Emyr Lewis commented that if the duty was retrospective, it may be more manageable for the Welsh Government to concentrate on publishing up to date versions of Welsh-made legislation.
- 1.48 The Presiding Officer of the National Assembly for Wales agreed that legislation should be published online but made clear that it would need to be "authoritative (i.e. official), maintained, searchable" so that it is the main source of information for the public "because there are risks in relying on general web searches which might throw up out-of-date information."
- 1.49 Universities Wales agreed that legislation should be published online. It stated that the "most obvious solution is to ensure that this is address as part of the legislation.gov.uk facility." Universities Wales identified issues with legislation.gov.uk which will be addressed elsewhere in the consultation analysis document.
- 1.50 Association of London Welsh Lawyers endorsed the approach in New Zealand where the Legislation Act 2012 requires the Parliamentary Counsel Office to produce versions of legislation presumed to be correct both online and in print:
- The Legislation Act 2012, s 6(2) obliges the NZ Government, through the Parliamentary Counsel Office, to publish legislation in both printed and electronic form, with such versions presumed to be correct. The geographical layout of New Zealand is the accommodation of its citizens is, in many ways, reflective of how the population in Wales is accommodated within its boundaries.
- On the one hand there are pockets of busy City and Town based conurbations, together with less populated rural areas. It is those citizens in more remote areas (without ready access to copy text legislation) for whom the facility of an up to date online legislation will be of the most benefit.
- 1.51 In a consultation meeting a lawyer working in the private sector and a member of the judiciary sitting part-time highlighted that many people in Wales still do not have access to the internet, or have very poor internet connection and this should be taken into consideration.
- 1.52 Further, another part-time member of the judiciary informed the Law Commission of the sort of research resources available in the courts in Wales. The observation went beyond the bounds of internet access. The consultee stated that there is no access to Wi-Fi in the courts which the consultee sits and there is limited or no phone signal. The consultee does not have a judicial laptop and has access to the books which happen to be in the particular courtroom the consultee is sitting in. The consultee highlighted, that regardless of which books are present, none are up to date on Welsh law.

**Consultation question 6-3: Do consultees think it important that an online legislation database for Wales clearly identifies the legislation of the United Kingdom Parliament, and parts of that legislation, that apply to Wales?**

1.53 All consultees were in favour of a database that clearly identifies the legislation of the United Kingdom Parliament and parts of that legislation that apply to Wales. LexisNexis UK highlighted some presentational issues with displaying legislation based on its application.

1.54 The Welsh Government agreed that clearly identifying application of legislation is important due to the “patchwork of legislation” that exists:

This is clearly of importance due to the patchwork of legislation that currently exists, made by the UK Parliament but often applying either to Wales or to England alone (this is because between 1999 and 2011 in particular the law was often changed, by the UK Parliament, differently in relation to Wales; and more recently, since the National Assembly has had enhanced legislative competence, Acts of the UK Parliament are being routinely amended only in relation to England). There is also a connection here to consolidating the law as the effect of doing so would be to ensure that legislation within the competence of the National Assembly is all (or nearly all) made by the National Assembly; which itself demonstrates that the legislation applies in relation to Wales.

1.55 This was also highlighted by David Michael (Neath Port Talbot County Borough Council) stated:

Current formulations in legislation are confusing. Certain parts of Acts are sometimes described as extending to England and Wales even though most of the provisions are England only in application. Since there is one single England and Wales jurisdiction the description may be technically correct but it helps neither the practitioner nor the lay person.

1.56 The National Trust commented:

Differences between English and Welsh laws occur when the law in either country is changed. Keeping track of major changes in the law of Wales is easy (for example we are closely monitoring the Renting Homes (Wales) Bill and actively engaging with the Welsh Government) but the implementation of more minor changes and keeping the legal team up to date is more difficult. This applies to changes to the law in Wales and to changes in England, both create divergence and we have to track both to see when and where divergence occurs. Quite frequently the law in England changes and the law in Wales remains the same. For example, the recent Small Business, Enterprise and Employment Act 2015 made some changes to the operation of the security of tenure provisions of the Landlord and Tenant Act 1954 in relation to home workers, it was not straightforward to work out whether these changes apply only to England or to England and Wales... It would be extremely helpful if an online database clearly distinguished UK and Welsh legislation in the way described. It would make the job of keeping up to date with the divergence of English and Welsh laws considerably easier, and would make it much easier for lawyers (and non-lawyers) who are not familiar with Welsh law to advise on Welsh matters.

- 1.57 Similar points were made by Citizens Advice Wales. It highlighted how complex it is to understand the application of some provisions of the Deregulation Act 2015, for example. Citizens Advice Wales stated that, consequently, it must rely on explanatory notes to understand the application of provisions.
- 1.58 The Care Council for Wales agreed with the consultation question, as did Dr Catrin Fflur Huws (Aberystwyth University). Angela Williams (Law Commission's Welsh Advisory Committee) agreed and noted that online databases should make clear to readers which provisions apply in Wales and should also allow readers of legislation to specify which country they are interested in looking at legislation for before the legislation itself is displayed.
- 1.59 Other consultees that agreed with the consultation question included National Farmers Union Wales, Edwin Hughes (a lay magistrate), Noel Lloyd (Aberystwyth University) and the Welsh Language Commissioner.
- 1.60 Keith Bush QC highlighted the importance of "the continuation of a comprehensive unified database for the UK" but thought that the system could be clarified, as currently the process of working out territorial application is complex. Similarly, the Wales Council for Voluntary Action agreed that "clarity about the reach of UK legislation in Wales" is necessary. The Wales Council for Voluntary Action gave the example of the Localism Act 2011 which has complex territorial application, with the majority of provisions applying in England only, some in Wales and England, others in Wales only and some having UK application.
- 1.61 LexisNexis UK highlighted the problems in presenting legislative text that shows territorial application. LexisNexis UK stated that currently, there are no devices which allow parallel texts to be presented which would show the law as it applies in Wales and the law as it applies in England. LexisNexis UK also stated that it is difficult to definitively conclude that a section applies only in England or Wales:

When dealing with amendments made in relation to Wales to a Westminster Act by an Assembly Act or by another Westminster Act, the first hurdle is deciding whether the amendment should be construed narrowly as applying to Wales only or construed broadly so that the amendment is seen as applicable to both England and Wales. If we take the broad construction, then the amendment can be taken in with confidence and there is no need for qualification of the amendment. Such qualification would take the form of a note explaining that the amendment applies to Wales only.

This initial difficulty may seem more intellectual than practical, but the Government of Wales Act 2006, s 108(3), (4)(b) together state that an Act of the Assembly is within the Assembly's legislative competence if it neither applies otherwise than in relation to Wales nor confers, impose or removes functions exercisable otherwise than in relation to Wales.

Further, Assembly Acts do not unequivocally state that an amendment to a Westminster Act is to have effect as regards both England and Wales.

- 1.62 An example given by LexisNexis UK is that of the Further and Higher Education (Governance and Information) (Wales) Act 2014 s2(3) which substitutes Further and Higher Education Act 1992 s22 for the existing ss22 and 22ZA:

The original s 22 reads (*italics used for emphasis*):

“A further education corporation *in England* may modify or replace their instrument of government or articles of government.”

The s 22 as substituted reads:

“A further education corporation may modify or replace their instrument of government or articles of government.”

In the absence of a definitive statement on the face of the Welsh Act, it can be assumed that the 2014 Act applies *only* to Wales, and has no effect in England. Then there will be two section 22's, each effectively saying the same thing but one being English and the other Welsh. Equally, it can be assumed that there is now only one s 22 (that substituted by the 2014 Act) because the text of the amending 2014 Act makes no distinction between the two countries.

This may not make a lot of difference as regards the effect of the section, but in the above example it does make a difference to the text.

- 1.63 LexisNexis UK also highlighted that different commencement times means that it is difficult to adequately show the territorial application as sometimes provisions have been commenced in England and not in Wales and vice versa.

- 1.64 The National Archives informed the Law Commission about its user research that revealed that “most people – including many legal professionals – struggle to understand the parallel concepts of extent and territorial application of legislation.” The National Archives noted that they have a “distinct Wales-only extent, where this best aids the reader.” This feature can be used when a United Kingdom Act of Parliament is amended by an Act of the National Assembly for Wales, for example. The National Archives have not recorded information about the application of UK Acts of Parliament to Wales. However, The National Archives have developed a “tool capable of capturing both extent and territorial application information for all UK legislation.” It commented that utilizing the tool and identifying UK legislation that applied in Wales is a

... substantial task, involving a significant amount of research. The National Archives is not resourced to undertake this initiative but we can offer a substantial capability and would be willing to work with partners towards such a goal.

**Consultation question 6-4: Do consultees attach importance to legislation being accessible through a general web search?**

- 1.65 Many consultees agreed with the consultation question. Consultees who agreed included the Care Council for Wales, Keith Bush QC, Dr Catrin Fflur Huws (Aberystwyth University), Association of London Welsh Lawyers and Huw Williams (Geldards LLP).

- 1.66 The Welsh Government agreed that it is important that legislation is accessible through a general web search:

Yes. This is important, and is generally available in this way now. However, the search is likely to provide a link to legislation that is not in its up to date form on legislation.gov.uk. It is essential, therefore, that legislation is available on legislation.gov.uk in up to date form as soon as practicable. We understand that all primary legislation will be available in updated form by the end of this year.

- 1.67 David Michael (Neath Port Talbot County Borough Council) that legislation should be available through a general web search and highlighted that subscription services are not a “feasible option for members of the public”.

- 1.68 Angela Williams (Law Commission’s Welsh Advisory Committee) highlighted the potential problems when lay people begin their search for a piece of law through a search engine:

Lay people often have no idea how to begin to look for a piece of law. When they have an idea of what the act/regulations might be called, it is often not a precise idea. Secondary legislation often consists of large numbers of SIs with very similar titles. Search engines, when they list legislation are unlikely to draw attention to territorial issues. All this makes searching very difficult.

Searching within websites are also difficult if you are vague about titles or years.



- 1.69 Similarly, the Presiding Officer of the National Assembly for Wales, Dame Rosemary Butler AM, noted that “there are risks in relying on general web searches which might through up out-of-date information”. David Gardner (administrative court lawyer for Wales) noted that accessing legislation through general web searches is desirable for litigants in person, but that this comes with “the danger of inaccuracies”. Mr Gardner recalls occasions where litigants in person have extensively quoted Wikipedia.
- 1.70 The Welsh Language Commissioner supported legislation being accessible through a general web search in both Welsh and English. The Welsh Language Commissioner referred the Law Commission to the advice document on Welsh language considerations in information technology, *Technology, Websites and Software: Welsh Language Considerations*.
- 1.71 The National Archives shared its user data with the Law Commission and noted that over 60 percent of visits to legislation.gov.uk start from a web search which illustrates how many people start their search for legislation through a general search engine. Dr Sarah Nason (Bangor University) stated:
- Yes, for good or ill, and despite research training, law students (at undergraduate, masters and PhD level) generally begin research via a general web search.
- 1.72 The Association of London Welsh Lawyers explained the problem with individuals searching for legislation via a search engine. The Association described the process as “time consuming, problematic and potentially fruitless”. The Association draw attention to the fact that for an individual to correctly establish the current law he or she would need to consider the law in Wales, European Union and United Kingdom.

**Consultation question 6-5: Do consultees consider that legislation should be accessible through a database’s internal search engine, including being searchable by subject matter?**

- 1.73 Consultees were generally supportive of the consultation question. Some consultees warned of the problems with having legislation searchable by subject matter.
- 1.74 Some consultees that agreed with the consultation question included the Welsh Government, the Care Council for Wales, Residential Landlords Association, Huw Williams (Geldards LLP) and Marie Navarro (Your Legal Eyes). Keith Bush QC agreed with the consultation in principle but warned that the priority should be to simplify legislation “rather than mitigating its complexity by means of sophisticated search methods”.
- 1.75 The Welsh Language Commissioner supported the proposition in the consultation question but noted that searching a database’s internal search engine, including by subject matter should be available in Welsh too. The Commissioner highlighted that the legislation.gov.uk website provides Welsh legislation but that it is not possible to search for that legislation. Legislation must be searched through the medium of English.

- 1.76 Angela Williams (Law Commission’s Welsh Advisory Committee) questioned whether it would be possible to use the topic headings on the Welsh Government website to group legislation by subject matter. The Welsh Language Commissioner identified possible benefits to having legislation searchable by subject matter:

It would facilitate finding legislation in specific subjects and enable researchers to identify other legislation that is relevant to the subject area in question that they would not otherwise be aware of, quite possibly.

- 1.77 The National Trust also suggested that it may be useful to have the search function search the body of the legislation so that the search results can refer you to parts of legislation. Dr Sarah Nason (Bangor University) commented that if it decided that investment should be made in online provision then material should be searchable “by as many criteria as possible (broad topics, subject specialisms, date of coming into force and so on)”.

- 1.78 The Association of London Welsh Lawyers supported making legislation searchable by subject matter which could be achieved through Cyfraith Cymru/ Law Wales:

The ALWL agree that unless an individual knows the title of the legislation being sought, finding the correct statute through a search engine will be time consuming, problematic and potentially fruitless. This is particularly pertinent when consideration is given to the fact that in order to establish the current law in Wales, EU, UK and Welsh legislation will all have to be considered.

UK legislation can generally be searched for by reference to name, type or year of enactment. Specialist legal websites (both government and commercial) usually have facility to search for particular words or phrases common in separate but potentially relevant legislation. This of course has the benefit of linking Statutes and Statutory Instruments.

We recognise that this falls short of enabling the user to search for subject matter. We therefore repeat our earlier comments with regard to the establishment of Cyfraith Cymru/Law Wales in which it is envisaged legislation can be searched for by subject matter. We support any innovation or tool that eases the use in online searches.

- 1.79 Similarly, The National Archives noted that although most users find legislation through a general web search, searching legislation by subject heading helps the user by providing some “framing” for areas of legislation:

Whilst most users will find and access legislation from a web search, there is value in a subject based organisation of legislation. It provides the user with some framing, helping them to establish a mental model for the different areas of law. The subject scheme developed by the Welsh Government for the Law Wales website is effectively done and helps clarify what the Welsh Government is responsible for.

We have a service on legislation.gov.uk that allows users to search for Statutory Instruments by subject, using the subject heading. We have identified and developed several improvements to our advanced search facilities, as part of developing a query language specifically for legislation documents. We will be able to offer a more advanced option to search by subject, sub-subject, and other pertinent information, such as enabling power, in future. We have retained in our data, but not presented to users, the subject based classification of Acts of Parliament used for the discontinued print publication, Statutes in Force.

Whilst subject based schemes aid the reader, identifying which parts of which pieces of legislation are about what subjects is a difficult and potentially time consuming task. We have explored using various taxonomies and vocabularies, such as the Integrated Public Sector Vocabulary (IPSV) and Eurovoc, in combination with automatic classification software. Our experience with these technologies was disappointing, in part because the vocabularies were not designed as subject based schemes for legislation.

- 1.80 David Michael (Neath Port Talbot County Borough Council) commented on some potential problems with making legislation searchable by subject heading:

Legislation should be searchable by subject matter on a particular database. However, much depends on the subject headings adopted. Some of the material on the Welsh Government's website is not as easily found as it might be since it follows internal organisational boundaries.

- 1.81 Similarly, local authority lawyers from North Wales noted that grouping legislation may not necessarily improve its usability. They stated:

For example if one searches legislation.gov for "local government" legislation there are 65 UK public general acts and others with "local authority" in their title. Identifying the correct piece of legislation is a skilled task that would be daunting to many.

- 1.82 The lawyers explained that if legislation was codified it would reduce the number of sources that need to be consulted. They state:

Making that legislation searchable by subject matter would further enhance usability, but should not be seen as an alternative to codification.

**Consultation question 6-6: Should Welsh language legislation be capable of being viewed alongside English language legislation on legislation.gov.uk?**

- 1.83 Most consultees that commented thought that Welsh language legislation should be capable of being viewed alongside English language legislation on legislation.gov.uk.

1.84 Some consultees who agreed included the Association of Judges of Wales, the Law Society Wales, Wales Governance Centre, Catrin Fflur Huws (Aberystwyth University), the Welsh Government and the National Trust, for example.

1.85 Dr Huws and the Welsh Government noted that the Welsh version of the legislation is part of the law and therefore the legislation should be available in Welsh and English side by side, so that the reader can understand the law and compare as necessary. Keith Bush QC stated:

A situation that treats the two language differently is not sustainable.

1.86 Similarly, the Welsh Language Commissioner highlighted that the Government of Wales Act 2006 prescribed the same status to the Welsh language as the English language and therefore “only by being read together do they [Welsh and English] represent the legislation of Wales. The Welsh Language Commissioner identified the following benefits with presenting the two language versions alongside each other:

Reading the text in both languages would facilitate understanding of the purpose of the legislation itself...There are practical advantages too resulting from reading Welsh language legislation alongside English language legislation as it would assist those who are less confident in using the Welsh language in the area of law to do so, enabling them to refer to clauses in the English version too. Thus they would become more familiar with the terminology and phraseology of Welsh language legislation.

1.87 Citizens Advice Wales informed the Law Commission of its research *English by default* which found that Welsh speakers “frequently find it easier to use Welsh language services on websites if it easier to “toggle” between the Welsh and English version”.

1.88 The Association of Judges of Wales noted that displaying the Welsh and English language legislation alongside each other could assist the courts:

It would provide obvious benefits in terms of accessibility and clarity and be of particular assistance in cases referred to the courts requiring the meaning and interpretation to be given to individual clauses of both primary and secondary legislation.

1.89 The Association of London Welsh Lawyers supported displaying both languages of the legislation alongside one another as the Welsh Government and the National Assembly have a commitment to the equality of the Welsh language. However, the Association considered that that “direct translations of certain English words or phrases do not have an equivalent in the Welsh language, which could in turn lead to misunderstanding or misinterpretation of Statute”. The Association of London Welsh Lawyers also appreciated the cost and time involved in translating and keeping up to date the legislation. Nonetheless, they concluded access to Welsh legislation as equal as English, “imperative”.

1.90 Dr Sarah Nason (Bangor University) agreed that parity should be given to both languages, however, for reasons of efficiency links could be provided to the Welsh Government/ National Assembly website. Dr Nason stated that there should be a good working relationship between the legislation.gov.uk website and any future Welsh badged services.

1.91 The National Archives informed the Law Commission of its in-depth user testing of Welsh language users of legislation.gov.uk. The National Archives created a wireframe prototype to user-test the presentation of Welsh and English legislation. Displaying the Welsh and English language legislation side by side tested well:

The dual column view tested well. It was positively received by participants as they felt it supported their working practices and demonstrated the equal status of the texts for bi-lingual legislation. The usability research indicated that a dual column layout supports a number of different working practices. Translators like it because it allows them to compare text side-by-side, while drafters can check the dual view but also move to a single language view for more comfortable reading. Researchers, advisers and practitioners also need to check terms against each other so benefit from having the two texts side-by-side.

1.92 The Wales Governance Centre, although supportive of displaying Welsh and English versions of the legislation side by side, highlighted a more pressing concern: “namely ensuring that an updated form of the legislation is available in both languages”. As explored in the consultation paper, legislation.gov.uk is not yet fully up to date and considering that the commercial providers do not have a platform for Welsh language legislation, this means that Welsh language legislation is not available in its up to date format by any provider. The Wales Governance Centre conclude:

We believe that this is an issue that must be tackled immediately if the law of the National Assembly is to be fully bilingual and is key component of improving accessibility to the law in Wales.

**Consultation question 6-7: Do consultees agree that a database of legislation applicable in Wales should be organised by subject matter, following the *Defralex* model structure, with clear and detailed sub-divisions? Should this be done by way of links from *Cyfraith Cymru/Law Wales* to legislation.gov.uk or in a section of legislation.gov.uk?**

1.93 Consultees were supportive of the proposition set out in this consultation question. Consultees included the Wales Local Government Association, Law Society Wales, Universities Wales, Professor Noel Lloyd and Marie Navarro who supported an indexation.

1.94 As described in the consultation analysis of consultation question 6-5, consultees were generally very supportive of organising legislation by subject matter. Below will be analysis of only those consultees that offered comment on the Defralex model specifically.

- 1.95 The Care Council for Wales were supportive of the Defralex model. It stated that if the Cyfraith Cymru/Law Wales is intended to be developed to be the “go-to” website then it should include links to legislation.gov.uk. Similarly, Huw Williams (Geldards LLP) was supportive of the Defralex model:

The Defralex model appears to offer significant benefits particularly in terms of indicating cognate legislation.

The fact that a high percentage of hits on legislation.gov come through search engines suggests that it may be the result of a legislative reference appearing in another text, for example a government publication. This would suggest that a link through legislation.gov would be most useful. However, as the CyfraithCymru/Wales Law “brand” becomes better known and moves up the results presented when “law+Wales” (or similar) is searched, this could well become an important “portal” as well.

- 1.96 The Association of Judges of Wales also supported the Defralex model:

One of the difficulties of undertaking research on the NAW website is that the indexing of content is poor causing the reader to have some knowledge of the subject before accessing the website. It would be helpful for the work being undertaken by the various departments to be linked into a central hub enabling the reader to establish what is available on any particular subject without having to trawl through Departmental sites the relevance of which may not be at all immediately apparent to the browser. This is particularly important in relation to learning about proposed legislation. If the “Defralex” model were to be employed by the Welsh Departments it would serve to enhance the ability to search their individual databases immeasurably.

- 1.97 The National Trust offered its own experience of indexing legislation:

The National Trust legal team advises on a very wide range of topics and is frequently asked to advise on unfamiliar areas of law. It is much easier to advise on these areas if the lawyer can refer to a list of the applicable legislation.

It is also worth noting that the National Trust’s intranet, which, amongst other things, serves staff as a comprehensive knowledge resource and a how-to guide, was recently re-organised by subject matter and is, as a consequence, much easier to use. Clear and detailed subdivisions would enhance the usability of the database, making it quicker and easier to home in on relevant pieces of legislation.

We have no strong views on the location of the database.

- 1.98 Keith Bush QC commented:

Legislation should be organised more systematically, with individual pieces being drawn up under the appropriate heading or sub-heading, so that an orderly 'statute book' develops. The role of a website such as 'Cyfraith Cymru / Law Wales' is something to discuss. No scheme should be relied upon unless it has been placed on a robust and permanent footing. And certainly the usefulness and comprehensive nature of legislation.gov.uk must not be compromised.

1.99 In addition to comments offered under consultation question 6-5 the Association of London Welsh Lawyers stated that the organisation of legislation is "particularly pertinent in Wales where the law in a devolved area is often an unwieldy complicated mixture of Westminster and Welsh legislation". It referred to the work of Defralex as "commendable".

1.100 The Welsh Government acknowledged that good accessibility to legislation requires "easy access by reference to subject matter":

Clearly good accessibility requires easy access by reference to subject matter. The balance between divisional organisation and indexing/search tools needs to be kept under ongoing review with a view to maximise accessibility for available resources. The Defralex model is clearly of interest, as are other models including from Commonwealth jurisdictions.

1.101 Dr Sarah Nason (Bangor University) identified some limitations of grouping legislation:

However, citizens generally experience legal problems across a range of subjects (mental health and education, community care and local government for example). It may also be valuable to provide relevant signposting and cross-referencing for areas of legal need that are often experienced at the same time. Similarly not all subjects fall neatly into one subject matter heading, proper thought should be given to ensuring that classification under a particular heading does not unduly restrict access to particular materials.

1.102 Dr Nason offered some views on by which means this legislation should be presented:

This would be better achieved by way of links from Cyfraith Cymru/Law Wales to legislation.gov.uk rather than in a section of legislation.gov.uk, this should avoid duplication of effort and allow Wales to take ownership of presenting material in a clear and innovative fashion (especially if a statutory duty is established as per question 6-1 above).

- 1.103 Citizens Advice Wales highlighted problems with the Defralex model. It describes the Defralex site as “comprehensive” but “not organised in an accessible or readable way for members of the public to understand”. Citizens Advice Wales continued, commenting that the website is “difficult to research as legislation is not organised into relatable fields of law dealt with by DEFRA, and the site doesn’t provide any context to the raw legislation and statutory instruments”. Citizens Advice Wales compare the Defralex site to Cyfraith Cymru/Law Wales which they described as “more readable and accessible for the public”. It stated that the topic headings on the Law Wales website are more “instinctive” and easier to navigate compared to Defralex. Citizens Advice Cymru thought that Law Wales could link to legislation.gov.uk, but it acknowledged that this website is outdated and is therefore not a “reliable source”. Citizens Advice Wales did propose a portal that distinguishes between those with legal training and those without.
- 1.104 The Wales Council for Voluntary Action commented on the Cyfraith Cymru/ Law Wales website. It warned that the Law Wales website is still “at a very early stage” and that any links to legislation.gov.uk would mean linking to a website that is not always up to date. Similar concerns were highlighted by the Wales Governance Centre who noted the usefulness of grouping legislation under topic headings. The Centre, however, referred to the fact that the headings on the Law Wales website do not list their own legislation, and therefore the link to legislation.gov.uk would provide out of date legislation.
- 1.105 The National Archives described its involvement in creating the Defralex model. It suggested that if the National Archives was to be involved in any such grouping of legislation for Wales it would seek to do some more user-testing to better understand user needs.
- 1.106 The Law Commission met with representatives from the Police National Legal Database as part of the consultation process. In the consultation meeting the process of setting up a comprehensive database was discussed.

#### **Process of setting up a comprehensive database**

- 1.107 The information received from PNLD could be helpful in assessing the costs of different sorts of websites and models of funding.
- 1.108 The website was started by staff at West Yorkshire Police Force and has become the main police database for legal information. The website is a subscription only service and every police force in the country subscribes to it. Subscription rates depend on the size of the police force. The PNLD have a team of full time staff, most of whom have a legal background of some sort.
- 1.109 The website is geared specifically to its stakeholders – it is designed for the police to use. It is limited to criminal offences and each offence is written out on the website (not linked to legislation.gov or any other source). Information is given on the elements of the offence, with information on charging and on any terms that need further explanation. There are also user-friendly descriptions of case law where it is thought that this will help the officer, but no links to the transcripts, law reports or any legal articles.



- 1.110 It was interesting to learn of a project which has achieved a comprehensive database of information but with a clear user in mind.

**Consultation question 6-8: Should legislation available on an online legal database for Wales be editable by volunteer legal experts?**

- 1.111 Nearly all consultees that responded to this question raised serious concerns with having volunteer legal experts editing an online legal database for Wales. Some consultees considered that there may be some benefits, such as monetary savings, but identified the overwhelming drawbacks.
- 1.112 Dr Catrin Fflur Huws (Aberystwyth University) thought that there would certainly be advantages to having volunteer legal experts editing legislation but thought the following points should be considered:
- (1) Who oversees the accuracy of the material and ensures that it is updated
  - (2) Who accesses material on subjects – is there a danger for there to be some areas on which no-one makes comments
  - (3) What is the advantage to participants? What is going to encourage them to participate and to do so on a regular basis?
- 1.113 Dr Huws raised the issue of responsibility: who would ultimately be responsible for the material, including its accuracy? This was raised by many other consultees. For example, the Law Society Wales, Edwin Hughes (lay magistrate) and Professor Noel Lloyd (Aberystwyth University).
- 1.114 The Care Council for Wales thought that a “clear authoritative process” for editing legislation is needed. In the same light, Huw Williams (Geldards LLP) considered how any open-source editing could mean that the database is treated with “almost the same degree of caution as a Wikipedia resource”.
- 1.115 Concern over quality was echoed by consultees such as Marie Navarro (Your Legal Eyes), the Association of London Welsh Lawyers, the Residential Landlords Association and the National Trust. The National Trust considered how the quality of the content may be an issue but they concluded that “they are not insurmountable obstacles and agree that a system of open source editing should be explored”. Keith Bush QC regarded the editing of legislation as work “too important” to be left to volunteers and that it is work that should be “funded and carefully organised”.
- 1.116 The Welsh Language Commissioner offered no specific comment on the question posed but noted that if an open-source editing process was to be employed it would “have to be ensured that they updated the legislation in Welsh and English simultaneously and to the same standard in order to treat both languages on the basis of equality”.
- 1.117 The Welsh Government stated that it saw little merit in attempting to replace the legislation.gov.uk website, but it acknowledged that the service could be improved:

At present we see little merit in replacing the existing database, legislation.gov.uk. That is not to say, however, that we don't see a need for the service to be improved and better serve Welsh interests. The development of a distinct or separate legal jurisdiction may require consideration to be given to the development of a separate database for Wales. It is worth noting however that Scotland and Northern Ireland, both with separate jurisdictions, continue to use the services of legislation.gov.uk. Additionally, the costs of establishing a separate database could be significant and would need careful consideration. Consequently we would need to be persuaded of the merits of a separate database.

1.118 Huw Williams (Geldards LLP) questioned whether the editing process would attract enough volunteers to achieve a database that is sufficient and up to date. This is another consideration that should be borne in mind when considering the possibility of voluntary open-source editing.

1.119 The National Archives gave its account of its own experience of editing legislation, whether the editing is done by an employee, a paid third party or a volunteer:

Ensuring the quality of information provided to the user is essential, particularly when it is provided from an official source. Since 2012, The National Archives has operated an 'Expert Participation Programme', which has enabled us to expand the number of people working to bring the revised legislation on legislation.gov.uk up to date. We determine the editorial practice and the process at The National Archives. These are the real determiners of quality. The process means that every task is done by an expert legal editor (usually someone with legal qualifications or a legal background), and reviewed by a more experienced senior editor. It does not matter whether the editor is employed by The National Archives, by a third party, or is a volunteer. Quality and consistency are what matters most. We have been able to identify tasks that lend themselves to people who, whilst legally trained, are relatively inexperienced as editors. As well as providing training and review we also have an online editorial manual, which sets out our practice, as well as guiding the editor through more complex tasks.

This is another area where there may be an opportunity, but the challenge of managing volunteers should not be underestimated. In practice, we have found most of our Expert Participants have been employed by somebody, rather than being unpaid volunteers. There is no reason, in principle, why volunteers cannot contribute to a legal database, so long as there is a clear process and editorial practice that ensures the quality of what is produced.

1.120 The Wales Governance Centre drew on the fact that online facilities will exclude a significant number of people in Wales. It referred to the Welsh Government's National Survey for Wales 2014-15 which revealed that 19% of the Welsh adult population do not regularly use the internet. It is therefore important to consider textbooks or similar resources for those who are digitally excluded. Lack of internet access to some Welsh citizens was a concern heard generally in consultation meetings.

**Consultation question 6-9: If so, what safeguards should be put in place?**

1.121 We received limited responses to this consultation question as many consultees had commented that they do not support a process of open-source editing as discussed in consultation question 6-8.

1.122 Catrin Fflur Huws (Aberystwyth University) suggested the following assurances:

- (1) To ensure the accuracy of the material
- (2) To ensure that the material is recent
- (3) To ensure that the material is bilingual
- (4) To ensure that there is no information that is inaccurate or malicious
- (5) To ensure to what degree it is ensure that the information is correct

1.123 The Association of Judges of Wales raised the concern of accreditation and the possibility of the online database becoming similar to the process used on Wikipedia:

We are aware of the recent initiative taken by the NAW working in partnership with Westlaw UK to create a new website "Cyfraith Cymru/Law Wales". We welcome that initiative but recognise that it is yet in its infancy. It aims to publish legislation and invites contributors to post articles and commentaries on the site written by academics and experts in the various fields to explain, compare and critically analyse. There is clearly a potential accreditation problem in allowing anyone to amend entries on the website (as in the case of Wickipaedia). We would suggest that one possible way of limiting the problem of mis-information being posted would be to restrict individual entries to footnotes to be the subject of periodic editorial review. At which time approved footnotes might be incorporated by the editors into the main text. Funding again appears to be an obstacle that needs to be addressed in order to attract contributors

1.124 Marie Navarro (Your Legal Eyes) suggested having "editors and checkers" verifying the information. Similarly, the National Trust drew on the discussion in the consultation paper and suggested vetting editors and "verification of edits by an editorial board":

The National Trust legal team would be confident in using an open source edited system if the database was generally used by and its accuracy generally accepted in the legal industry. That might be achieved, as is suggested in the consultation paper, by the vetting of editors and verification of edits by an editorial board, or if there were a clear and simple system by which users of the database could easily check the source of the edits (e.g. where an existing Act is modified by an amendment Act, there could be a link to the amendment Act) – that way, a lawyer using the database could put the veracity of the database beyond doubt.

If there were a delay between edits being made and those edits being verified by an editorial board, edits could be marked as verified or unverified so that their reliability could be more easily assessed.

- 1.125 The Association of London Welsh Lawyers considered it essential to have a committee that would peer review the edits. The committee should consist of “suitably qualified academic and practitioner lawyers”.
- 1.126 As quoted above, the National Archives have a quality control process to ensure information is accurate. This process involves a trained legal editor, the work of whom is reviewed by a senior editor. Materials such as training and an online editorial manual are also provided.

**Consultation question 6-10: Do consultees find explanatory notes helpful? Could they be improved?**

- 1.127 The majority of consultees agreed that explanatory notes are helpful, but that they could be improved.
- 1.128 Consultees explained that explanatory notes can help interpret legislation and are useful as pre-reading for the Act itself. The Residential Landlords Association described explanatory notes as “very helpful” as they help give context to areas of law that readers might be unfamiliar with. The Residential Landlords Association commented that explanatory notes are especially useful for those who are not legally trained.
- 1.129 In contrast Citizens Advice Wales argued that explanatory notes are geared more towards “people working in policy, researchers, legislators and legal practitioners than for member of the public”. Citizens Advice Wales stated that explanatory notes can be “extremely useful” and that an easy-read document could be created to serve the public. Dr Sarah Nason (Bangor University) noted the following about the usefulness of explanatory notes:

In my experience explanatory notes are helpful, especially to law students, and are often cited as authoritative interpretations of relevant provisions. Seeing provisions and some commentary in context is a method adopted by a range of leading textbooks and having this material online is beneficial to students and professionals.

- 1.130 Some consultees stated that some explanatory notes are of limited utility as they simply explain provisions whose meaning is not self-evident.

1.131 Keith Bush QC drew on his own experience of preparing explanatory notes and stated that he is “doubtful of their value”. Mr Bush QC explained:

The tendency, in drafting them, is not to say anything that could be interpreted as an addition to, or a change to the subject of the law itself. The exception is their ability to record the pre-enactment history, and the motives that led to the legislation – factors that could be valuable in interpreting unclear provisions.

1.132 Similarly, in a consultation meeting with local government lawyers, explanatory notes were described as merely paraphrasing the legislation, which is not useful for the citizen.

1.133 These are the following ways that consultees suggested explanatory notes could be improved:

- (1) Consistency in the way explanatory notes are produced.
  - (a) The Care Council for Wales argued that there should be guidance for those who write explanatory notes to assist with achieving consistency.
- (2) Providing hyperlinks to background papers and proceedings.
  - (a) The National Trust referred to the fact that this was a proposal made by the Good Law Project. The National Trust stated that it supported the proposals made by the Good Law Proposals regarding explanatory notes.
- (3) The Presiding Officer of the National Assembly for Wales stated “the way in Bills address human rights considerations, alongside compatibility with European law, should be more explicit in Explanatory Memorandums”. Explanatory notes are contained in the explanatory memorandums and are submitted to the Assembly to be scrutinised alongside Bills.
- (4) Including keeling schedules with an explanation of all amendments.
- (5) The Care Council for Wales said that explanatory notes should be written in “non-legalistic language” and should set out the background to the legislation clearly, as well giving the aim to the legislation and individual sections of the legislation.

1.134 LexisNexis UK gave its experience of dealing with explanatory notes, and gave examples of how some explanatory notes are more useful than others:

The Explanatory Notes to the Localism Act 2011 has a segment devoted to explaining the general application of the Act to England and/or to Wales, and the notes to certain individual provisions have further explanations. Annex A provides a section-by-section account of the application of the individual provisions of the Act. In editorial practice, this Annex has proved invaluable.

Without such a guide (but it is only a guide) it is easy to make the mistake of assuming that any given provision applies to both England and Wales, when in fact it applies to only one of them.

Compare the 2011 Notes with those to the Housing (Wales) Act 2014.

The Housing (Wales) Act 2014, Part 2, is the principal statute on homelessness in Wales, replacing the Housing Act 1996, Part 7. The Explanatory Notes to the 2014 Act do not so much as mention this replacement, even in passing.

In those Notes, there are the following clues (but nothing more).

S 57:

“The Housing Act 1996 referred to “violence”; this has now been changed to “abuse” to clarify that it should not be restricted to physical violence.”

S 60:

“Sections 179(2) and (3), 180 and 181 of the Housing Act 1996 provided that local housing authorities might give financial and other assistance to homelessness advice providers. These provisions have not been replicated here, since general local authority powers are now available for this.”

Contrast the above with the Explanatory Notes to the Local Government Byelaws (Wales) 2012,, which explain for the principal provisions of the 2012 Act their relationship to the corresponding provisions of the Local Government Act 1972 which they replace.

Also contrast with the Explanatory Notes to the Mobile Homes (Wales) Act 2013 which state

“The Mobile Homes (Wales) Act 2013 restates and consolidates the legislation on mobile home sites in Wales”

and (like the Local Government Byelaws (Wales) 2012) contains additional information at some (but not all) of the individual sections to elaborate on their sources in the previous legislation.

Such information, though, still leaves open the question of how comprehensive the explanation of a replacement is. For example, the Mobile Homes (Wales) Act 2013, s 44, is based on the Caravan Sites Act 1968, s 4, but this is not specifically mentioned in the Explanatory Notes to the Mobile Homes (Wales) Act 2013. Whereas s 42 of the 2013 Act is specifically linked with its predecessor in the 1968 Act.

This absence of a full comparison where a Westminster Act is replaced as regards Wales, leads into the difficulties that are experienced with allocating subordinate legislation to the new provision under which it takes effect by virtue of the Interpretation Act 1978. Further, case law relating to a replaced provision must be accounted for, otherwise that information can go missing.

- 1.135 LexisNexis's comment on explanatory notes illustrate ways in which explanatory notes could be improved to assist technical editors.
- 1.136 Professor Dawn Oliver (University College London) described an extended role for explanatory notes:

In the Welsh Government internal guidance should (ideally, but see below) be issued by the first minister's office requiring ministers and officials involved in the legislative process to make and publish Legal Accessibility Statements before a bill or secondary legislation can progress through the internal government procedures.

These statements should indicate whether and if so where an authoritative text for the combined relevant statutory and secondary legislation provisions will be published if the measure is passed.

These statements would be the responsibility of Counsel General, who is in any event responsible at stages in the development of a bill for ensuring the quality of draft legislation. Quality must surely include accessibility.

The Explanatory Notes could also cover this issue.

The government member in charge of the Bill should be obliged by internal guidance to make Legal Impact Statement to the Assembly: such a requirement could well fall within the minister's broad responsibility for competence.

The Legal Accessibility Statement may be part of the Regulatory Impact Statement or separate from it.

Would a government introduce or agree to such measures? Yes, if the Welsh Assembly were to press ministers to provide this information, and make political trouble if they do not do so.

**Consultation question 6-11: How could explanatory notes best be presented?**

- 1.137 Consultees gave a host of views to this question, ranging from presentation to purpose.

1.138 With regard to presentation, David Michael (Neath Port Talbot County Borough Council) thought that explanatory notes should be available as a complete document and by hyperlink from the legislation itself. Keith Bush QC also thought the explanatory notes should be a separate document but thought that it should not be footnoted to the legislation as this would give the explanatory notes too much status. The National Trust noted that it would prefer for explanatory notes to be available online, which could be viewed alongside the legislation they relate to. The Association of London Welsh Lawyers, similar to views submitted in consultation question 6-10, stated that hyperlinks in explanatory notes would “allow easy access to other relevant material”.

1.139 Dr Catrin Fflur Huws (Aberystwyth University) highlighted that in essence explanatory notes are to explain in written form something which is already written:

What is significant is the fact that explanatory notes have to explain in written form what is already written. This means that two interpretations can be created – or that the explanatory document explains the same concept in different terms. Would it not therefore be better to spend time ensuring that the legislation itself is easy to understand, and to use the explanatory notes to explain how the law accords with other legislation in the same area.

1.140 The National Archives explained that it believes that there are opportunities to better present explanatory notes:

... in particular bringing the portion of the text of the explanatory note together with the portion of the legislation which it relates.

1.141 Further, the National Archives informed the Law Commission of the following:

The National Archives regularly shares its work and findings with the drafting offices in the UK. We meet the four First Legislative and Parliamentary Counsel once every six months. At the UK level, as part of the Office of Parliamentary Counsel’s good law initiative The National Archives has been exploring different approaches to the drafting and presentation of Explanatory Notes, as well as options for drafting tools for the content. We have researched who uses Explanatory Notes and why. We have explored different templates and also different ways of capturing the information, so it can be more flexibly used. In particular we have developed a more interactive form of presentation of the notes alongside the text of the legislation, which we think works well.

1.142 The Welsh Government stated that it had been considering how to improve the presentation of explanatory notes and have been focusing on the following:

- (1) Explanatory notes should provide an introductory summary of the content of the whole or part of the Bill/Act written as plainly as practicable;
- (2) Explanatory notes should be genuinely explanatory – this means providing useful supplementary information not paraphrasing provisions of the Bill/Act;



- (3) Conversely where no explanation is necessary specific section by section notes aren't necessary.

It stated that it is also considering whether the political context to a Bill/Act or the reason for the legislation should be set out in the explanatory notes. This information is currently found in the explanatory memorandum.

**Consultation question 6-12: Should guidance and/or commentary be included on an online legislation resource for Wales? If so, how detailed should its coverage be?**

1.143 The overwhelming majority of consultees thought that an online legislation resource for Wales should include guidance and/or commentary. Numerous consultees stressed the importance of guidance being detailed and accurate.

1.144 The Care Council for Wales replied that “clear, accurate guidance, including statutory guidance, describing key responsibilities in relation to the legislation will be essential”. Similarly, David Michael (Neath Port Talbot County Borough Council) also advocated having a resource that covers a wide range of material. He stated:

All issued statutory guidance should be available online as a legislative resource. Consideration however should be given to the content of that guidance. Modern circulars are often more concerned with explaining or advocating a particular policy which sometimes goes beyond the legislation itself with insufficient attention being given to an explanation of the legislative provisions themselves. There should be more emphasis on explanation of the legislation provisions authored or checked by the appropriate legal advisors.

1.145 Linenhall Chambers also thought commentary should be included on an online legislation resource for Wales. It was noted that commentary should provide regular updates on new legislation and processes emanating from the Welsh Government. Such guidance should include an explanation of how legislation emanating from Wales effects Westminster legislation. Linenhall Chambers also thought that the website could host some sort of a “Noddy Guide” to the law in Wales that would be accessible to practitioners and the public.

1.146 The Wales Local Government Association (WLGA) commented:

Furthermore, a significant challenge with regards accessing and interpreting statute law is that often an Act (and previously a Measure in Wales) provides a general overarching legislative framework and much of the detail and often matters of most relevance to the general public and public service practitioners are determined through subsequent statutory instruments. Similarly, statutory guidance, which should be a key companion to statute law to aid interpretation and application of the law, is published separately from the original law.

Whilst [www.legislation.gov.uk](http://www.legislation.gov.uk) publishes all Acts and all Statutory Instruments online, they are available in different sections of the website. Statutory guidance does not appear to be published via [www.legislation.gov.uk](http://www.legislation.gov.uk). It is therefore difficult to know whether statutory instruments following an Act have been made and, if so, what they might be called and where they may be found on the website.

It would be much more accessible if all subsequent statutory instruments and statutory guidance associated with a particular Act (or Measure) were indexed and available from the same 'parent page' of that particular Act.

- 1.147 The Wales Council of Voluntary Action described a website that would have the primary legislation and then accompanying documents that explain the legislation being available in one place:

There is not a comprehensive central point available to search for and access relevant sources of law. This can result in citizens, organisations and advisors becoming reliant on receiving newsletters from others that have already interpreted what a specific legal provision means in practice. Having a central resource that is accredited and/or assured by an official body would avoid this, and ensure that people know where they can find accurate, up to date information on how to apply the law. Such a resource (possibly a website) could have different areas or streams for citizens, advisors and practitioners, so that each person could access information that is relevant to their need.

We would very much welcome a new resource of this kind if it is possible to create one, but would urge those developing it to carry out comprehensive testing in order to ensure it offers what people need from a user perspective.

While the Law Wales website is likely to be of use to some, it is currently at a very early stage so it is unclear how many will make use of it, and it provides links the Legislation.gov website which is not always up to date. We believe it could be useful for the Law Commission to create and publish a set of criteria that websites such as this need to comply with in order to provide quality assurance, especially if it is not possible to create the kind of central resource that we have mentioned above.

- 1.148 The Association of Judges of Wales (AJW) drew attention to the increase of litigants in person in the courts. It stated that this calls for a means of providing "consistently accurate information to which they might turn and be referred to by the courts". AJW explained that it would be useful to have an "overview of the meaning of concepts of law, the procedure to follow including the way in which proceedings are conducted would be of immense assistance to access to justice and would likely reduce the number of cases issued in the courts.

1.149 Universities Wales drew on its experience of dealing with the law in Wales. It noted that the publication of commencement orders has previously been problematic, and guidance from the National Assembly for Wales has had to be relied upon. Universities Wales commented that there is no easy way of being aware of whether commencement orders have been published or not therefore it would be useful to have them published on a legislative website. Universities Wales also thought that information should be included about the negative resolution procedure as the information on this procedure is spread between the standing orders and the Statutory Instruments Act 1946.

1.150 The National Trust stated how useful guidance can be to supplement legislation:

Where it is available, we find that guidance provides useful assistance with the provision of practical advice. For example, when advising on legislation about private water supplies, it was very useful to refer to the guidance produced by the local authorities who are charged with the implementation of the legislation. We agree that the availability of guidance is patchy, whilst it would be very helpful to have guidance available for every piece of legislation we recognise that limited resources may mean that this is not possible; we would rather see resources put towards the availability of free-to-access up-to-date legislation than the production of comprehensive guidance. However, if public and private organisations are to continue to produce guidance, it might maximise its quality and usefulness if the organisations could be given a template 'guidance note' and an outline of what it should contain. We referred to the National Trust's intranet above, this contains tens if not hundreds of guidance notes, they were all recently revised using a template and outline of contents and this has seen a marked improvement in their quality.

We agree that guidance and commentary would be easier to find and use if it were all held in one place. This may be one area in which the 'open source editing' referred to above could be usefully employed; organisations could be free to upload their guidance to a centrally hosted platform, users of the guidance could decide on how much reliance to place on it depending on its origin.

1.151 Similarly, the Welsh Government noted the difficulties with bringing together all legislation and commentary in one place:

There is currently a disconnection in the UK between primary and secondary legislation (Acts and Statutory Instruments) on the one hand and quasi-legislation that derives from primary legislation (e.g. Codes of Practice and Guidance) on the other. Formal publication requirements apply to the former, which are all published by the National Archive on legislation.gov.uk and on paper, while publication of the latter is a matter for government (in practice individual departments). The problem therefore is that all the documents relevant to setting out the law (in other words, for telling the story) are not available in one place. Fixing this is, however, not as straightforward as it would appear. This is because there is a vast backlog of existing legislation and quasi-legislation that is not connected in this way.

1.152 Huw Williams (Geldards LLP) explained that there should be a clear distinction between information that has legal standing and general commentary, and such a distinction should be the feature of any website. Keith Bush QC made a similar comment.

1.153 The Wales Governance Centre (WGC) referred to the information prepared by textbooks and the Law Wales website and stated that these materials are “an important part of building an understanding of the law in Wales”. However, the WGC noted that such publications serve different audiences. It also stated:

Further considerations are required in terms of how much value could be added by having a separate Welsh legal update in these areas, rather than following the existing England and Wales updates, whether updates would be published in hard or electronic format, who would be responsible for collating and editing this information, and whether this would be a free or subscription service.

WGC considered how commentary could be provided through regularly updating Law Wales or through quarterly or annual reviews of the law, for example. WGC considered the limitations of the Law Wales website.

1.154 The Residential Landlord Association commented that accessible legislation should not need bank of information for users to interact with the area of law. However it stated:

To help increase our understanding of the intentions of the law, formal questions and documents produced by the person responsible for introducing the Act could be made available alongside the actual Act. This would, where the drafting is unclear or contains too many legalisms, help the reader understand and interpret the law with greater force.

1.155 Local authorities from north Wales stated that commentary is not the role of the legislature:

Official guidance whether statutory or best practice should be available with source legislation as a means of explanation. However, commentary is not the role of the legislature whose purpose is to legislate. Interpretation is the role of the judiciary and commentary is for experts. Confusing those roles could lead to commentary on intended effects being at odds with actual judicial interpretation and could call in to question the provenance of the commentary itself. In short, the roles should be kept distinct.

1.156 Dr Sarah Nason (Bangor University) makes a similar point to the local authorities:

Yes guidance/commentary should be included but it should be limited to basic historical development of the relevant provisions and any interpretive guidance around how they are anticipated to operate in specific practical scenarios. Detailed critical analysis and commentary would be excessive, could be confusing and would render the resource unwieldy. The main concern should be stressing clarity in practical operation as opposed to a more in-depth analysis of the nature and aspirations of the provision.

1.157 In consultation meetings we heard other suggestions of how to provide commentary on the law applicable in Wales. A lawyer working in the public sector suggested having booklets that describe the law in Wales and the law in England and how it differs. In a meeting with a member of the judiciary it was explained that the information prepared alongside primary legislation is much better, but there is room for improvement. In this meeting it was suggested that explanatory memorandums and impact assessments should be linked to the primary legislation. Explanatory memorandums should explain the effect of proposed legislation on other legislation and should consider any changes to the civil and criminal procedure rules. Explanatory memorandums should also include how the policy objectives differ from the current policy objectives.

1.158 In a consultation meeting with a lawyer working in the public sector it was stated that a good starting point would be to simply have the primary legislation with all the secondary material including guidance in one place.

**Consultation question 6-13: Have consultees experienced difficulties due to the limited availability of textbooks on the law applicable to Wales?**

1.159 The overwhelming majority of consultees said that they had experienced difficulties due to the limited availability of textbooks on the law applicable to Wales. Consultees that stated that they had experience difficulties included the Care Council for Wales, Keith Bush QC, Dr Catrin Fflur Huws (Aberystwyth University) and David Michael (Neath Port Talbot County Borough Council). Many consultees, such as the Association of the Judges of Wales, thought that this lack of material was due to financial viability and lack of funding arrangements.

1.160 David Gardner (administrative court lawyer for Wales) first emphasised the importance of textbooks:

Even consolidated and clear legislation can be difficult to decipher if you are coming to an area of law, or even a specific part of that area, for the first time or the first time after a long gap. Textbooks can be a key starting point for legal practitioners, 3<sup>rd</sup> sector workers, and litigants in person. They allow for expert identification of key legislation, guidance, and case law precedent with expert commentary on the relevant area.

Mr Gardner then gave his view on the position regarding the availability of textbooks on the law applicable in Wales:

There is, at present, a complete lack of discrete Welsh textbooks on the law in Wales which makes researching the relevant law a long process, increasing costs to all. Some textbooks do mention the effect of devolution on the specific area of law that they cover, but the effect of devolution is often confined to a few pages and is often incorrect.

1.161 University of Wales Press (UWP) stated:

Anecdotal evidence suggests that the law as it is applicable in Wales is scarcely covered by standard legal texts; thus current coverage is inadequate for user needs either at academic or practitioner level, being confined to a few pages and/or merely by footnotes.

In short, there is a gap in the provision of legal texts for books dedicated to Welsh law, to meet the needs of the target sector: academic and practitioner, and other market sectors (such as charities, local authorities, citizens).

1.162 UWP described the importance of textbooks to the “legal ecosystem”. It also referred to the complex legal market where a ‘one size fits all’ approach does not work. Books are written towards particular readers, whether they are the general public, undergraduates or practitioners. UWP stated:

In short, the complexity of the market can’t be underestimated, which in Wales is further compounded by the challenges of navigating an unconsolidated body of law.

1.163 UWP also highlighted how academic textbooks for undergraduates are a process of years of research and writing based on market demand and they have “become classics of their kind”. For Wales to establish a similar wealth of textbooks it will need to consider the challenge that is to “manage market need and expectations, while simultaneously balancing the imperative for a considered, strategic, coherent approach to produce effective and sustainable outcomes for the long term.”

1.164 Cerebra referred to the fact that the consultation paper noted at paragraph 1.57 that the comprehensive explanation of the law in Wales is not going to be revised in Professor Clements’, *Community Care and the Law* (5<sup>th</sup> ed 2011). Cerebra also drew to our attention that the new edition of Professor Clements’ *Disabled Children: A Legal Handbook* will also not explore the position in Wales. Cerebra stated:

We certainly do not wish to see families in Wales falling behind in terms of the availability of authoritative legal information and we hope that the Law Commission's recommendations will help to resolve our concerns in due course.

- 1.165 The Association of Judges of Wales highlighted the position in relation to public family law applicable in Wales where there is an absence of writing on public law specifically on children. It stated:

There is an obvious need for a supplement applicable to Wales within at least one of the standard works of reference – The Family Court Practice, Butterworth's Family Law, Hershman and McFarlane: Children Law and Practice. We understand that steps are being taken to address this situation. Publishing the full text of the 2014 Wales Act and, in due course all relevant subordinate legislation, codes and circulars applicable to Wales together with a textual commentary thereon would be the minimum requirement and/or a specific chapter explaining the provisions.

- 1.166 Dr Catrin Fflur Huws (Aberystwyth University) said that she had come across text books that state that the law is different in Wales but then fail to address how the law is different.

- 1.167 Citizens Advice Wales noted that often textbooks focus on constitutional or devolution issues rather than "substantive areas of law such as housing, planning, or social services". Citizens Advice Wales emphasised the important role of textbooks as "often the simplest and most readable source of law" that are used widely by students and sometimes members of the public who may wish to research some basic law.

- 1.168 The Welsh Language Commissioner drew attention to the Welsh and English language textbooks being developed by the Coleg Cymraeg Cenedlaethol and University Wales Press. However, the Commissioner noted that there is a "pressing need" for books that raise awareness of the diverging law of England and Wales.

- 1.169 The Association of London Welsh Lawyers considered how the lack of textbooks covering the law applicable in Wales may be because preparing the "task of assimilating, commenting, presenting a definitive academic and legal tome on the law in Wales would undoubtedly be a time consuming task for the most able of Welsh lawyers". The Association commented that a potential author would have to carefully balance the market for such a publication against the time and effort it would take to produce the publication. Producing such a publication would also be a project that would be competing with potentially more worthwhile projects.

1.170 In a consultation meeting, lawyers working in the public sector gave an example of how the lack of textbooks covering law applicable in Wales has caused them difficulties. Previously, these lawyers relied on textbooks such as encyclopaedias to explain particular areas of the law, but they are no longer able to do this as the textbooks do not take account of the position in Wales. Now they can rely on primary legislation provided by a commercial provider only. This legislation is only available in English and therefore when writing advice in Welsh the law must be quoted in English.

1.171 In the same vein, in a consultation meeting with a third sector organisation they explained how their advisers had previously been able to rely on textbooks to give advice to citizens. Textbooks such as *Community Care* and *Disabled Children and the Law* were previously relied on. Advisers have been concerned about where they can now go to get the depth of information and understanding provided by textbooks.

1.172 The Welsh Government stated:

We anticipate that the dearth of commentary on the law in Wales (by comparison to England at least) exacerbates the problem. The comparative lack of commentary on Welsh law was one of the reasons why we developed the Cyfraith Cymru / Law Wales website.

1.173 In comparison, Huw Williams (Geldards LLP) gave the view of a practitioner and said that he had not noticed a lack of textbook resources:

To date, from a practitioner's perspective there has not been a noticeable lack of textbook resources. This is probably due to the pace of change. As Wales legislates more comprehensively in particular areas (e.g. Planning) then the call for textbooks will undoubtedly increase.

That said, the market for specialised Welsh textbooks is bound to remain limited. Accordingly, there are two aspects that the paper doesn't touch upon and which merit further consideration:

The savings that might be possible by publishing on-line only.

The coverage of Wales and Welsh law in new editions of well-established textbooks dealing with the law of England and Wales (e.g. Wade and Forsyth "Administrative Law").

1.174 Similarly, the National Trust stated that it had not yet experienced difficulties due to a lack of textbooks, but acknowledged that this might become a problem in the future.



**Consultation question 6-14: What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?**

- 1.175 Consultees offered a range of possibilities of ways accessibility to the law could be promoted in the form of textbooks. Some consultees argued that that funding should be arranged so that an incentive for publishers is created. Other consultees argued that the responsibility to prepare textbooks rested with the universities and the academic community. Answers are explored below.
- 1.176 The Care Council for Wales stated that dedicated resources are required. Similarly, David Gardner (administrative court lawyer for Wales) referred to the University Wales Press book *Administrative Law* of which he is the author and which will be published in 2016. He stated that if such projects were to be continued, they would need to be commercially viable.
- 1.177 Dr Catrin Fflur Huws (Aberystwyth University) suggested that the importance of knowing the difference between the law applicable in England and in Wales needs to be emphasised. In turn this would create some demand for textbooks explaining the position in Wales.
- 1.178 Marie Navarro (Your Legal Eyes) felt that universities should develop research and specialisation in Welsh laws that would in turn have an effect on the material available. Similarly, Citizens Advice Wales suggested commissioning academics to produce textbooks. Citizens Advice Wales drew attention to the fact that textbooks have a reputation of being expensive and ensuring that textbooks are available in libraries and online would promote the accessibility of the law applicable in Wales. Dr Sarah Nason (Bangor University) gave the position of an academic at a Welsh university:

At present there are no incentives for academics in Wales to write textbooks about Welsh law. The Research Excellence Framework (REF) is used to judge the quality of academic research across UK universities, but it is also used by many institutions as a means of evaluating individual academic performance, extending to promotion prospects and basic security of tenure. The REF process encourages original research and critical analysis, in many cases textbooks which state current law and practical application would not be considered sufficiently critical to be 'REF-able'. There is a major disincentive for academics to spend time developing textbooks. REF also encourages international research, whereas focusing on one legal jurisdiction alone is discouraged. There ought to be specific incentives for academics in association with their employers; e.g., a concrete assurance that time spent working on textbooks will be properly valued and that an appropriate 'discount' could be applied in relation to the specific academic's REF submission (as is already done for example in the case of part-time workers and those who have taken a period of maternity leave). It should be considered whether an individual who has done substantial textbook work could be considered as part-time for the purposes of REF (and therefore only have to submit a 'discounted' set of REF outputs). The Welsh Government must support Welsh universities in this regard, including financially where appropriate, as any diminution on the quantity of REF-able work will impact on the funding received by the relevant university department from the Higher Education Funding Council.

- 1.179 Keith Bush QC highlighted that there has already been some developments with regard to textbooks covering the law in Wales. It is assumed that these developments are the books being prepared by Coleg Cenedlaethol Cymraeg and University Wales Press. Mr Bush QC stated that these developments should be supported by the Welsh Government. The Association of London Welsh Lawyers similarly stated that Welsh Government should be sorting such initiatives:

We consider that Welsh Governmental support, both financial and resource wise, may encourage potential authors to write new textbooks on Welsh law given the potential hurdles we highlight above.

- 1.180 University of Wales Press listed the following as aspects that need consideration to promote accessibility to the law in the form of textbooks: content, costs publishing requirements and funding:

CONTENT: how would this be managed? Possibilities may include:

- To effectively re-write the standard texts, to replicate information in common to both England and Wales, but to include material dedicated to the Welsh position; this would run the risk of reinventing the wheel and have potential copyright issues with established text publishers/or expensive licensing arrangements with these publishers

- To publish supplementary texts: i.e. a general overview of the position in England and Wales, but with a substantial proportion of the book dedicated to Welsh law, to be used in conjunction with standard, adopted textbooks?
- Persuade the publishers of the standard law texts to publish versions of the texts for Wales: this may be unappealing due to the potential low financial return
- The issue of accessibility in a bi-lingual environment and translation of content is an additional factor
- Textbooks are not eligible for REF (Research Exercise Framework), therefore the time available, and incentive, for university law lecturers to write books on Welsh law is much reduced

COSTS: the question of costs needs to be carefully considered:

- Legal academic publishing is a commercial venture for the law publishers, dependent on high demand and economies of scale afforded by substantial print runs and sales to a large market the Welsh market is much smaller so the profitable economy of scale model won't be replicated
- Law textbooks are authored by leading academics whose labour intensive input to successive editions is rewarded by a significant level of royalties from substantial sales; the market is much smaller in Wales therefore the financial return will be much more modest for authors
- The impact on student budgets of buying more books: law undergraduates are already have a significant financial outlay for books for the LLB
- The costs of operating in bi-lingual environment will be considerable

PUBLISHING REQUIREMENTS:

- Needs strategic thinking and planning for content and also timing (to be published before the start of the academic year)
- Needs expertise appropriate for law publishing e.g. copy editors with legal knowledge in this case of Wales and the Welsh language

- Needs professional marketing, distribution and sales mechanisms
- Needs to accommodate new editions as and when required
- Needs to be done in a timely fashion as is possible: today's law students are tomorrow's practitioners – they will need to have satisfactory grounding in Welsh law
- Needs discussion between Law Society /Bar Council/Law Schools/stakeholders to discuss how the qualifying law degree will look like for Wales
- UWP would be very happy to be part of stakeholder discussions

FUNDING: To effectively create a coherent and effective law publishing industry for Wales, will be expensive thus significant funding will undoubtedly be required. Access to the law and to legal advice is essential to a well - functioning society, consequently establishing a professional platform for legal publishing in the early years of the NA and WG is an opportunity which will serve Wales, and its citizens for many decades to come. It will also contribute to the distinct identity and culture of Wales with structures and practices worthy of a modern nation.

- 1.181 The Association of Judges of Wales (AJW) suggested that a source such as "What's in Force" in relation to statutory law should be commissioned as this would be of benefit to the legal profession and the Administration of Justice. AJW noted that funding presents the obstacle. However, AJW made the following argument:

We would suggest however that there is now scope for encouraging the senior learning institutions in Wales (and elsewhere) to offer post-graduate studies in comparative law on the basis that those studies would be published on Cyfraith Cymru/Law Wales on the basis that such research into comparatively narrow subjects would assist to compare and contrast the law as it applies in England and Wales and how the common law is evolving to meet the challenge.

- 1.182 The Law Society Wales informed the Law Commission of how the National Advice Network is "drawing together the commissioners, funders, providers and users of relevant services in a national response to advice provision". The Law Society Wales suggested that those interested in publishing the law that applies in Wales could collaborate on a formal basis.

# CHAPTER 7

## Introduction

- 1.1 Chapter 7 of the consultation paper explored consolidation: the process of replacing existing statutory provisions, which are to be found in a number of different statutes, with a single Act or a series of related Acts. The consultation paper raised the question whether the National Assembly should adopt procedures for consolidation Bills so as to reduce the amount of Assembly time spent on such legislation without limiting opportunities for scrutiny where the law is being reformed. The consultation paper observed models of consolidation from other jurisdictions to build a suitable model of consolidation for Wales.
- 1.2 Consultees were overwhelmingly in favour of consolidation. Consultees that supported consolidation included the Welsh Government, Wales Local Government Association, the Presiding Officer of the Fourth Assembly, Law Society Wales and the Care Council for Wales.
- 1.3 Many consultees stated that there was a compelling need for consolidation of areas of the law in Wales as soon as possible. Numerous consultees acknowledged that consolidation would be resource intensive but felt that consolidation was necessary. A limited number of consultees explained that focusing on publishing the law would be of more benefit as this offers a solution to inaccessible law in the short term.
- 1.4 Consultees gave reasons as to why consolidation is necessary.
- 1.5 Daniel Greenberg (Berwin Leighton Paisner LLP) emphasised that the devolution settlement had “caused havoc to the United Kingdom statute book”, particularly to Wales. He explained the practical effect of this:

There are now many enactments of enormous social importance where there is one text for England, another for Wales and a third for Scotland. And to make matters worse, the territorial limitations of particular provisions are often not apparent on the surface, as the text fails to explain clearly in each relevant section that it now applies only in one or more parts of the United Kingdom.
- 1.6 The Wales Local Government Association agreed that the legislation applicable in Wales needs to be streamlined and clarified. During a consultation meeting a third sector organisation stated that there is a need to “take stock” of the legislation in Wales. In another consultation meeting, lawyers working in the public sector also highlighted the multiplicity of dispersed legislation. They noted that consolidation is necessary to modernise the language of legislation. These sorts of comments were a common theme throughout the consultation period.
- 1.7 The Legal Wales Foundation, the consultation response for which was co-written by members that were predominantly from practice or the judiciary, stated that consolidation is necessary as “a great deal of time is taken up unnecessarily in court cases in these areas” especially with the growing number of litigants in person.

- 1.8 We attended other consultation meetings with lawyers working in the public sector. They informed the Law Commission of their experience of consolidation already undertaken in Wales and noted that consolidation had not been an easy task for Wales. They described how the Assembly is young, small and inexperienced and the work of consolidation was a challenge. The challenge of consolidation was so much so that the Regulation and Inspection of Social Care (Wales) Bill was a separate Bill to the Social Service and Well-being (Wales) Act 2014, which was envisioned to be an epic consolidation of the law on social services.
- 1.9 Emyr Lewis (Blake Morgan LLP) highlighted the challenge presented by consolidation. He noted that the process would “involve considerable time and resource to implement” and would be “unlikely to cover all relevant topics”. Investing in publishing of the law would give the citizen access to accurate up to date versions of legislation.
- 1.10 Universities Wales took a similar position and saw consolidation as part of the solution, rather than the solution. There was a focus on publishing and the more immediate benefits it would offer. Universities Wales stated that if consolidation was pursued, an incremental approach should be favoured and areas of most immediate priority should be focused on. They identified potential issues related to the devolution set up and the cross-border nature of the law:

This can be highlighted by a particular issue we encountered with the Higher Education (Wales) Act 2015. The reason given by the Welsh Government for not extending Higher Education Funding Council for Wales’s duty to assess the quality of education of regulated institutions to provision outside Wales was that it fell outside the Assembly’s legislative competence to do so. To remedy this, an order under section 150 of the Government of Wales Act 2006 had to be brought by the Secretary of State to provide reciprocal arrangements between England and Wales for the coverage of provision in the other’s country – notably, however, this did not solve the potential issue for provision in other countries outside Wales. If this is the case for similar issues, a consolidation or codification exercise undertaken in Wales may not be able to replicate or reform legislative provisions with a cross-border application as intended.

- 1.11 Daniel Greenberg (Berwin Leighton Paisner LLP) explored how a proper consolidation achieves much more than an updated text. He set out a compelling case for consolidation. He described a thorough consolidation programme as “urgently required” and identified the benefits of consolidation versus online publication:

In cases where the law has become complicated for one of a variety of reasons, and what is needed is re-presentation in a form which is easier to absorb, consolidation legislation has a vital role to play. This is not mere editorial work, such as can be achieved by the editors of electronic texts: it is expert legal work, where the requirement not to impose substantive change requires as great expertise as that of a painter who is asked to restore an ancient and valuable painting while preserving picture, colour, texture and nuance.

- 1.12 Mr Greenberg also explained ways of overcoming the drawbacks of consolidation explored in the consultation paper. He noted that a pre-consolidation amendments procedure can be used to “maximise the utility of the consolidation process” and that consolidation can be combined with substantive law reform. The latter process, of reforming and consolidating, was also a suggestion proposed in consultation meetings.
- 1.13 The Wales Governance Centre described consolidation as a “very second class option” in comparison to codification. The Wales Governance Centre stated that it does not see consolidation as playing a “significant role”. However, the Law Commission understands consolidation to be the necessary first step to codification.
- 1.14 In a consultation meeting, a lawyer working in the public sector expressed that consolidation should be one of the Counsel General’s functions and he should be promoting it.
- 1.15 Professor Inge Backer (Oslo University) endorsed consolidation as a device to “ensure that statutory law is easily accessible”. Professor Backer explained the process of consolidation employed in Norway:

In the Norwegian legal system, however, the challenge offered by amending statutes is dealt with in a rather direct manner: Amending statutes are drafted in a way which includes a directive of consolidation to be performed by any legal information service – once the amending statute takes effect, the relevant original provision is replaced by the new provision. For consolidation in this sense, a reenactment of the whole statute with the partial amendments is considered unnecessary. The enactment of separate statutes in a particular area covered by an existing act is generally avoided (by contrast, it was quite frequent between the wars), although it may occur and thus create a need for consolidation of separate statutes. On the other hand, numerous amendments to an act – sometimes drafted in different language or even terminology and possibly reflecting different legal policies – may call for a consolidation which often will involve a restructuring of the act to improve accessibility for present-day users. An important consolidation exercise of this kind resulted in the Taxation Act 1999, but more often such a consolidation will go hand in hand with a reform of content.

- 1.16 Consultation responses to the consultation questions will now be addressed in turn.

**Consultation question 7-1: Do consultees think there should be procedures in the National Assembly for technical legislative reform, such as consolidation Bills?**

- 1.17 The overwhelming majority of consultees thought that there should be procedure in the National Assembly for technical legislative reform, such as consolidation Bills. Consultees that were in favour included the Law Society Wales, the Care Council for Wales, David Michael (Head of Legal Services at Neath Port Talbot local council), Marie Navarro (Your Legal Eyes) and Keith Bush QC.

1.18 The Presiding Officer of the National Assembly for Wales, Dame Rosemary Butler AM, agreed that such procedures should exist in the Assembly. She stated that she will be encouraging the Assembly's Business Committee "to finalise a draft Standing Order on consolidation Bills to provide for expedient passage for Bills which are certified by Legislative Counsel as not involving any substantive change of law."

1.19 The Welsh Government stated that "correct procedures are a fundamental element of this both because of the lack of time available within the National Assembly and because governments need to strike a balance between reform and consolidation." The Welsh Government also noted that if adequate procedures do not exist in the Assembly it could risk "exposing existing laws to substantive reconsideration."

1.20 Professor Thomas Watkin noted that consolidation Bills would require an appropriate procedure:

Both with the consolidation of existing law or legislation when creating a code and with the subsequent up-dating of it by periodic consolidating enactments, the question arises of the appropriate procedure for such consolidation bills. As they would not be changing the law, the level and kind of scrutiny required for bills changing the law is not needed [Consultation Questions 3-2; 7-1]. A special committee, which could co-opt appropriate outside experts on the law and practice of the areas involved, might well be suitably entrusted with the task. The possibility, however, of some consequential and incidental changes being necessary at that stage should not be ruled out, but should be accommodated by the opportunity for democratic scrutiny and decision-making when the need arose. The process could still, however, be fairly streamlined.

1.21 Daniel Greenberg (Berwin Leighton Paisner LLP) made clear that what would be required for consolidation would be the "necessary resources for the Legislative Counsel's office to undertake a rolling programme of consolidation". He stated that a pure consolidation procedure should exist in the Assembly:

The consolidation mechanism within the Westminster Parliament has always been sufficient to ensure that pure Consolidation Bills are given speedy passage, without it having been thought necessary to create a new formal classification of resulting Act. The essence of the consolidation system is that the drafter certifies to an appropriate parliamentary Committee that the Bill does not contain substantive changes of the law; based on that assurance the Committee gives the Bill an appropriate scrutiny and it is then expedited through its remaining parliamentary stages by general agreement. There is no reason why anything more elaborate than this should be necessary or appropriate.

1.22 The Association of London Welsh Lawyers were cautious about technical legislative reform Bills having the potential to be more than technical reform:



Technical legislative reform should be just that - an administrative easing of cumbersome procedures and tautologous wording where, through careful drafting, duplication, obsolete and redundant provisions are jettisoned in favour of a more streamlined and comprehensive code of the relevant legal statutory framework. It should not impinge upon, or impact in any way, substantive reworking of the law which would require a more fundamental parliamentary review of the legislation in question.

The Association questioned who would be responsible for deeming whether a Bill is substantive reform or purely technical redrafting.

- 1.23 Similarly, the Association of Judges of Wales agreed that there should be procedures in the Assembly for technical Bills, however the Association thought that this should be a process led by Westminster:

Reform of the legislative process is required to produce a composite Statute Book clearly defining the law of England and Wales with special procedures being introduced to facilitate the passage of Technical Bills aimed at legislative reform including non-controversial Law Commission Bills.

However, this is not a process to be left to the NAW alone but should be led by Westminster. In that way, there is some prospect of being able to consolidate or codify the laws of England and Wales to achieve the clarity required to enable the population to find the law and the judiciary to apply it wherever they are required to do so throughout England and Wales. In this regard it would, in our view, be a mistake to treat Wales as if it were a separate jurisdiction. Whilst the NAW exercises a sub-ordinate legislative function the overarching responsibility for consolidation and/or codification should lie with Westminster working in collaboration with the NAW through an Office of State established for that purpose devoid of party political interests. This role may be fulfilled by the Office of Legislative Council

- 1.24 The Legal Wales Foundation stated that consolidation with scope for reform “would more effectively promote accessibility than the other options.” Catrin Fflur Huws (Aberystwyth University) also thought that procedures for technical legislative reform should exist in the National Assembly but she highlighted that consolidation is necessary in England as well as Wales.

- 1.25 The Residential Landlords Association disagreed with the need for a procedure for technical legislative reform Bills as it could be open to “abuse and detrimental to the principle of open government”. The Association based its comments on its experience of the Renting Homes (Wales) Bill which it noted should have been a consolidation Bill but developed to include reform. It stated:

If a different procedure were to exist for consolidation Bills, our fear is that they may contain elements of reform and change but not be subject to the same scrutiny or open process.

- 1.26 LexisNexis UK raised interesting, pertinent issues about consolidation of the law from the perspective of legal publishers. These issues focused on the substance of consolidation rather than the process in which it should be enacted. LexisNexis described how important Tables of Origins and Destination Tables are to legal publishers. Without these tables, publishing consolidated legislation would be “a near impossible task” as it would require the publisher to work out what legislation and how it was consolidated. LexisNexis reported that the Assembly has not published such tables when passing consolidating legislation. This forced LexisNexis to rely on the explanatory notes as guidance. Explanatory notes do not “always make clear, or comprehensively refer to, the antecedent UK legislation”. LexisNexis also highlighted how explanation or guidance should be issued as to how case law and statutory instruments should be carried over to consolidating legislation. LexisNexis stated that it has never come across any such explanation or guidance.

**Consultation question 7-2: Do consultees think that there is a need for consolidation in Wales? If so, do consultees have a view on a particular area of the law in Wales that would benefit from a consolidation exercise?**

- 1.27 The overwhelming majority of consultees agreed that there is a need for consolidation in Wales. Some consultees expressed that consolidation should be a process initiated sooner rather than later. For example, the Welsh Language Commissioner considered the increasing rate of divergence between the law of England and Wales and concluded that pursuing a programme of consolidation is pressing.
- 1.28 The Welsh Government noted that the statute book across the UK would benefit from consolidation, not only Wales:

In our view the statute book across the UK would in principle benefit from consolidation. In relation to Wales and to England there would be an added benefit in doing this because of would involve disentangling often complex legislation which applies to both countries in different ways. If the Welsh Government is to pursue this, therefore, our hope is that we wouldn't be doing so in isolation. The difficulty which requires to be overcome lies in the fact that the size of the historic legacy of overlapping laws makes this a time consuming and resource intensive exercise that needs to be undertaken by a small group of individuals specialist in legislative drafting and statute law.

- 1.29 Professor Thomas Watkin agreed that there is a need for consolidation and explored what areas should be consolidated:

The first step in such an exercise would probably be to consolidate the existing law or legislation on the topics in question. It is suggested in the Consultation Paper that the subjects or headings set out in Part One of Schedule 7 to the Government of Wales Act 2006 might be suitable as topics or combination of topics for consolidation and codification. This would be the case if the conferred-powers model of devolution were to be retained for Wales in the short to medium term. However, the likelihood of a reserved powers model being substituted within the life of the current UK Parliament means that a list of devolved topics is likely to disappear from the statute book. While this will rob the project of ready-made topics for codification, it also opens the path for a freer identification of such topic headings.

1.30 Dr Catrin Fflur Huws (Aberystwyth University) identified education as an area of law that is now “very dispersed” in England and Wales and would benefit from consolidation. Dr Huws noted that even basic terms such as “school” has a different meaning both sides of the border. Huw Williams (Geldards LLP) also thought that education law would benefit from consolidation.

1.31 Angela Williams (Law Commission Welsh Advisory Committee) emphasised the need for consolidation of local government legislation, specifically council tax legislation. She described the complex web of legislation, largely secondary legislation that sets council tax and concluded that it would be much more accessible if this law was in one place. David Michael (Neath Port Talbot County Borough Council) and Huw Williams (Geldards LLP) also agreed that local government law would benefit from consolidation.

1.32 Keith Bush QC advocated a wide ranging consolidation that would start with education and then address all of the other devolved areas. Marie Navarro (Your Legal Eyes) noted that consolidation should start with areas that have been legislated on the most by the Assembly. These areas include social services, education, planning and environment. Similarly, the Law Society Wales stated that areas which have seen landmark Assembly Acts would benefit from consolidation. Areas listed included social care, housing, planning and environment.

1.33 Citizens Advice Cymru thought that consolidation should focus on areas of law that have diverged the most:

Areas of law and divergence could be assessed for degree of divergence and impact on the public, leading to those with the greatest impact being prioritised for consolidation.

1.34 Similar was the position of David Gardner (administrative court lawyer for Wales). He stated that consolidation of the devolved areas would aid access to justice and would increase understanding of the relevant law. The following areas were highlighted: planning, social care and housing.

- 1.35 The Association of London Welsh Lawyers emphasised that any consolidation exercise should be considered very carefully. First, a detailed assessment of the time, cost and impact of such a change should be considered. Secondly, the five case studies in the consultation paper should be examined in some detail to assess which areas lend themselves better to consolidation. The Association commented:

One might imagine, for example, without being an expert in any particular one of the Case Study areas in question, that a Consolidation exercise in the sphere of Town and Country Planning or Local Government, where there is a long established cadre of legislation, might lend itself more readily to an overhaul or streamlining exercise in a way that a more rapidly developing and dynamic area of the law such as Social Care or Education or the Environment, might not.

- 1.36 Dr Sarah Nason (Bangor University) took a distinct administrative law approach and emphasised that administrative law applies to all citizens “regardless of their own behaviour or characteristics”. Dr Nason felt that the ad hoc development of administrative law in Wales would require a consolidation with reform and ultimately, would lend itself better to a code.

- 1.37 The Residential Landlords Association were less supportive consolidation. They stated:

The benefits stated in the consultation paper of strict consolidation are clearly helpful in providing clarity for those who may not be legally trained. However, we would stress that although these benefits seem achievable, in practice it may create more issues that it resolves. Strict consolidation would still have a significant draw on resources in an Assembly that is already working near capacity. The amount of legislation that could be proposed to be consolidated could significantly delay other pieces of new legislation. Having consolidation combined with law reform opens up the door leading to less scrutiny and good governance in the policy making process. It could be realised that politicians use the guise of consolidation to discuss and attempt to pass more controversial aspects of policy. Although we agree that areas of the law could benefit from simplification, there are potential issues and consequences that could arise.

**Consultation question 7-3: We welcome consultees’ views on the drawbacks and benefits of each of the models of consolidation described above, including pure consolidation and consolidation combined with law reform.**

- 1.38 Consultees identified drawbacks and benefits of consolidation generally. Some consultees offered comment on the drawbacks and benefits of specific models of codification. The general drawbacks and benefits of consolidation have been sketched out at the beginning of the consultation analysis for Chapter 7. The majority of consultees supported consolidation with law reform.

- 1.39 The Welsh Government expressed that the most important consideration would be to agree a means to “consolidate the law efficiently without routinely exposing the law on matters which it is not reforming, and may have no intention to reform, to full political scrutiny and reconsideration”. It made clear that no government would be willing to proceed with a consolidation process unless this could be ensured.
- 1.40 David Michael (Neath Port Talbot local council) thought that pure consolidation would be of limited effect and that consolidation with a limited element of law reform would give rise to greater benefits. Marie Navarro (Your Legal Eyes), the Legal Wales foundation and Dr Sarah Nason (Bangor University) agreed with this view. Law Society Wales also noted that its members supported consolidation with law reform. Huw Williams (Geldards LLP) expressed that different models of consolidation would be suitable to be specific subject areas. For example, education law may be more suitable for pure consolidation whilst local government law may be suitable for a programme of reform with consolidation.
- 1.41 Keith Bush QC expressed that the need for a legible, bi-lingual body of Welsh legislation is so great that the focus should be on pure consolidation. Pure consolidation would permit a speedy legislative procedure in the Assembly. The Association of London Welsh Lawyers thought that process employed in New Zealand, as explored in the consultation paper, would be the most appropriate approach to consolidation in Wales.
- 1.42 Dr Catrin Fflur Huws (Aberystwyth University) noted that consideration should be given to how pure consolidation and consolidation with some reform would be achievable when Wales cannot legislate on non-devolved matters. The Association of Judges of Wales advocated a consolidation programme being led by Westminster. The Association questioned how consolidation with reform would be possible if the political parties in Westminster and Cardiff would always be different.
- 1.43 The Welsh Language Commissioner provided four proposals with regard to the Welsh language for us to consider in drawing up a model for consolidation:
- (1) The Welsh Language Commissioner submitted that the Welsh language version of the consolidating Act would need to be drafted simultaneously in Welsh rather than merely being translated. This is because one of the aims of consolidation would be to simplify and modernise language and delete any minor inconsistencies or ambiguities. Simultaneously drafting would highlight possible inconsistencies.
  - (2) Consolidation would be a “golden opportunity” to standardise Welsh terms and would also be a means of identifying gaps in Welsh language terms.
  - (3) “Consideration could be given to creating a corpus of the bilingual legislation of Wales by consolidation. It would be possible to use this corpus as a basis for developing resources for drafting bilingual legislation and specific machine translation software for legislating.”

- (4) It would need to be ensured that there were bilingual solicitors and linguists with the highest linguistic and legal skills in both English and Welsh to undertake the work.

1.44 The Residential Landlord Association identified drawbacks with both models of consolidation:

The benefits stated in the consultation paper of strict consolidation are clearly helpful in providing clarity for those who may not be legally trained. However, we would stress that although these benefits seem achievable, in practice it may create more issues that it resolves. Strict consolidation would still have a significant draw on resources in an Assembly that is already working near capacity. The amount of legislation that could be proposed to be consolidated could significantly delay other pieces of new legislation. Having consolidation combined with law reform opens up the door leading to less scrutiny and good governance in the policy making process. It could be realised that politicians use the guise of consolidation to discuss and attempt to pass more controversial aspects of policy. Although we agree that areas of the law could benefit from simplification, there are potential issues and consequences that could arise.

**Consultation question 7-4: We invite consultees to provide examples and evidence of the problems they experience from a lack of consolidation, in terms of time or other costs. In addition, we ask consultees to provide examples and evidence of the costs and benefits they think would result from consolidation.**

- 1.45 The overwhelming majority of consultees identified problems with a lack of consolidation. Consultees highlighted that the mass of amended legislation takes time to understand. Many consultees expressed that they relied on the services of commercial publishers to guide them through the legislation. Consultees described how these problems have an effect on their day to day work generally, for example, how they advise clients and on the court service. However, the overwhelming majority of consultees recognised that a consolidation programme would be resource intensive. Any such programme would take time and money. Consultees also recognised that the benefits of consolidation would be difficult to quantify.
- 1.46 Some consultees felt that they had given evidence to this question throughout their responses to other consultation questions, such as consultation question 1-1.
- 1.47 Dr Catrin Fflur Huws (Aberystwyth University) highlighted territorial application as the main difficulty experienced from a lack of consolidation:

The main difficulty is that laws that are relevant to both England and Wales include different clauses that are relevant in both territories. Thus there is no clarity regarding what sections are relevant to England, and which are relevant to Wales. Consolidation would simplify things by creating a law for England and a different law for Wales. This would be costly – and would duplicate some work if both legislatures did this separately, so the work would need to be done jointly between both territories, but it should also be ensured that the process is simple and does not take up much of the time of the legislature.

- 1.48 Huw Williams (Geldards LLP) set out the complex, convoluted position left by the administrations of the devolution settlements successively amending legislation. He noted that this in itself should qualify a programme of consolidation. Similarly, the Association of London Welsh Lawyers described the complex position:

In essence, the complexity of unravelling intricate and convoluted provisions across a plethora of, at times, loosely connected pieces of legislation, adds enormously to the time and thus cost of providing clear answers and guidance to clients. This in turn can lead to frustration and a risk of providing incomplete advice in cases, for example, where an obscure piece of legislation might impact a more central, core statutory provision. This could then give rise to a prolonged legal process of appeal and further hearing(s) which would exacerbate the costs and timely conclusion of a case.

A pure consolidation exercise, again for the reasons already adumbrated in detail above, would go some way towards alleviating the burden and cost of having to trawl through a morasse of legislation to the general detriment of the public whom it is meant to serve.

- 1.49 The Welsh Government explained:

The Welsh Government's staff is made up of approximately 5000 civil servants. All of these officials, to varying degrees, need to understand the law in their areas of policy. Most obviously Welsh Government lawyers and legislative counsel (of which there are approximately 120) work with Welsh law on a day to day basis. Similarly the large number of officials charged with helping Ministers to govern areas of policy need to be familiar with, and understand, the law within their specific areas. Approximately 1000 officials work with legislation on a regular basis. There is no doubt that developing an understanding on the Welsh legislative backdrop – the context within which they work – is hampered by its complex and disparate structure. A new policy official or lawyer working in the field of education for example is faced with law applicable to Wales scattered around approximately 22 Acts of the UK Parliament, 2 Assembly Measures and 3 Assembly Acts; as well as hundreds of Statutory Instruments. This makes it difficult for policy officials initiating reforms to understand the current legislative/policy framework and difficult in turn for lawyers to advise on it. What should be a straightforward question therefore routinely leads to extensive legal research having to be carried out, even by those more familiar with the law in that area.



## CHAPTER 8

### Introduction

- 1.1 In chapter 8 we made the case for codification. We considered how reforming the structure of enacted legislation could require that the law be better set out and more accessible. We explored the meaning of a code and codification as being forward looking, preserving clearer and more accessible law.
- 1.2 Codification was well received. The majority of consultees supported the notion of codification, although many of these consultees identified the potential drawbacks of codification.
- 1.3 A number of consultees decided not to comment on codification. These consultees included stakeholders such as the National Trust, Wales Council for Voluntary Action, the Public Services Ombudsman for Wales and LexisNexis UK. Those who explained why they had not commented on codification stated that they did not feel expert enough to comment on the matter. For example, Professor Noel Lloyd, responding from a lay perspective commented:

I do not feel competent to comment on the issue of codification (chapter 8), but there are clearly some important issues to be considered.

- 1.4 David Michael (Neath Port Talbot County Borough Council) stated:

Since I have no particular knowledge of law codes and only have experience of the law of England and Wales I shall make no further comment on this point.

This consultee did offer some comment on codification and questioned how the limited jurisdiction of the National Assembly for Wales would affect the ability to codify, specifically to bring the common law into statutory reform. Similar concerns were expressed by consultees that both agreed and disagreed with the notion of codification. These concerns are explored below.

- 1.5 A small proportion of consultees were not in favour of codification. Of these consultees some opposed codification whilst others simply thought that other solutions trumped codification in the list of priorities. Many consultees appeared to be unconvinced by the practicability of codification but agreed with the principle of codification.
- 1.6 Consultee Daniel Greenberg of BLP, Westlaw UK and a legislative drafter stated:

... a codification system as described in Chapter 8 is unrealistic, and would introduce unnecessary complexity and confusion into an already intolerably complex and confused legislative environment.

Daniel Greenberg also identified the following problems with codification

It [codification] would offer no significant advantages over traditional consolidation... and shows lack of understanding of political and legislative reality.

He noted:

Introducing a new layer of complexity into the statute book by differentiating between codes and other legislation is inherently undesirable.

Daniel Greenberg referred the Law Commission to the Tax Law Rewrite project and the Education Act 1996, the former a “predictably disappointing” consolidation project and the latter a consolidation project that “within a few years lay in tatters”.

1.7 Residential Landlord Association Wales stated:

What the RLA would like to see is a better system of interacting between common and statutory law and clearer notification of laws that apply to different geographical regions. Having one resources for all of these would be ideal, however this is not without its risks and draw backs. We do not believe that the answer to this question is to alter the legislative process, introducing a new system of amendments and enactments via special procedures to introduce a new code or alter an already existing one. This can over complicate what it an already intricate system but relatively simplistic to follow. The most reasonable route to achieving these objectives would be to better organise existing databases to better cope with common and statute law, rather than introducing a system of codification.

1.8 Other consultees agreed that limited resources might be better spent on making improvements to the way legislation is published and access to the law online. Emyr Lewis (Blake Morgan LLP) commented:

Consolidation and codification offer considerable challenges, both in terms of the process and the end-product. From a practical perspective, the main problem is that they will both involve considerable time and resource to implement. Unless the Government is prepared to dedicate the necessary time and resource to enable them to happen (which will involve sacrificing some other use of those resources), then they will not happen. Even if the Government is prepared to dedicate those resources that is unlikely to cover all relevant topics, and the processes involved will still be lengthy.

In the meantime, the citizen will still not be able to access accurate up-to-date versions of legislation, in particular secondary legislation which often has a significant impact on people’s lives.

Faced with this, it is arguable that, when it comes to setting priorities of how to use resources, a way needs to be found of giving citizens such access by creating an up-to-date, freely accessible database of legislation. It may well be difficult to (1) state the whole of the law applicable in Wales (2) consolidate or codify Welsh-applicable law on any particular topic. That is not a reason against at least ensuring that citizens have access to up-to-date legislative texts.

It is appropriate that the Welsh polity should take responsibility for doing this, at least in respect of Wales-made legislation.

- 1.9 Another consultee felt that codification offered no real benefit over a consolidation procedure. Keith Bush QC stated:

The only type of 'codification' that would be practical for Wales would be one that was based on the devolved areas. And (apart from rules regarding how to amend the legislation in the future) this kind of codification would not be any different to a comprehensive programme of consolidation.

- 1.10 Concern about codification under the limitations of the devolution settlement was expressed in consultation events.
- 1.11 Academics and students questioned whether there was capacity in the National Assembly for Wales to codify the law and asked whether Westminster or Cardiff would be responsible for passing a codifying Act.
- 1.12 A campaign organisation questioned how codification would work within a joint jurisdiction if Westminster continued to legislate for Wales and that legislation existed outside the code.
- 1.13 A lawyer working in the public sector highlighted that under the Government of Wales Act 2006, the Assembly do not have the power to restate law and therefore Assembly codes would not present a complete picture of the law in an area.
- 1.14 In a different consultation meeting with academics it was questioned how the code would deal with the limited subjects on which the Assembly can legislate. For example, how would a social services code deal with the fact that the Assembly cannot legislate on family law and therefore adoption could not be included in the social services code? Consequently, these academics noted that using the term 'code' could be misleading as it insinuates that it is a complete statement of the law.
- 1.15 The Association of the Judges of Wales thought that the greatest need for codification rested in England and that this work could be "supplemented by the changes brought about by devolution in Wales":

However, Public Family Law is not the only devolved field in which consolidation would be of immediate benefit. The law relating to waste, the environment and town and country planning (all devolved fields) is also in need of urgent attention. The present regime amounts to a confusing minefield of legislation. Consolidation of the law now applicable in Wales would, in our view, promote cost cuts, clarity and accessibility. The existence of separate legislation in these fields in Wales is largely unknown. Here again, in order to clarify the law as it applies throughout the jurisdiction there needs to be impetus given to the task being undertaken jointly by Westminster and the NAW as referred to above.

Codification of the law presents similar problems and whilst Wales remains part of a unitary system of justice for England and Wales the greatest need for codification rests on the English side of the border supplemented by the changes brought about by devolution in Wales.

- 1.16 Of those consultees that commented on codification the overwhelming majority thought that some form of codification was desirable. The Lord Chief Justice of England and Wales, the Presiding Officer of the Fourth Assembly, Professor Thomas Glyn Watkin and the Association of London Welsh Lawyers, for example, all supported codification.
- 1.17 The Lord Chief Justice of England and Wales acknowledged that consolidation of the law “could be seen as a more attractive, and somewhat easier, option”, but he remained “firmly of the view that codification presents a more sensible and long-term solution” and endorsed the policy direction described in the consultation paper.
- 1.18 The Welsh Government were supportive of some form of codification both in their consultation response and in other forums such as consultation meetings and public lectures given. In their consultation response, the Welsh Government highlighted how the devolution settlement permits a different way to be taken with the law in Wales and that, in principle, this provides a good platform for any substantial codification or consolidation. The Welsh Government made their commitment to simplified, manageable and accessible law explicitly clear.
- 1.19 Dame Rosemary Butler AM commented that she would like to see the Welsh Government commit to a “programme of either consolidation or codification” and described some of the benefits of codification:

Codification in particular would have a significant impact in terms of time saving, particularly if secondary legislation, guidance, direction, circulars and other relevant information were all linked to the relevant Code.

- 1.20 Several consultees agreed with codification in principle, but also acknowledged the hurdles which had to be overcome. Professor Watkin considered how codes would serve three possible readerships; members of the legislature, legal professionals and citizens subject to the law. He concluded that “there can be little doubt that the needs of the third category would be well-served by a code”, however, he noted that:

The creation and maintenance of such a code or codes requires therefore a steadfast political will to undertake the exercise, see it through to completion and thereafter resource its continued maintenance. Without such a clear, prior commitment, it is not worth starting the exercise.

Professor Watkin made clear that political will is crucial to the success of codification. He added:

There is no reason to believe that the task of legislators would be assisted by a change of form, and the arrival of an unfamiliar new format is unlikely to assist scrutiny and debate, albeit that in a young legislature such as the National Assembly, such a change might be more easily assimilated and achieved.

- 1.21 Consultees expressed concern about the resource demands of codifying the law. Any codification of the law would inevitably take time and money. The National Farmers Union for Wales referred to codes as “desirable” for the accessibility of the law but highlighted that such an ideal would cost time and money. Similarly, the Wales Local Government Association acknowledged the resource implications of codification but stated:

... it would be a missed opportunity if such a programme is not initiated soon given Welsh devolution is still comparatively young and the pages of the Welsh statute book will only grow and become increasingly complex.

- 1.22 The call for codification to be a process initiated sooner rather than later was a view shared by other consultees such as the Wales Governance Centre and the Association of London Welsh Lawyers. The Association of London Welsh Lawyers stated:

There is a now a great opportunity to codify Welsh law, and we believe that this opportunity should be seized.

- 1.23 The Wales Governance Centre concurred:

In our view, the key to improving access to the law is an early and extensive codification programme based on the proposals made in chapter 8.

- 1.24 A couple of consultees disagreed with the view that a codification programme should be carried out as soon as possible and thought that further consultation and consideration should be given to the idea of codification. Universities Wales supported the idea of codification but explained:

At this stage it is not clear that benefits of codification outweigh the costs of its implementation and maintenance, although we welcome this being explored and considered further. In the meantime, further developments in legislation.gov.uk such as the Defralex-style indexing of Welsh legislation may help to provide a workable alternative to codification for many purposes.

Universities Wales thought that different ways of publishing legislation could provide a solution whilst codification is being considered further.

- 1.25 The Law Society Wales expressed that a “further consultation” should be arranged before deciding to codify some areas of the law. Law Society Wales thought that any further consultation should include presenting

... examples of presentation and the processes required to deliver codes including clear evidence of the benefit of codification compared with other tools and solutions which are available now before a decision is taken. The processes and timescales should be investigated thoroughly and weighed against resources.

The Law Society continued:

There is no immediate support to 'codify the law in Wales' although members see advantages in certain areas being subject to such a system.

- 1.26 An incremental approach to codification was something that was supported by consultees. This was supported by stakeholders such as the Presiding Officer of the National Assembly for Wales, Emyr Lewis, Universities Wales, and Association of London Welsh Lawyers. Universities Wales commented:

From a pragmatic perspective would favour taking an incremental approach involving a selective programme of consolidation focussing on areas of most immediate priority or areas to be targeted for reform/new legislation.

- 1.27 Some consultees thought that there were distinct benefits to codification in addition to creating one comprehensive source of legislation on a specific area. The Care Council for Wales explained that codification would force the executive and the legislature to take an overarching view of legislation:

We believe that there is merit in considering the development of codification in relation to Welsh legislation. As an illustration, in the implementation of the Social Services and Well-being (Wales) Act 2014, a frequent area of debate was the relationship between the Act and the Future Generations Bill with consistent view that a relationship was required to aid the implementation of both pieces of legislation and the lack of a defined relationship between them, is likely to weaken the potential positive impact of both areas of legislation. We would therefore endorse the view that legislation such as the Future Generations Bill could act as an overarching law with a direct relationship to the Social Services and Well-being (Wales) Act 2014 and other legislation dealing with similar social issues in Wales.

- 1.28 This view was also supported by Professor Backer who stated that surely a system of codes would "help retain oversight of statute law". However, Professor Backer wondered "whether a strict prohibition against separate legislation can be maintained in practice". Professor Backer gave the example of EU legislation which "could easily have a structure at variance with the code and accordingly difficult to insert into the code without rearranging it".

- 1.29 Huw Williams, a Partner at Cardiff based law firm, Geldards,<sup>1</sup> argued that given a programme of consolidation is necessary “there is every reason to consider whether the resources that would have to be deployed anyway to achieve consolidation would not be better devoted to the creation of a series of Codes in key areas.”
- 1.30 The Welsh Language Commissioner commented on codes from the perspective of the Welsh language. The Commissioner supported codes as it would result in a corpus of bilingual legislation for Wales.
- 1.31 In conclusion, codification was supported but many consultees expressed the following concerns
- (1) how workable the structure would be in practice
  - (2) how the devolution settlement work affect codification
  - (3) whether there was capacity in the Assembly to execute codification
  - (4) Time and expense of codification
- 1.32 Consultation responses to the consultation questions will now be addressed in turn.

**Consultation question 8-1: Do consultees agree that the objective of codification in Wales should be to bring the common law into statutory form, and/or reorganise statute law?**

- 1.33 Consultation responses agreeing that the common law should be brought into statutory reform and responses agreeing that only the statute law should be reorganised were roughly equal.
- 1.34 The Welsh Government stated that the priority should be reorganising statute law. The Welsh Government thought that whilst reorganising statute law, developments in case law that have impacted legislation could also be included. The Welsh Government acknowledged that, if feasible, codifying the common law would improve accessibility, but that many argue that the common law is not suited for statute and its inherent flexibility could be lost.
- 1.35 Dr Catrin Fflur Huws noted that “in the first instance, the emphasis should be on statutory reorganisation, as it is this that cause the law to be dispersed”. Dr Huws explained that reorganising statute law into codes should not necessarily mean that all the legislation on a particular area is put in one code. Dr Huws argued that, for example, an area such as education may be better served by being divided into separate codes such as the code on primary education and the code on secondary education. Dr Huws also noted environment as an area that is “too cumbersome” to be included in one code. In direct comparison, the Welsh language, a law of specific rights, would lend itself well to being in one code.

<sup>1</sup> The writer noted that the views expressed were personal.

- 1.36 Dr Sarah Nason agreed that the statutory law should be reorganised. Her response was detailed and given through an administrative law lens. Dr Nason stated that

It is generally more appropriate to focus on the reorganization of statute law than bringing common law into statutory form. Common law develops on an incremental basis and does not stand still; there is a danger that codification of common law principles will stultify progressive development (especially of those principles such as grounds of judicial review that have at their core the aim of protecting the citizen from the state).

Dr Nason highlighted examples of administrative procedure codes such as the Netherlands' General Administrative Law Act 1994, GALA (Algemene wet bestuursrecht or Awb). Dr Nason explored the successes and concerns of the GALA before considering the lessons Wales could learn from GALA to design a better codifying Act. Concerns included that "the presence of an overarching Act such as the GALA limits the flexible development of administrative law."

- 1.37 Other stakeholders that agreed that the statute law should be reorganised included the Legal Wales Foundation and Law Society Wales.

- 1.38 Keith Bush QC stated that the "ideal" is to consolidate the entire law including the common law and legislation. However, he swiftly concluded that such an exercise "does not seem practical for Wales". Other consultees supported the idea of bringing the common law into statutory reform.

- 1.39 The Association of Judges of Wales stated:

We would favour the model of codification adopted in the two areas referred to above allowing judges to interpret and supplement through the time honoured processes of common law pending future review by the legislature when it may incorporate the common law developments into the statutory code. Such a system would enable the law to be readily accessed particularly if the decisions of common law were also to be gathered together and posted electronically in a sub-divided index matching up with the individual sections of the statutory code

The Association explained that a legal requirement would need to be set up requiring judges to post their decisions under the relevant index. This sort of requirement already exists in relation to Circuit Judges and above who must post their judgements in Public Law cases on Bailii. The Association thought that extending this requirement would not be too onerous. The Association suggested that the requirement could be extended to post judgements on the Law Wales website.

- 1.40 The Association of London Welsh Lawyers explored bringing the common law into statutory reform at some length. They identified three propositions that supported why the common law should be brought into statutory reform:



- (1) When carried out before, it has worked well in practice. Examples are given in para. 8.12, including the Partnership Act 1890, which has stood the test of 125 years.
- (2) It should improve the accessibility and certainty of the law (see para. 8.75), both for the public and professionals (lawyers and others, such as accountants, surveyors and public officials).
- (3) Judge-made law may have drawbacks in bi-lingual parts of the substantive law of a common law jurisdiction.

The second and third propositions were expanded upon. The Association of London Welsh Lawyers also highlighted the benefits of codifying the statute law alongside what they refer to as “judge-made law”. They noted the following benefits:

- (1) It would make the existing statute law in the codified area more accessible and easier to understand. Rather than having to consider a number of different statutes, perhaps with titles unrelated to the topic of law being researched, the relevant law could all be found in one enactment with a title that accurately labelled its content.
- (2) It would make for better and more accessible law in the future. Rather than piecemeal amendment, repeal or addition by means of separate Acts or parts of Acts, the changes would be made to the code *in situ*, without proliferation or fragmentation.
- (3) We note the observation in para. 8.14 that codification of statutes, as opposed to consolidation, is associated with “substantive legal reform” as well as with the future course of the law (as just referred to in our preceding para. (2)).

1.41 Other stakeholders that thought that there was merit in bringing the common law into statutory reform were the Residential Landlords Association and the Administrative Court lawyer in Wales.

**Consultation question 8-2: Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?**

1.42 The overwhelming majority of consultees agreed that each code should constitute the authoritative and comprehensive statement of the law relation to a particular subject. Consultees that agreed with this consultation question identified problems with achieving an authoritative and comprehensive statement of the law on a particular subject.

1.43 Dr Sarah Nason drew on the experience of the Netherlands with GALA and explained that it “shows that it is not possible to accommodate all the law applicable to certain specialist areas of public decision-making procedure within one codified act.” Dr Nason concluded that “in that regard a code developed for Wales is unlikely to be entirely comprehensive.” She explained that the importance of the common law development, especially in the field of administrative law, “it seems unlikely that a code could constitute an authoritative and comprehensive statement of the law relating to a particular subject.” Dr Nason also questioned whether it would be the “relevant court’s interpretation of the code that is authoritative and would it be for the relevant court to determine if the code is sufficiently comprehensive to satisfy key constitutional principles”. Dr Nason regarded these as “fundamental issues surrounding the appropriate separation of powers within the state”.

1.44 All other consultees agreed with the consultation question in principle, but many raised concerns about the practicability of achieving codes that are authoritative and comprehensive statements of the law relating to a particular subject.

1.45 The Welsh Government stated:

We are of the view that the important issue is that an authoritative and comprehensive statement of the law is available together. It is important also to establish a coherent structure setting out the law by subject.

The Welsh Government also considered the extent in which secondary legislation should be incorporated into a code and how “soft law” would be accessed. They stated that further thought would need to be given to this.

1.46 Professor Thomas Watkin noted the citizen would be “well-served by a code, consolidating the law or at least the legislation on a particular topic – such as education”. Professor Watkin explained that the citizen will only be well-served if the code is “subsequently maintained”. Although Professor Watkin supported maintaining a comprehensive code on a subject to assist the citizen, he considered that “the code(s) to be updated at the end of each Assembly term, as the task of checking only the most recent enactments is not as difficult as tackling the whole statute book”.

1.47 Many consultees agreed with the consultation question but highlighted some potential problems with achieving a code that is authoritative and comprehensive.

1.48 Dr Catrin Fflur Huws thought that to achieve an authoritative and comprehensive code, it could mean widening Wales’ legislative powers, or allowing Wales to codify legislation on a subject outside competence. Dr Huws gave the following example

For example, there could be one statute on rights relating to the Welsh language, but it would mean Westminster giving permission to the National Assembly for Wales to codify into that statute some matters that are not within the Assembly’s remit, such as use of the Welsh language in the courts.

- 1.49 Similar concerns were raised by the Association of Judges of Wales who discussed the division of competences between Westminster and the Assembly in the area of public law children work. Westminster is able to legislate substantively in the area but the Assembly is responsible for many of the agencies supporting family law such as Cafcass Cymru. The Association reiterated the importance of having a comprehensive code and identified a limited number of exceptions where law could exist outside the code:

Allowing the fragmentation of the codified system would undermine the primary reason for establishing the code itself and should only be contemplated when the scope of the code itself is to be enlarged which may be required from time to time through changes in society, technological advances or for reasons presently unforeseen.

- 1.50 Huw Williams of Geldards agreed with the consultation question but noted that there could be a difficulty in deciding the precise boundary of a code. He gave the example of an “Education Law Code” and questioned whether the code should be broken up into a “Schools Code” and “Further and Higher Education Code”.
- 1.51 Other stakeholders that agreed with the consultation question included Marie Navarro, Residential Landlords Association, Legal Wales Foundation and Citizens Advice Wales.

**Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?**

- 1.52 The overwhelming majority of consultees agreed with the consultation question. Consultees that agreed with the question included the Care Council for Wales, the Legal Wales foundation and the Association of London Welsh Lawyers.
- 1.53 The Association of Judges of Wales highlighted how the National Assembly has taken full advantage of its law-making powers in the areas of social care and housing, for example. The Association stated that the Assembly has used its power to “effecting wholesale and far reaching” reforms and that it is now “largely unfettered by the pre-existing law of England and Wales”. It stated how this leaves the Assembly free to “simplify and codify” those areas of law and that there is “no reason why the same practice should not be adopted in all the devolved fields”.
- 1.54 The Welsh Government expressed that this question was a “practical issue” that would need full consideration. However, it stated that “flexibility would be essential” and noted that there could be “one code” with “separate chapters or subdivisions” rather than a number of codes. The Welsh Government noted that the current Wales Bill “will affect how this should be viewed and progressed”.
- 1.55 Many consultees agreed with the consultation question but identified issues with using a list of the National Assembly’s legislative competences as a starting point for codification.

1.56 Such was the response of Professor Thomas Watkin who explained that the consultation paper insinuated that the starting point for consolidation and or codification would be the subjects in Schedule 7 to the Government of Wales Act 2006. Professor Watkin referred to the shifting landscape of the devolution settlement and that the conferred powers model of Schedule 7 would be retained for Wales for the short to medium term. Professor Watkin noted that moving to a reserved powers model would evidently “rob the project of ready-made topics for codification” but that this gives the project “freer identification of such topic headings”. The evolving devolution settlement was also raised by Huw Williams of Geldards and the Wales Governance Centre.

1.57 Some consultees agreed with the consultation question but noted that even within devolved fields there are aspects of subject matters that are excluded from competence and that this may be problematic. This was raised by Dr Catrin Fflur Huws and the Association of Judges of Wales. The Wales Governance Centre also identified this issue:

It should be noted that the boundaries of what can be codified will necessarily follow the contours of what is and is not devolved. While no doubt that will create numerous practical difficulties as the process continues, we do not see it as a principled objection to codification that the competence of the National Assembly is limited.

1.58 The Wales Governance Centre agreed that Schedule 7 to the Government of Wales Act 2006 should be the starting point but considered how the structure of codes should be based on “what best serves the citizens, rather than pre-existing legal categories.” The Wales Governance Centre gave the following example:

For instance, planning and environment might be best dealt with as a single Code, as might social services and health.

The Wales Governance Centre identified the following primary areas for codification:

In our view, the primary areas for the biggest and most important Codes are planning, environment, housing, social services, local government and health. There are in addition a number of smaller areas (in terms of the quantity of legislation) such as the Welsh language and economic development.

1.59 The Presiding Officer of the National Assembly for Wales agreed that a programme of codification or consolidation should start with the legislative competences of the Assembly but that the programme should prioritise fields that “most impact on the citizen and on businesses in Wales.”

1.60 Keith Bush QC noted that the only type of codification practical for Wales would be based on the devolved areas. He stated that this sort of codification “would not be any different to a comprehensive programme of consolidation.”

- 1.61 Huw Williams of Geldards considered that the scope of codes may need to be decided by consultation or debate but questioned how helpful the current list of the Assembly legislative competences would be. He favoured a more pragmatic approach to codification and stated that the Welsh Government and the National Assembly should agree an initial programme covering three areas.
- 1.62 Dr Sarah Nason agreed that the subject matter of codes should be subject to consultation. Dr Nason noted how codes can be over or under inclusive and this could be problematic if the starting point for a programme of codification was to be the legislative competences of the Assembly:

Whilst in general the list of legislative competences of the National Assembly could represent a good starting point, the example of administrative procedure as given in this response is not a specific competence. It is an aspect of governance that cuts across all the devolved legislative competencies.

**Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?**

- 1.63 Analysis of consultation responses to this question will be addressed in two parts. First, should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Secondly, where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?
- 1.64 The Care Council for Wales believed that the Assembly should be able to enact both codes and Acts of the Assembly. Similarly, Dr Sarah Nason agreed that the Assembly should be able to enact both codes and Acts. She suggested that both should have the same status and the term code simply denotes the process in which it was enacted. These consultees made no observation about whether this power should be provided by statute.
- 1.65 Huw Williams of Geldards expressed that he was unsure what was being suggested by the consultation question. He clarified that if the consultation question intended to gather views on whether the Assembly should be given consent by Westminster (in the form of Westminster legislation) to enact codes in Wales, then this would “offend the principle that the National Assembly should be a master of its own procedure.” Keith Bush QC made a similar observation and stated that legislation would not appear necessary, rather the character of a code could be ensured by Assembly Standing Orders.
- 1.66 In the same light, the Presiding Officer, Dame Rosemary Butler AM stated the following:

The Assembly could amend Standing Orders to create and amend Codes using existing powers. However, primary legislation, outside the Assembly's current competence, would be required for certain formal but important matters, such as including Codes as enactments within the Interpretation Act. I am expecting that the forthcoming Wales Bill, if enacted, will give the Assembly control over its own arrangements for legislation and therefore bring the creating of a Codes system within the Assembly's competence. This would avoid the need to confer a specific power on the Assembly through an Act of the UK Parliament, which would be inconsistent with the constitutional trajectory of the Assembly.

- 1.67 Similarly, the Wales Governance Centre disagreed that the distinction between an Act and a code should be set out by UK statute. The Centre felt that deciding the form of Assembly legislation should be a matter for the Assembly to determine. Two reasons were provided. First, there should be a distinct "Welsh approach" to enacting and maintaining legislation rather than something the UK Government determine. Secondly, for practical reasons the structure should be determined in Wales. The development and maintenance would inevitably be moulded by the Assembly, and could be provided for in standing orders which would allow some flexibility.
- 1.68 The Wales Governance Centre noted that if Welsh legislation was to be devolved the distinction between an Act and a code should be set out in a Welsh Legislation Act. The Centre argued that "the requirement for a programme, and the specification of its governance, should feature as part of that Act."
- 1.69 Daniel Greenberg disagreed that the distinction between Acts and codes could be set out in standing orders. He explained that this distinction would be unrealistic and that the legislature cannot use internal procedural arrangements to tell the courts and other readers of legislation how to construe their legislation. Daniel Greenberg considered that any distinction should be set out in primary legislation but he remained unpersuaded by the need for codification and its success if it was established.
- 1.70 The Association of Judges of Wales took a different view and stated that the "overarching responsibility for consolidation and/or codification should lie with Westminster working in collaboration with the National Assembly for Wales". Reasoning given was that a Westminster led process would allow for the law of England and Wales to be consolidated and/or codified which would provide clarity for the citizens as well as the judiciary when they are applying the law in either England or Wales.
- 1.71 With regard to the second half of the consultation question, the views of consultees varied.

1.72 Professor Thomas Watkin described a system where, ultimately, legislation further amends the code, but there remains a period where the new legislation exists outside the code until it is consolidated. Professor Watkin explained how the Assembly would not be assisted by the arrival of a new legislative procedure, therefore it may be best to retain the process of having Bills that facilitate full scrutiny and debate about the proposed changes to the law. Bills could have schedules that detail how the code is amended by the Bill or Bills could be consolidated in the code at a later date, either by a subsequent Bill or by periodic consolidation of the code (perhaps at the end of each Assembly term).

1.73 The Residential Landlord Association briefly mentioned how limiting further legislation within the subject areas of the code only taking effect by way of amending the code may have unforeseen consequences. The Residential Landlord Association stated that:

We would say that although codification may be a noble aim, we do not agree with the level of alteration it would impose on the process of the National Assembly and that many technical issues still need to be resolved to provide adequate assurances.

1.74 The Legal Wales foundation noted that there should be a “clear distinction” between Acts and codes and agreed that further legislation within the subject areas of a code should only take effect by way of amending the code, “in the interests of clarity and accessibility”. The Administrative Court Lawyer for Wales also agreed and felt that such a process would be a “logical way” of “ensuring that codification is reserved”.

1.75 Daniel Greenberg explained that having new legislation only taking effect by amending the code is misconceived in two ways. He outlined two reasons:

First, the political reality is that the legislature cannot impose "rules" of that kind on future administrations and expect them to be obeyed: a Minister legislating today is concerned only with what will get her or his legislation through the Assembly with as little scope for interference and distraction as possible/ not with the long-term holistic integrity of the statute book. Making the legislation wider than is necessary in order to knit it seamlessly into the existing code will not impress the Whips/ if it thereby opens up considerable new flank for discussion and amendment.

Secondly, it simply is not true that free-standing legislation is inherently less helpful to the reader than absorption into a pre-existing code. Sometimes it will be; and sometimes it won't be. And the question is determined not by the nature of the code, or the determination of future generations to build a legislative Tower of Babel, but on the nature, extent, application and target-audience of the new legislation. Often, a free-standing enactment with an appropriate sign-post in a wider enactment will be the most convenient method of legislating for all concerned; particularly now that legislation is accessed primarily in electronic form, mostly through texts that offer hyper-linking and grouping by search results.

- 1.76 Dr Sarah Nason responded that there should be an “initial presumption” that further legislation on a subject matter amends the code as “this lessons the potential for fragmentation”. Dr Nason acknowledged that there might be possible circumstances where amending the code may not achieve the legislative aim.
- 1.77 The Welsh Government stated that they did not have a “firm view” on this consultation question but agreed that there would be a need for “a mechanism or process of some sort... in order to maintain newly consolidated legislation in an ordered and accessible form.”

**Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?**

- 1.78 Consultation responses offered a range of views to this consultation question.
- 1.79 The Lord Chief Justice of England and Wales commented that he was “pleased to see that the consultation picks up on Sir Geoffrey Palmer’s proposal about establishing a legislation office to lead on a codification programme”. The Lord Chief Justice stated that a model which is an “independent institution that is both a hybrid of, yet independent from, the executive and legislative branches with an mandate to produce better law is a concept that should be carefully considered”.
- 1.80 Huw Williams from Geldards agreed that a “Code Team” should be established and that this Team should include joint efforts from the Office of the Legislative Counsel and the National Assembly Commission. It was suggested that a Code Team is established to draft the initial Codes and that this could be a permanent structure dependent on its success. Huw Williams expressed that the development and maintenance of the codes should logically be the responsibility of the Office of the Legislative Counsel with oversight by the Counsel General. This role of development and maintenance could be given proper acknowledgement by placing a statutory duty on the Welsh Ministers or the Counsel General. He stated that, in addition, the standing orders of the Assembly could require that there is a Code Reform Bill during each Assembly and that this would deal with structural and presentational issues.
- 1.81 The Association of Judges of Wales suggested the “logical step would be to arrange the Departments supporting the NAW co-extensive with the codes rather than establishing a distinct office or department simply to support the development and maintenance of the Welsh Codes.”
- 1.82 Dr Sarah Nason considered that having a distinct office would be important but that specialist expertise is likely to come from various legal teams with specific policy knowledge. Dr Nason stated that it may be better to set up cross-departmental teams of experts who are responsible for development and maintenance of the various codes. Such cross-departmental teams could be accountable to a specific officer to ensure effectiveness.
- 1.83 The Welsh Government expressed that the expertise for such an office already exists in the Office of the Legislative Counsel:



We believe the promulgation of legislation is a matter for the executive. The development and maintenance of Welsh codes would require considerable expertise in the workings of statute. Such expertise already exists within the Welsh Government in the Office of the Legislative Counsel and we see no reason for this to be altered.

- 1.84 The Wales Governance Centre agreed with the consultation question. It refers to a “Codification Office” as the “bureaucratic backbone of the Code system”. The Wales Governance Centre stated that the Codification Office should be set up in the National Assembly Commission. The Wales Governance Centre explained that the drafting of the Codes should be a Welsh Government responsibility (or perhaps in some cases the Law Commission). It was explained that the Assembly Codification Office would have two roles, first a co-ordinating role and secondly, responsibilities for “maintaining, editing etc the Codes” as set out in standing orders. The Wales Governance also stated that as part of enacting and maintaining the codes it would be important to ensure that codifying bills would not have to compete for legislative time in the Assembly with “ordinary” political Government Bills.
- 1.85 Professor Dawn Oliver commented on having a New Zealand style legislation office in Wales. Professor Oliver highlighted that the duties of the Office of the Legislative Counsel is owed to the Government and therefore it would be difficult to envisage the National Assembly having a “veto over objectionable provisions in Bills.”
- 1.86 Keith Bush QC argued for an independent statutory body to be established. Such a body could be responsible for supervising and organising a programme of codification as well as advising the Assembly on the quality of proposed legislation, for example.

**Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?**

- 1.87 A limited number of consultation responses were received for this consultation question. Of those who offered a view, the majority thought that standing orders should make provision for a motion as described in the consultation.
- 1.88 Huw Williams of Geldards agreed that standing orders should make provision for enactments of codes. He described that the Assembly by resolution should declare whether an enactment is a code. If the Presiding Officer decided that a Bill fell within the remit of a code, that Bill should amend the code and it could only depart from that process if the Assembly resolves to the contrary, possibly by way of a super majority, perhaps 60%.
- 1.89 The Association of London Welsh Lawyers and Dr Sarah Nason agreed with the consultation question. Dr Nason reiterated that although a Bill can be enacted as a code, the code will have the same status as an Act. The purpose of enacting a Bill as a code would be to “ensure proper development and maintenance in accordance with any procedure developed.”

- 1.90 The Welsh Government also agreed that such a mechanism would be sensible to include in the codification process. The Welsh Government stated:

A mechanism of some sort that could convert a Bill that for example covers more than one subject area (according to the political will of the day) into legislation that fits within a consolidated structure or code could also be considered.

- 1.91 Keith Bush QC noted that deciding whether Bills are going to be codes or not should be decided from the outset so that the adequate scrutiny can be undertaken.

**Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?**

- 1.92 Consultees were in favour of having the member in charge and the Presiding Officer being responsible for a motion that an enactment stand as a code. This was supported by the Care Council for Wales, Association of London Welsh Lawyers and Dr Sarah Nason, for example.

- 1.93 Huw Williams of Geldards solicitors expressed that the motion to declare an Act a code should initially be in the name of the member in charge and the Presiding Officer holds the power to decide whether a Bill falls within the remit of a code. He also noted that if a code is to be stripped of its code status, then this should also be done by statute to ensure adequate scrutiny of such a change. Stripping a code of its code status should not be done by simple motion.

- 1.94 The Welsh Government commented that publishing and organising the statute book is a matter for the Crown and therefore the executive, however should be scrutinised by the Assembly in the usual way. The Welsh Government noted that it would be interested to hear the Law Commission's views on the best way to establish and maintain a code, providing it does not undermine the position of the executive.

- 1.95 Marie Navarro stated that the motion should only be in the name of the Presiding Officer.

**Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?**

- 1.96 The majority of consultees were in favour of the Presiding Officer determining whether a Bill falls within the subject area of a code, in whole or in part.

- 1.97 Huw Williams of Geldards agreed that the Presiding Officer should decide whether a Bill falls in an area of a code and therefore amends the code or whether that Bill exists as a standalone Bill not part of codified area. The Care Council for Wales also stated that this approach seems sensible.

- 1.98 Dr Sarah Nason thought that such a question should be subject to consultation with appropriate departments and legal departments but that ultimately it would be for the Presiding Officer.

- 1.99 In comparison, the Welsh Government felt that determining whether a Bill falls within the subject area of the code, either in whole or in part, should be a matter for the executive and not the Presiding Officer. Welsh Government acknowledged that there could be a role for the Presiding Officer to the extent that it does not compromise the position of the executive in maintain the statute book.
- 1.100 Daniel Greenberg stated that such a question alludes to the complexity and “new scope for confusion and challenge” when deciding whether a subject fall in or out of a code’s parameters.

**Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?**

- 1.101 The majority of consultees agreed with the consultation question but offered different models of who should staff a Code Office.
- 1.102 The Wales Governance Centre agreed that there should be an Assembly Codification Office that would be “entrusted by standing orders with the responsibilities for maintaining, editing etc the Codes as set out in the Consultation Paper.” This view was supported by the Presiding Officer. The Association of London Welsh Lawyers agreed that an office should be set up by the Assembly, but made no comment on the staffing of such an office.
- 1.103 Keith Bush QC stated that the functions listed in the consultation question should be undertaken by a body independent from Government and the Assembly but that it should advise the Assembly.
- 1.104 Huw Williams of Geldards explained that if the code was to stand as substantive law in its own right, “then the principle primary legislation can only be amended under the authority of the Assembly must be maintained.” It was suggested that there should be a legislative opportunity every five years for the Assembly to make changes as listed in the consultation question. He considered that there should be limited editorial power to ensure better presentation of the code when it has been subjected to successive amendments. Huw Williams suggested delegating powers to the Counsel General through statutory authority to make such edits. There should be provision for the Presiding Officer to certify these edits.
- 1.105 The Welsh Government highlighted how the functions described in the consultation question are closely linked to the role of the executive in designing and maintaining the law and therefore should not be held by the legislature.

**Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?**

- 1.106 Many consultees expressed concern about technical editorial changes not being subject to Assembly approval undermining the authority of the Assembly.

1.107 Professor Thomas Watkin seemed to suggest that consequential and incidental changes necessary to the code when amendments are being made should be “accommodated by the opportunity for democratic scrutiny and decision-making when the need arose”. However, Professor Watkin suggested that a “special committee” could be established “which could co-opt appropriate outside experts on the law and practice of the areas involved” to look at consolidation Bills and whether they change the law. Keith Bush QC made a similar observation and highlighted the Assembly’s unique position as a legislature that should not be compromised. Quick and simple processes could be established so that Assembly Members could give express consent to such amendments to the code. Keith Bush QC noted that ultimately, it is the Members that have the authority and democratic mandate to change the law. Similarly, the Association of London Welsh Lawyers explained that allowing the process described in the consultation question could lead to a lack of confidence in the Assembly, “especially if the perception of what is “technical editorial” became stretched.”

1.108 The Welsh Government agreed with the consultation question in principle:

In principle yes. If there is any change in the law then approval is likely to be required. It depends therefore on the nature of the ‘technical’ change.

1.109 Dr Sarah Nason agreed with the consultation question providing an appropriate procedure for challenging the determination that amendments are “technical editorial.”

1.110 Huw Williams of Geldards reiterated his view that the Counsel General should have delegated powers to make certain edits subject to the Presiding Officer’s certification.

1.111 The Association of Judges of Wales commented:

We agree that editorial changes following codification should not require NAW approval save when such changes are to be elevated to form part of the code itself. They would have the status of guidance only as would be the case at present ranking behind the Welsh common law in terms of application and interpretation.

1.112 Marie Navarro suggested an ad hoc committee or having the code office responsible for such amendments.

1.113 The Wales Governance Centre made general comments on the role of a Code Office:

But the Assembly Codification Office would have, first, a key co-ordinating role; and, secondly, could be entrusted by standing orders with the responsibilities for maintaining, editing etc the Codes as set out in the Consultation Paper.

**Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?**

1.114 The majority of consultees agreed. Consultees that agreed included the Care Council for Wales, Huw Williams of Geldards, the Association of London Welsh Lawyers and Dr Sarah Nason.

1.115 Huw Williams of Geldards stated:

It is agreed that where editorial changes are so significant as to amount to minor amendments then a simplified committee based procedure would be appropriate once the changes had been certified as “minor”. Alternatively changes that go beyond the mere editorial should all fall the dealt with under the quinquennial Code Reform Bill suggested above.

1.116 The Association of London Welsh Lawyers stated:

We agree, in that the relevant subject Committee would be made up of elected legislators, rather than officials.

Presumably, the Committee would have delegated authority from the Assembly, so that the issue for the Committee would be whether formal approval by the full Assembly was required.

1.117 Dr Sarah Nason agreed that in general, such a process should be in place. Dr Nason referred to the administrative procedure code which she described in earlier consultation responses. This code cuts across various subject matters and therefore the procedure for considering whether a minor amendment needed the approval of the Assembly needs to be variable.

**Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?**

1.118 A limited number of consultation responses addressed this consultation question sufficiently.

1.119 The Association of London Welsh Lawyers agreed with the consultation question. Similarly, Dr Sarah Nason agreed but expressed that there needs to be a procedure in place which allows Assembly Members to object.

**Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?**

1.120 Consultees that answered this consultation question expressed concern over the exact definition of “substantial defects” that could warrant using a shortened legislative procedure.

- 1.121 The Welsh Government noted that using a shortened version of the normal legislative process would be dependent on the circumstance. The more “substantial” the correction, the less likely a shortened version of the legislative process would be appropriate. Similarly, Dr Catrin Fflur Huws agreed with the consultation question but noted that clarity is needed as to when this process should be used. The Association of London Welsh Lawyers agreed with the consultation question.
- 1.122 Huw Williams of Geldards thought that all changes that go beyond the mere editorial should form part of the quinquennial Code Reform Bill he suggested in his response to consultation question 8-5.
- 1.123 Marie Navarro disagreed that a shorter version of the normal legislative process should be used to pass Bills that correct substantial defects in the code. Dr Sarah Nason also disagreed and stated that the normal legislative process should not be bypassed if the term ‘substantial defects’ is not sufficiently clear and if there is no opportunity for members to object to the shortened version being used.

**Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to bills to those designed to ensure better codification, rather than alternative substantive provision?**

- 1.124 The majority of consultees that responded highlighted practical issues with the rule described in the consultation question.
- 1.125 The Welsh Government made clear that it is essential to differentiate between consolidation with minor amendments and changing the law in a more substantial way. It noted that the success of consolidation is dependent on the consolidation not being routinely open to political debate. It stated:
- The process will not succeed if the law consolidated is routinely open to political debate. The process of initial codification is thus akin to one of consolidation, provided that the codifying/consolidating bill does not also contain significant amending or new substantive provision.
- 1.126 Dr Catrin Fflur Huws thought that this would be possible in principle, but that codification and specifically having to create bilingual codes would require greater reform “due to the complexity of expression in two languages.”
- 1.127 Further concerns were expressed by Keith Bush QC who noted the practical difficulties attached to hampering the right of the legislature to amend law. He explained that trying to enforce such a rule about amendments would be “impossible to implement without creating tensions that would undermine the confidence of Members in the principle of codification.” Similarly, Dr Sarah Nason thought having such a rule would impede the progressive development of the law.

**Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?**

- 1.128 The overwhelming majority of consultees were in favour of the proposition for a codification programme set out in this consultation question.
- 1.129 The Care Council for Wales commented that drawing up a programme of codification as described in the consultation question would be desirable. Dr Catrin Fflur Huws also agreed. Keith Bush QC commented that a codification programme based on devolved law, similar to the substance of a consolidation programme, would be “very desirable”.
- 1.130 The Wales Governance Centre agreed with the consultation question. The Wales Governance Centre stated that the requirement to draw up a codification programme should be included in an Assembly Act. The Centre stated that a broad strategic codification programme should, first, set out the broad structure of codes and secondly, provide a timetable for their achievement including a view as to the likely mode by which the code would be achieved. The Centre thought that the programme should be maintained as a living instrument for reasons of planning and accountability to stakeholder and the public.
- 1.131 The Wales Governance Centre noted that the programme should be devised by a board that included representative from the National Assembly, Welsh Government, the judiciary and legal professionals. The board should also include non-lawyers who interact directly with the law, for example, social workers and non-lawyers directly impacted by the law, for example, patients and service users. The Centre emphasised that the board must be dominated by lawyers and it should be a platform for effective challenge.
- 1.132 In terms of agreeing a programme of codification the Wales Governance Centre thought that it should be included in statute that the Counsel General and the Presiding Officer should sign and approve the final programme and that the programme should then be laid in the Assembly. In circumstances where an agreement cannot be reached, the Counsel General could be responsible for signing off the programme. However, the Counsel General will have to provide a statement as to why he or she is persisting with the programme without the agreement of the Presiding Officer.

- 1.133 The Association of London Welsh Lawyers agreed with the consultation question and drew attention to the final sentence of the consultation paper which advocated a codification programme being carried out earlier rather than later. The Association explained that they had understood the consultation paper to prefer codification-led law reform projects, however some areas of law would require different approaches. The Association of London Welsh Lawyers supported this approach. The Association of London Welsh Lawyers also felt that a distinct Welsh approach should be taken towards a codification programme as Wales already has a history of codifying the law. Welsh law should not seek to follow the approach of those codes of the jurisdictions of continental Europe. The Association of London Welsh Lawyers also stated that codification should not seek to cover every possibility that occurs to the drafter. The Unfair Contract Terms Act 1977 was referred to and it was described that this sparingly drafted Act sets out principles, such as reasonableness, which is left for the courts to determine.
- 1.134 Huw Williams of Geldards thought that a programme of codification covering three areas initially should be agreed by the Welsh Government and the National Assembly.
- 1.135 Dr Sarah Nason agreed with the consultation question in principle but suggested that such a programme may be premature and would very much depend on responses to this consultation.
- 1.136 Citizens Advice Cymru felt that a codification programme could detract from law reform in Wales. An effective codification programme should consolidate and codify subjects that have already been significantly reformed in Wales. A codification programme should not look to codify areas of law that have not yet been reformed. Citizens Advice Cymru also stated that any resource demanding codification programme should be balanced with other priorities such as “funding for frontline legal advice and representation to ensure that people are supported to access the law and resolve their problems”.
- 1.137 Marie Navarro stated:
- Yes, the Assembly could also have another programme of consolidation in addition to that of the Welsh Government.
- 1.138 The Welsh Government stated that if consolidation or codification would be pursued, a programme for it would be sensible. The Welsh Government thought that the content of the programme would be a matter for the executive, subject to appropriate consultation.



## CHAPTER 9

- 1.1 In Chapter 9 we discuss the possibility of harnessing the machinery of government to ensure that legislation is well designed and accessible from the start. We looked at the process of legislative design and existing controls of legislation in Wales, for example, impact assessments. We drew lessons from the approach in New Zealand given that it is similar to Wales in terms of population and being a unicameral legislature. We explored New Zealand's Legislation Advisory Committee, Legislation Design Committee and alternative models. Reform options for Wales were considered.

### INTRODUCTION

- 1.2 There was a mixed response to having bureaucratic control mechanisms. Many consultees doubted the effectiveness of setting up new committees responsible for improving legislation.
- 1.3 As explored in the consultation analysis of Chapter 8, the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd commented that he is "pleased to see that the consultation picks up on Sir Geoffrey Palmer's proposal about establishing a legislation office to lead on a codification programme". The Lord Chief Justice emphasised that that the "addition of an independent institution... with a mandate to produce better law is a concept that should be carefully considered".
- 1.4 Dame Rosemary Butler AM (Presiding Officer of the National Assembly for Wales in the Fourth Assembly) offered limited comment on having control mechanisms and noted that she would support any initiatives "which facilitated ongoing dialogue between all organisation involved in legislative design". Dame Butler stated that such a committee would need to be owned by politicians alongside technical experts.
- 1.5 Consultees such as the Welsh Local Government Association expressed concern about the effectiveness of any new committee as it would include largely the same stakeholders that are currently involved in the legislative process, but under the guise of a slightly different role. The Wales Governance Centre expressed similar concerns and also stated that arranging the machinery of government should be a matter for Welsh Government. Emyr Lewis (Blake Morgan LLP) questioned whether any new bureaucratic controls would be more effective if they were stipulated in standing orders.
- 1.6 In a consultation meeting, academics and students suggested that further bureaucratic mechanisms would only slow the legislative process, in an Assembly that is already over-worked.

- 1.7 Some consultees favoured setting up bureaucratic structures. In a consultation meeting, a legal academic suggested experts from outside the legislature and the executive could have a role in Assembly committees. This sort of role would also act as a catalyst for preparing the legal profession in Wales for the challenges presented by devolution. In another consultation meeting a lawyer working in the public sector suggested having “fitness for purpose” committees for every department which would be driven by civil society. These committees could fulfil a similar role to the Lord Chancellor’s Statutory Advisory Committees.
- 1.8 Each consultation question will now be considered in turn.

**Consultation question 9-1: We ask consultees whether a “legislative impact” assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government?**

- 1.9 The majority of consultees were in favour of a legislative impact assessment being added to the list of impact assessments undertaken during the course of policy development in the Welsh Government.
- 1.10 Dame Rosemary Butler AM (Presiding Officer of the National Assembly for Wales) thought that legislative impact assessments should be undertaken during the course of policy development for all Bills. The Care Council for Wales, David Michael (Neath Port Talbot County Borough Council) and Catrin Fflur Huws (Aberystwyth University) also thought that there would be merit in having legislative impact assessments.
- 1.11 The Law Society Wales suggested that a legislative impact assessment could be part of the function of a new committee.
- 1.12 Dawn Oliver (University College London) described having “Legal Accessibility Statements” which should be issued as a requirement by the First Minister’s Office. She described that the Statements should “indicate whether and if so where an authoritative text for the combined relevant statutory and secondary legislation provisions will be published if the measure is passed.” The Legal Accessibility Statements would be the responsibility of the Counsel General and would be intended to ensure the quality and accessibility of Bills.
- 1.13 Citizens Advice Wales thought that there was a wider role for legislative impact assessments and that legislative impact assessments should be “backdated to include all measure and acts that have previously been passed”. This would assist in deciding which subject areas take priority with regard to consolidation. Citizens Advice Wales acknowledged that resources may be an issue but that “the resource requirement for this to happen should be recognised”.
- 1.14 The Welsh Government felt that legislative impact assessment would be a complex task that would overlap with the role of scrutiny. Thought would need to be given as to how these impact assessments would work in practice and what the effect of having legislative impact assessments would be.
- 1.15 Keith Bush QC referred to the previous success, or lack of, of similar mechanisms. He stated:

The Finance Committee has often criticised the standard of the assessment of the likely costs of implementing legislation, which is part of the impact assessment of any Bill. In a democratic legislature that operates on the basis of party politics, no statement on behalf of the Government in relation to the characteristics of the legislation gets much attention if the majority of the Members support the Bill.

At Westminster level, the independence of the House of Lords means that powerful committees such as the Committee on Delegated Powers can create practical problems for the Government if the legislation does not reach their standard.

A more effective way of raising the quality of legislation in the Welsh context would be to establish an independent body – a Legislative Commission – that would have statutory functions in relation to the quality of legislation (amongst other things) and could intervene in the legislative process – not to prevent it (something that would be contrary to Assembly Members' control over the law) but to delay it – if there was a large enough flaw in a Bill.

- 1.16 Universities Wales supported the scope of impacts assessments being carefully reviewed:

For instance, we submitted evidence to the Finance Committee in relation to the Higher Education (Wales) Bill (HE (Wales) Bill) which identified significant issues with the costing of the HE (Wales) Bill proposals and estimates of the impact for the sector. A further impact that in our view should be routinely included is the impact of proposals for the Office for National Statistics (ONS) classifications for purposes of national accounts. This has been a significant issue that has had to be considered in almost all recent legislation we have been involved with (see 2.2 above) from public service/workforce planning legislation to the regulation of higher education.

**Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?**

- 1.17 We received mixed consultation responses to this consultation question.
- 1.18 The Welsh Language Commissioner stated that she would “welcome any new models offered to ensure that legislation is well planned and both consistent and accessible from the outset”. The Welsh Language Commissioner stated that amendments to the process of planning legislation would be specifically welcomed if it could be ensured that the Welsh language would be given full consideration in primary and secondary legislation. The Welsh Language Commissioner gave examples of difficulties she had encountered in pressing the Welsh Ministers to take account of the Welsh language.

- 1.19 Creation of such committees was supported by Keith Bush QC. He stated that a committee should be independent. This view was supported by Marie Navarro (Your Legal Eyes). Mr Bush argued that the independent body would be able to provide “authoritative and impartial public advice on technical and legal matters in order to strengthen the Assembly’s ability to improve the quality of legislation (without interfering at all with the policy behind it)”. Mr Bush compared this role of this committee in Wales to the House of Lords “‘as a revising chamber’ at United Kingdom level”.
- 1.20 The National Trust noted that a committee could be very useful to ensure clarity and continuity in the legislative process. The National Trust stated that what became the Well-being of Future Generations Act saw “three name changes, two departments and four changes of Minister as well as several seeming changes of purpose or modes of delivery before it came into being”.
- 1.21 Dawn Oliver (University College London) doubted whether a “New Zealand style Legislation Design and Advisory Committee would have sufficient influence on government in Wales, unless some Assembly Members were included in its membership and there was support for its work in the Welsh Assembly”.
- 1.22 The Welsh Government highlighted the problems with the Legislative Design and Advisory Committees in New Zealand. It emphasised that the Design Committee ceased to exist following a change in government and that this is an indicator of the problems that arise when such a committee is involved at the heart of government. The Welsh Government stated that the structure of legislation is closely linked to the policy content and therefore it should be a matter to be considered within government.
- 1.23 Catrin Fflur Huws (Aberystwyth University) disagreed with the creation of such Committees and thought that it would be better to have expertise in the existing Committees. The Law Society Wales stated that the functions of the Constitutional and Legislative Affairs Committee could be widened to include subjecting draft Bills to pre-legislative scrutiny. The Law Society Wales noted that outside experts could help the Constitutional and Legislative Affairs Committee perform this role “as a more immediate response”. Universities Wales also support the possibility of enhancing the role of the Constitutional and Legislative Affairs Committee. Universities Wales also state that it is important to ensure that the Assembly is the final arbitrator on constitutional and legislative matters. These matters will be covered further in consultation question 9-3.
- 1.24 The Association of London Welsh Lawyers were unconvinced by a formal committee being established. Similar to many other consultees, they stated that “principally... it would merely reorganise the process of legislative development and drafting and add little other than a further layer of bureaucracy”. The Association of London Welsh Lawyers concluded that the system in New Zealand “provides little evidence of a positive impact on legislation”.
- 1.25 Sarah Nason (Bangor University) expressed similar concerns and said that any such committee should work in close partnership with other committees and departments so that it does not simply duplicate roles that already exist. Dr Nason suggested having academics and third sector organisations such as Citizens Advice Wales on this committee.

**Consultation question 9-3: We would also welcome consultees' views on alternative models.**

- 1.26 Consultees offered limited comment on alternative models.
- 1.27 The Welsh Government reiterated that legislative design should be a matter for government, and noted that it does “not see the need to establish a permanent committee of experts”. The Welsh Government emphasised that the Assembly and its committees “may already take advice from those with particular expertise when considering legislation” and that the Government itself can also take advice from counsel if required. The Welsh Government concluded that it sees no reason why proposals to consolidate the law should be subject to a different procedure.
- 1.28 The Dame Rosemary Butler AM (Presiding Officer of the National Assembly for Wales) encouraged any initiative that facilitated discussion of legislative design. She stated that any sort of committee or other mechanism should involve and be owned by politicians and technical experts.
- 1.29 Dawn Oliver (University College London) stated:
- But other ways of bringing the legislature to the fore in consideration of the quality of legislation, especially accessibility, are worth exploring.
- These could include the ways in which Assembly Committees perceive their roles, including in relation to the quality and accessibility of legislation, discussed in relation to Legal Accessibility Statements, above.
- 1.30 Law Society Wales suggested extending the functions of the Constitutional and Legislative Affairs Committee to perform pre-legislative scrutiny of draft Bills. Experts from civil society could be involved as a “more immediate response”.
- 1.31 The Association of London Welsh Lawyers advocated a more “informal approach” of consulting “on a subject and legislation specific basis”. Consultation could be carried out with the academic community, practising lawyers and other stakeholders. The Association of London Welsh Lawyers considered that this responsibility to undertake informal consultation at earlier stages could rest with the Counsel General but that it is not appropriate to impose formal requirements.

**Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models.**

- 1.32 We received minimal consultation responses to this question. The Welsh Government expressed that establishing a committee similar to the Advisory Committee in New Zealand would be costly in terms of members and setting up a secretariat.
- 1.33 We have prepared an impact assessment of the recommendations made in the final report, which is available on the Law Commission website at: <http://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/> .

# CHAPTER 11

## INTRODUCTION

- 1.1 Chapter 11 looked at Welsh language terminology and drafting bilingual legislation. We explored how Welsh language terminology has already been defined in legislation since the National Assembly started legislating in Welsh in 1999. However, the consultation paper noted that there is a current need for further work in this area. The consultation paper also explored the form of bilingual legislation as well as how bilingual legislation is drafted. We drew lessons from the practice of drafting bilingual legislation in Canada and Hong Kong. We also considered the role of jurilinguists and editors.
- 1.2 The Welsh Language Commissioner made general comment on drafting Welsh language material. The Commissioner stated that during her post as Welsh Language Commissioner and through the process of imposing standards in accordance with the Welsh Language (Wales) Measure 2011 the reliance on translation services to achieve the requirements of bilingualism has been made clear. The Welsh Language Commissioner took a suitably long term view on this and commented that “although translation services of necessary, we must also move to a situation of more long-term and strategic planning in order to develop bilingual working practices”.
- 1.3 The Welsh Language Commissioner reflected this long term view in the specific consultation questions. For example, whilst the Law Commission asked questions about the drafting of Welsh language legislation, the Welsh Language Commissioner commented that policy documentation and directions should also be drafted simultaneously in both languages. This overarching approach extends much further than the limited focus of the Law Commission. This was recognised by the Welsh Language Commissioner:

I know that this vision and my responses to this document do not suggest an easy way of operating in the short-term. It is also true that progress is taking place as more resources are published on the BydTermCymru website, for example, and that some examples of improvement in the consideration given to the Welsh language as part of the enactment process were highlighted recently. However, more strategic planning and investment will be needed to build on the good work done so far. As a basis for this, there is a need for a substantial cultural change in order to realise the objective of bilingual enactment and to ensure that Welsh and English legislation are truly equal.

- 1.4 The Welsh Language Commissioner set out considerations for the Welsh Government:

It will need to continue to plan internally ensuring that it has officers with the necessary skills; to consider the contribution of information technology and to establish specific procedures and guidelines. The Government will also need to do the following via its policies in the area of education:

1. Ensure that the education system in Wales produces professional workers who have skills of high-standard in Welsh and in English to discuss policy and to legislate in both languages
  2. To ensure that there are more opportunities to study law through the medium of Welsh
  3. To run a campaign to promote the need for expertise in drafting and interpreting bilingual legislation
  4. To ensure that considerations associated with bilingual legislation form part of the syllabus in schools and universities in England and Wales.
- 1.5 The Wales Council for Voluntary Action reflected on the current availability of Welsh language material. It highlighted that at present there are not enough legal documents available in Welsh. It explained that although the majority of people living in Wales are able to understand English, “some people may be much more comfortable expressing themselves in Welsh as it is their primary language”.
- 1.6 Much comment was made on the development of Welsh legal terminology for Wales. Consultees such as local governments in North Wales stated that “there is a need to guard against falling into the trap of generalising by stating that the difference between formal, legal Welsh and informal Welsh creates a vacuum which poses significant and higher challenges than similar situations with other languages”.
- 1.7 William Robinson noted that the consultation paper almost completely ignored EU legislation. Mr Robinson stated:

But Wales is part of the EU and it might usefully look at the EU’s approach to making its legislation accessible and to drafting legislation and making it available in more than one language. The EU model is certainly not optimal but it is an example of a system that has developed quite recently and has had to find its own solutions to the common problems that face Wales.

**Consultation question 11-1: We invite the views of consultees as to how the process of standardising and keeping up to date Welsh legal terminology should be continued and funded. In particular, what manner of body should be responsible for performing this role?**

- 1.8 The Welsh Government commented that the issue of developing and standardising Welsh legal terminology is something it would like to consider further. The Welsh Government commented that there might be merit in bringing together the bodies that currently have a role in standardising terms, but that such a process should be guided by international standards in terminology management.

- 1.9 The Association of Judges of Wales highlighted the importance of developing proper practice as to the standardisation of Welsh legal terms. It reflected on its own experience:

The current situation in Wales is that resources are piecemeal with no central point of focus. The recent experience within the justice sector is a good example, where the now defunct Welsh Language Board led a project to standardise some terminology in the administration of Justice. The 'standardised' terms were then forwarded to Canolfan Bedwyr, at Bangor University in order to be uploaded on Cysgliad (a software programme available to the judiciary) only for Canolfan Bedwyr to query some of the 'standardised terms'.

The Association of Judges of Wales commented that "if a minority language is to gain a foothold with the courts and tribunals, then being able to use the language with confidence and with access to appropriate terminology is paramount to its viability".

- 1.10 The Wales Council of Voluntary Action acknowledged that some provisions have been made for the standardisation of Welsh terminology but felt that further work needs to be done in relation to legal terms.
- 1.11 The Welsh Language Commissioner commented that the standardisation of terms should be done alongside the formulation of policy:

1. The process of standardizing Welsh and English terms for a specific policy area should happen simultaneously as a basis for the work in hand. This should be done in consultation with linguistic, subject and legal experts.

The Welsh Language Commissioner referred to the development of concise English terminology and how this has been a process of interpretation. Similarly, Welsh legal terminology should not be developed in a vacuum "but rather it should be developed hand in hand very closely with developing and interpreting legislation, in the same way as legal terminology in English developed".

- 1.12 The Welsh Language Commissioner proposed a method of standardizing legal terminology:
1. [It] requires judges, solicitors, translators and editors to refer problematic terms to one central location explaining the context, quoting the legislation and explaining their difficulties
  2. [It] requires new policy and legislation developers to specify the terms used in Welsh and in English at the beginning of the process of creating policy. Only by doing so can Welsh and English terminology really be standardized for use in legislation developed bilingually. This is consistent with the evidence I gave to the Constitutional and Legislative Affairs Committee's investigation into legislating in the Fourth Assembly.



- 1.13 The Welsh Language Commissioner considered how the above would require a “terminologist” to be appointed, “who would be responsible for receiving the problematic terms of the above solicitor and judges”. Terminologists could also advise policy people and those developing legislation, as this very early stage is also something that should be done bilingually. It was noted that it would be necessary to have the standardisation criteria recognised by an official organisation such as the Lord Chancellor’s Standing Committee. Terminologists should also consult with legal experts verified by such an official organisation and consult with linguistic experts. The Commissioner noted that the ‘Coleg Cymraeg Cenedlaethol’ is currently in the process of establishing a Welsh Language Standardisation Panel. It was suggested that this panel could offer linguistic advice.
- 1.14 The Welsh Language Commissioner proposed a collaborative process, which was supported by other consultees such as local authorities in North Wales.
- 1.15 The Care Council for Wales advocate a process that is driven by the Assembly and suggested that the function could rest in the Assembly’s translation services. The Care Council thought it essential that the role is undertaken by a “central body” so that it can be used by others as a resource.
- 1.16 In contrast to the Care Council for Wales, Huw Williams (Geldards LLP) thought that the greatest impetus to develop and standardise terminology will come from the Office of the Legislative Counsel in the Welsh Government. Mr Williams suggested that the process be formalised:

Funding the OLC to publish an on-line English Welsh Legal Glossary, very much along the lines of what has been done in Hong Kong. Perhaps this could be made available as a resource within the *Cyfraith Cymry/Law Wales* website. Another option might be collaboration with the Welsh Academy which is responsible for publishing the most authoritative dictionary of the Welsh language. Publication of the Glossary might be accompanied by the publication of a guide to the use of Welsh in the law aimed at the general public and as an introductory text for practitioners who may then wish to delve deeper.

Coupled with this I suggest an Advisory Committee of legal, linguistic and jurilegal experts who can act as a source of external advice and assistance to the OLC.

- 1.17 The Association of Judges of Wales also thought that responsibility for standardising terminology should rest with the Welsh Government. Similarly, Legal Wales suggesting responsibility for terminology resting with the Office of Legislative Counsel and the Welsh Language Unit of HMCTS. Edwin Hughes (lay magistrate) also suggested having the HMCTS Welsh Language Unit responsible for the process.
- 1.18 Law Society Wales proposed having the responsibility rest with government and the legislature. The Law Society referred to the work of the Assembly’s Research Service which provides Welsh terminology in relation to Bills.

- 1.19 In contrast, Noel Lloyd (Aberystwyth University) considered the potentially valuable role of the law schools in Wales and the 'Coleg Cymraeg Cenedlaethol'. In a similar vein, Linenhall Chambers encouraged the creation of dictionary/glossary/thesaurus of Welsh Legal words.
- 1.20 Catrin Fflur Huws (Aberystwyth University) made a unique point. She noted that there is too much concern about the standardisation of Welsh terms, and not enough in English. It was described how the British system is well acquainted with using the same words to bear different meanings, for example "absolute" and "possession". A similar point was made by Keith Bush QC who noted that terminology is not a "stumbling block". Mr Bush referred to the fact that there is now a "corpus of legal terminology" and the term used by the National Assembly "should be accepted by everyone else in Wales, unless it has been shown to be erroneous". If a term is found to be erroneous, an alternative could be decided by informal discussion that could include the law schools and the 'Coleg Cymraeg Cenedlaethol'.
- 1.21 The Welsh Language Commissioner noted three things in relation to the development and standardisation of legal terms:

Although I acknowledge that the history of the Welsh language inevitably means that there is a lack of Welsh language legal terms available, the focus should not be entirely on standardizing Welsh language terms but rather on the Welsh and English terms in Wales. The new legislation of Wales is in itself developing new concepts in both languages. Consider in that respect what is now meant by the terms 'safonau' and 'standards' in relation to the Welsh language or 'lesiant' and 'well-being'. These terms have definite concepts relating to them which result from the definitions of Welsh legislation. One of the main international principles of standardizing terms is the need for terms to reflect a concept. One of the purposes of legislation is to implement a policy aim and thus it is vital to establish that policy concept from the outset and to specify terms in Welsh and in English to reflect that concept.

Though some would argue that it would be better to establish a new panel to try to standardize these terms on the same lines as past panels such as the one established by the Welsh Language Board, I believe that it would be much better to establish a method of referring difficulties to terminologists so that the terms can be standardized in response to real situations and requirements.

You note in 11.8 and 11.9 of the consultation document that there is more of a difference between written and spoken Welsh than there is between written and spoken English. I am not certain whether any reliable research has been carried out that proves this allegation. What is more relevant perhaps is the difference between the formal and more verbal registers in Welsh and those in English. In considering the standardization of Welsh language legal terms therefore it would be necessary to differentiate between these registers in order to ensure that complex legal concepts can be explained more simply to those who do not work within the area of the law. Perhaps in this respect the wording of the legislation and the wording resulting from implementing the legislation will vary, of necessity, in order to ensure that the public understand the meaning of the legislation. In this respect, standardizing Welsh and English terminology simultaneously as I outline above would be even more relevant.

**Consultation question 11-2: Accordingly, we invite the views of consultees as to what, if anything, can be done to make Welsh legal terminology more accessible to legal professionals and to the public.**

- 1.22 Many consultees referred to the historical and cultural context of Welsh and how this is largely responsible for Welsh legal terminology not being seen as “accessible”.
- 1.23 The Care Council for Wales stated that legislation should be written in the “clearest possible language without undue recourse to obscure technical terms”.
- 1.24 Catrin Fflur Huws (Aberystwyth University) submitted that it is not Welsh terms that are inaccessible, but rather bilingual terms and their interpretation. Dr Huws argued that “there is a lack of understanding of the status of the Welsh legislation, and the need to ensure that interpretation happens by reference to both forms of the act”.
- 1.25 The Welsh Language Commissioner made a similar point and highlighted that “terms will only become familiar to use by getting used to using them”. The Welsh Language Commissioner again emphasised the importance of the “education world ensuring that the legal workers of the future are familiar with Welsh language legal terminology”. The Commissioner added that terms could be made more accessible if one national search interface was created, so that people would not have to consult various sources. The Welsh Language Commissioner stated:

In the absence of such a search interface the Welsh Government should use BydTermCymru<sup>32</sup> the Welsh Government Translation Service's database of terms to publish the terms standardized by the terminologists as part of the process outlined in 3.6.1-3.6.5 above. It could be agreed with other organizations which publish sources of terms and a glossary on-line such as Geiriadur Prifysgol Cymru, y Porth Termau Cenedlaethol and the Coleg Cymraeg Cenedlaethol that these terms that have been standardized by the Welsh Government are included in their databases too in order to try to avoid multiplying forms between various sources.

- 1.26 The Commissioner explained that terminology could be made more accessible by using the media. The Commissioner referred to the Oxford English Dictionary that tweets and sends emails regarding specific records.
- 1.27 Keith Bush QC agreed with the Welsh Language Commissioner on the point of bringing together different projects that are being worked on currently. He named sources such as TermCymru and the work of the Universities. Mr Bush stated that there should be one terminology website, which different bodies could feed in to. This was highlighted as not being too expensive to pursue.
- 1.28 The Association of Judges of Wales considered the role of technology and suggested creating an 'app' or a digitalised version of the source that could be included on the Ministry of Justice's website for example.

**Consultation question 11-3: We invite the views of consultees as to whether the form or presentation of bilingual legislation could be improved and, if so, in what ways.**

- 1.29 Convincing arguments were put across by consultees as to presenting English and Welsh legislation side by side.
- 1.30 The Welsh Government highlighted how the default position on legislation.gov.uk offers one language text only. The Government stated how this "tends to reinforce the idea that there are two texts that should be treated independently of each other, rather than setting out a single instrument in two texts". Further, considering that the commercial providers only publish the English version "reinforces the idea that the English text is predominant". The Welsh Government advocated making the "dual-language text the default option" as it would challenge this perception.
- 1.31 Catrin Fflur Huws (Aberystwyth University) agreed with the view of the Welsh Government and argued that the legislation needs to be in two columns, one in Welsh, one in English. Dr Huws made clear that the "system needs to be able to refer to both". Edwin Hughes (lay magistrate) also agreed with this view. Further, so did the Presiding Office for the Assembly and the Welsh Language Commissioner who noted that "only by being read together do they represent the legislation of Wales". The Welsh Language Commissioner referred to the Bilingual Design Guidelines published by her office.

- 1.32 The Care Council for Wales thought that the way legislation is currently presented enables “direct and easy comparison” and shows the legislation on an “equal basis”. Local authorities in North Wales noted that the provision on legislation.gov.uk “allows a range of options”. The local authorities stated that the ideal would be to be able to operate easily in either language so that the versions can be compared if necessary.
- 1.33 Huw Williams of Geldards solicitors commented that the presentation of bilingual legislation can sometimes be confusing in the context of Assembly legislation that “effects extensive English only amendments to a pre-existing Westminster Act”:

The Planning (Wales) Act 2015 is a good example of this and large parts of the Act are taken up with the duplication of new provisions in English with only the brief formal wording effecting the amendment being rendered bilingually. This is yet a further argument for a consolidation or codification programme which will involve adopting a fully bilingual text.

**Consultation question 11-4: Do consultees agree with our analysis of the objectives of bilingual drafting?**

- 1.34 The overwhelming majority of consultees agreed with our analysis of the objectives of bilingual drafting. Some consultees that agreed included the Welsh Government, Keith Bush QC, Legal Wales and Noel Lloyd (Aberystwyth University). The Association of Judges of Wales also agreed with our analysis of the objectives of bilingual drafting but questioned that perhaps “objective 5 could be expanded to ensure that we achieve effective equality and usability between the two language versions?” The Care Council for Wales agreed with the objectives but questioned, “what about an objective concerning cost, efficiency?” Similarly, local authorities from North Wales noted that the objectives “appear reasonable but would it not be appropriate to add “ensuring confidence in the bilingual legislation system?””.
- 1.35 The Welsh Language Commissioner seemed to agree with the analysis of the objectives of bilingual drafting. The Welsh Language Commissioner explained that these objectives will only be realised when the Welsh Government adopt a model of co-drafting. The Welsh Language Commissioner described the process as the following:

I am of the opinion that there is a need to adopt the practice in Wales of drafting legislation bilingually by bilingual drafters who draft legislation in Welsh and in English simultaneously following receipt of bilingual policy directions developed by bilingual policy-makers. That would realise the bilingual drafting objectives you note in section 11.50 of the consultation document. Specifically it would ensure faithfulness to the intention of those who promoted the Bill and would ensure that the meaning of the provision is consistent between the text in both languages. It would also be a means of maintaining an effective bilingual legal system and ensure effective equality between both languages. As Keith Bush QC notes, there is also a need for bilingual drafting to ensure ‘a text in each language which conveys the same meaning as the other but which readers in each language perceive both to be equally natural and familiar use of language’. Bilingual drafting by bilingual drafters drafting legislation in Welsh and in English simultaneously following receipt of bilingual policy directions developed by bilingual policy-makers would be a means of ensuring this. Only by discussing both language together can appropriate expression be specified in both languages which conveys the same meaning and expresses the purpose of the legislation.

- 1.36 Law Society Wales commented that the first objective of bilingual drafting should be to “produce equivalent law”. Law Society Wales continued by explaining that a “full and rigorous co-drafting should be employed to test draft legislation”.

**Consultation question 11-5: Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?**

- 1.37 Most consultees considered that the current arrangements for the allocation of drafting are satisfactory. However, the Welsh Language Commissioner gave a powerful consultation response that focused on the longer term.
- 1.38 Thomas Watkin commented that the “advent of bilingual drafting of legislation in Wales is not readily comparable with its practice in other jurisdictions”. Professor Watkin compared how in Canadian provinces such as New Brunswick the languages involved in bilingual drafting had been used in law-making for centuries and “had developed, modern, legal registers”. In contrast, Professor Watkin explained how the use of Welsh as a law-making language in modern times is a new process and consequently the language “lack[s] an equivalent terminological register and there was no existing tradition of legislative drafting on a national level”.
- 1.39 Professor Watkin concluded that lessons can be drawn from the practice of other jurisdictions, but that it would be “unwise to seek to transplant a model”. Professor Watkin stated that Wales should find a style of bilingual drafting that considers Wales’ own “historical and cultural position”. Professor Watkin suggested that the following two components need to happen before Wales can follow a similar practice to other jurisdictions:

- (1) Wales having a “cohort of lawyers who are capable of drafting freely in both languages”,
  - (2) The Welsh language having gained “parity with English as a legal language as a matter of practice as well as theory”.
- 1.40 Citizens Advice Wales supported the view of Professor Watkin. It noted that consideration should be given to the number of clerks and lawyers proficient in Welsh and the dominance of English in the civil service in Wales.
- 1.41 The Welsh Language Commissioner took a different position to Professor Watkin. The Welsh Language Commissioner described the current system of drafting employed by the Welsh Government as reflecting the present position of the Welsh language; “In the Welsh Language Commissioner’s introduction she stated that the aim of the Welsh Government should be to have the two language versions drafted by the same drafter, “who would be equally as skilful in both languages and able to take advantage of the assistance of linguistic experts throughout the process””. The Welsh Language Commissioner noted that this should be an aim that is pursued as a matter of urgency “in order to achieve it in the medium term”. The Welsh Language Commissioner set out some steps that would need to be taken to achieve this, such as investing in educating a fully bilingual workforce.
- 1.42 The Welsh Language Commissioner’s response to the specific consultation question is less specific. The Commissioner seems to be advocating a more general version of co-drafting where bilingual drafters draft legislation in Welsh and English “simultaneously following receipt of bilingual policy directions developed by bilingual policy-makers”. This response does not note explicitly that the aim should be to have one drafter proficient in both languages and drafting both versions. The Welsh Language Commissioner set out some benefits to this model of co-drafting:

Developing text bilingually and simultaneously can improve expression and the intention of the policy and legislation itself. As the present guidelines of the Legislative Counsellor for Wales reveal, patterns of expression in Welsh and in English are not the same. In discussing the means of expressing the policy objective through legislation in both languages therefore, expression in both languages can be improved and the policy objectives formulated better.

As a result, it is also an opportunity to develop legal phraseology and patterns that can be understood and are accessible in both languages.

It would reduce errors between Welsh and English versions of legislation and secondary legislation. I am aware of examples in which there are differences between Welsh and English versions of legislation. Although it is not included in the secondary legislation itself, see page 3 of the explanatory note in the Welsh Language Standards Regulations (Number 1) 2015<sup>36</sup> in relation to the policy-making standards of the Welsh Language Measure. In the explanatory note, the word 'pobl' is used three times in the Welsh version to convey 'people' (twice) and 'person' (once) in English. In the legislation itself<sup>37</sup> the words 'person/personau' are used in Welsh and 'person/persons' in English. In the explanatory notes to the Regulations only one example in both languages reflects the legislation itself.

It would reduce the current dependence on the Welsh Government's translation services.

It would widen the opportunities for people to use their Welsh language skills in the workplace in accordance with the Welsh Government's strategic aim 4 in its strategy document for the Welsh language *iaith fyw: iaith byw*.

- 1.43 Similar views to those of the Welsh Language Commissioner were expressed in consultation meetings. In a meeting with academics the drafting process employed by Welsh Government was described as "opaquely transparent". Further, in a consultation meeting with lawyers working in the public sector there were some particularly strong views about the need for co-drafting. The lawyers reported how much of their work is done through the medium of Welsh and therefore the status of Welsh legislation is important. Attendees of the meeting questioned simply why it is not possible for one drafter to draft in Welsh and the other in English.
- 1.44 The Wales Council of Voluntary Action thought that the current model of drafting could mean that the "accurate meaning of certain provisions can be lost or skewed" because direct translation is not always possible.
- 1.45 Law Society Wales agreed with the Welsh Language Commissioner's view that a "full and rigorous" model of co-drafting "should be employed to test draft legislation". The Association of Judges of Wales took a softer approach. It explained that as law schools produce a greater number of Welsh speaking law graduates, more may be achievable in terms of drafting. The Association stated:

The Canadian experience shows that an approach may have to be adapted in light of the resources available but there is no reason why we should not aspire to an improved system of drafting.



1.46 The Welsh Government responded that the current arrangements for the allocation of drafting are satisfactory. The current arrangements replicate those of the United Kingdom Government and the other devolved administrations. The Welsh Government acknowledged that other arrangements exist elsewhere, “which involve a specialist drafting office undertaking more of the drafting work”. Keith Bush QC made a similar comment:

The present system, which follows the traditional pattern of drafting services in Whitehall, seems quite satisfactory. But it is early in the history of legislative drafting in Wales to reach a final conclusion.

1.47 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, recognised that in the long term, co-drafting would have particular advantages. However, the Presiding Officer argued that the resources could be more “usefully devoted to making those elements of law which are currently available in English available in both languages, through a process of codification or consolidation”. The Presiding Officer also stated that it would be valuable to train monolingual drafters in Welsh language awareness, “so that they avoid particular constructions that would give rise to ambiguity in Welsh, such as “shall” and “may””.

1.48 Huw Williams (Geldards LLP) made a similar point to the Presiding Officer. He made two observations:

1. I would not wish to see additional resources devoted to the further elaboration of the techniques of “co-drafting” perhaps in the pursuit of perfection at the expense of codification/consolidation projects. Given the reality that the use of Welsh as an everyday language in the law is still at a very formative stage, I think that the standards achieved by OLC using the techniques described is sufficiently high for present purposes.
2. I see a useful role of both jurilinguists and editors, especially if it is decided to proceed with a codification programme. I think investment in these resources will be more useful and cost effective than pursuing the goal of co-drafting, which appears from the consultation to be somewhat elusive even in those jurisdictions such as Canada with the longest experience of bilingual common law drafting.

**Consultation question 11-6: Does the system presently employed by the Welsh Government satisfactorily achieve the objectives of bilingual drafting?**

1.49 Many consultees reiterated views expressed in consultation question 11-5.

1.50 Catrin Fflur Huws (Aberystwyth University) responded no to the consultation question. Dr Huws argued that the drafting process needs to move closer to the system in Canada. Dr Huws described how interpretation of Welsh language legislation is affected by the means in which it is drafted:

Lack of bilingual drafting intensifies this situation as the interpreters take it that the Welsh version is a translation.

- 1.51 Similarly, the Welsh Language Commissioner disagreed that the system currently employed satisfactorily achieves the objectives of bilingual drafting. The Welsh Language Commissioner emphasised the reliance on translation services, and noted that translation services should not be relied upon to meet the requirements of bilingual legislation in Wales. The Commissioner referred to the process of legislative drafting involving putting a policy into words. The Commissioner made clear that unless policy is “developed in Welsh and English together at the same time... the process is so much more difficult and will depend on translation”. It is stated that it is difficult to envisage a situation where long term reliance on translation is viable, as stated by Dr Richard Crowe, jurilinguist in the Welsh Government in the consultation paper. The Commissioner concluded:

It is also difficult to imagine that it realizes the policy objectives of the Welsh Government itself in relation to the Welsh language in terms of more Welsh speakers using Welsh in their work' or the legislation referred to...

- 1.52 The Welsh Language Commissioner placed a strong focus on policy being developed in Welsh as well as the legislation. She makes this central to the Welsh Government realising bilingual policy objectives. Again, the Welsh Language Commissioner set out what needs to be done to achieve such objectives:

1. Ensure that the education system produces a bilingual workforce with language skills of high standard in both Welsh and English as well skills of the highest order in the development of policy. There is a prominent place for Welsh universities in this matter in terms of preparing a bilingual workforce with the appropriate skills for a bilingual Wales, but it is also obvious that the compulsory education system needs to ensure that pupils have high-standard linguistic skills before they reach the University.
2. Ensure that policy-making procedures are bilingual from the outset. An important part of this is to ensure that skilled bilingual workers of the highest order work bilingually in policy-making functions within the
3. Welsh Government in order to fulfil the needs of those procedures. This includes policy officers as well as the solicitors who advise them.

4. These policy-making procedures should include developing the bilingual terminology and glossary of the policy areas from the very beginning when formulating policy. The action of standardizing terms should not take place in a vacuum outside the policy-making process. The process of standardizing Welsh and English terms for a specific policy area should happen simultaneously as a basis for the work in hand. This should be done in consultation with linguistic, subject and legal experts.
  5. Policy documentation and directions should be written simultaneously in both languages by officers who can write policy bilingually. The need to translate every policy document should not be relied upon as a second step in the formulating of bilingual policy documentation. Neither should responses in Welsh to public consultations be translated into English but rather officers should be able to interpret them in the language in which they were submitted to the Government.
- 1.53 Finally, the legislation itself should be co-drafted in both Welsh and English simultaneously. The Welsh Language Commissioner submitted that it is only under these circumstances that the objectives of bilingual drafting will be achieved.
- 1.54 In contrast, consultees such as Keith Bush QC took a much more positive view, noting that it is “impossible to criticise the commitment of the Welsh Government’s drafting team in securing worthy bilingual legislation”. Mr Bush went as far as to say that as the Assembly’s legislative output increases, the standard currently displayed by the drafting team will need to be safeguarded. The Legal Wales agreed and submitted that the present system seems to have many of the advantages of co-drafting. However, Legal Wales noted that the full advantages of co-drafting “should be a long term aim”.
- 1.55 Similarly, the Welsh Government agreed that the current system satisfactorily meets the objectives of bilingual drafting.

**Consultation question 11-7: Would there be any advantage in the Welsh Government’s seeking, as a long term objective, to move from its current model to a system of co-drafting?**

- 1.56 Many consultees acknowledged co-drafting as a suitable long term objective. Consultees included the Care Council for Wales, Dame Rosemary Butler AM (Presiding Officer of the National Assembly), the Association of Judges of Wales, the Wales Council of Voluntary Action and the Law Society Wales.
- 1.57 The Welsh Language Commissioner, whose view has been explored above, made it perfectly clear that co-drafting should be something that should be planned for “as a matter of urgency in order to achieve it in the medium term. The Welsh Language considered that it would not be possible to implement this “vision in the short-term due to the fact that the English language is so prominent in the civil service in Wales”. The Welsh Language Commissioner urged that a “definite plan must be put in place in order to move to such a situation in the medium term”. The Welsh Language Commissioner continued:

Consideration should not be given to what is currently practical and offer improvements to that system, but rather it is necessary to plan towards a more far-reaching and strategic aim. To do this, there must be a change of culture, strategic planning and setting of policy to transform the situation.

- 1.58 The Welsh Language Commissioner listed advantages resulting from a method of co-drafting. The benefits have been listed above at para XX. The Commissioner listed five benefits. First, the intention of the policy and the legislation itself potentially being improved. Secondly, an opportunity “to develop legal phraseology and patterns that can be understood and are accessible in both languages”. Thirdly, there would be a reduction in errors between the Welsh and English versions of legislation. Fourthly, it would reduce the dependence on the Government’s translation service. Finally, it would promote use of Welsh in the workplace in accordance with Welsh Government’s strategic aim.
- 1.59 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, also recognised that there would be benefits to moving to a system of co-drafting in the longer term. However, as noted above, the Presiding Officer thought that resources would be better placed in projects such as consolidation and codification.
- 1.60 In contrast, Keith Bush QC did not identify any benefits to co-drafting and questioned its practicality:

There is considerable confusion regarding what exactly is meant by co-drafting. The author doubts whether anyone has ever been able to carry out the complex, personal, task of drafting legislation jointly. One person must create in his head the words that he is going to use in order to express a concept. It is not possible for two persons to do so together, although both could go away, of course, and work on the same instructions independently. But the product would not be bilingual legislation but two different pieces of legislation.

- 1.61 Mr Bush sketched out the consultative method of drafting that takes place in Welsh Government. Mr Bush stated that, what might undermine the current process would be a lack of time to discuss and amend the different language versions. Mr Bush questioned whether an independent body should exist which had the function of safeguarding the standard of legislation including the standard of bilingual legislation.
- 1.62 The Welsh Government noted that co-drafting is attractive in principle, and may be something the Government wishes to “further develop on a piecemeal basis” but concluded that “the process currently deployed works well”.

**Consultation question 11-8: What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?**

- 1.63 All consultees that responded considered that there is an important role for jurilinguists and editors. Legal Wales simply stated that any input by these roles in the process of legislation should be treated as recommendations only.

- 1.64 Thomas Watkin seemed to suggest a more important role for translators and revisers. He stated:

It needs to be considered whether their respective status and salaries reflect the importance of the working partnership which needs to develop, and whether their location within the government organization is appropriate.

- 1.65 He also commented that, like much of the other issues, there should be a willingness to learn from the experience of other jurisdictions. Professor Watkin referred to the role of Legal Revisers in the institutions of the European Union and jurilinguists in Canada.

- 1.66 Similarly, Huw Williams (Geldards LLP) also considered the role of both jurilinguists and editors:

I see a useful role of both jurilinguists and editors, especially if it is decided to proceed with a codification programme. I think investment in these resources will be more useful and cost effective than pursuing the goal of co-drafting, which appears from the consultation to be somewhat elusive even in those jurisdictions such as Canada with the longest experience of bilingual common law drafting.

Mr Williams viewed investment in jurilinguists and editors as more useful than pursuing co-drafting.

- 1.67 Keith Bush QC encapsulated the importance of both roles as ensuring that “both texts express the same meaning in two languages and both of which are, natural and clear and as easy as possible to use for users of both languages”. In the same vein, the Presiding Officer of the National Assembly, Dame Rosemary Butler AM, summarised the importance of both roles as challenging the “English drafting if a lack of clarity makes translation difficult”.

- 1.68 The Welsh Language Commissioner considered jurilinguists and editors to have a technological role in the sense of maintaining translation memories, corpuses and machine translation software, all of which ensure accuracy and consistency of the software. The Commissioner also considered how jurilinguists and editors should support legislative drafters, if a process of co-drafting existed. They would continue to contribute towards improving the quality of the legislation by:

1. Ensuring the accuracy of the texts
2. Ensuring linguistic consistency within and between the texts in both languages
3. Cross-referencing and ensuring consistency with other legislation and secondary legislation
4. Ensuring consistency of meaning within and between the texts
5. Methods of making expression easier in both languages

6. Providing advice regarding language and terminology
7. Developing and evolving better drafting patterns
8. Contributing towards developing and updating drafting guidelines that can be shared publically
9. Basing their work on research and awareness of the development of these languages
10. The skills of these officers could be used as part of any action taken to codify or consolidate legislation.

1.69 The Welsh Language Commissioner stressed the importance of the skill of such roles. The Commissioner referred to the translation course that is being developed by the 'Coleg Cymraeg Cenedlaethol'.

**Consultation question 11-9: We invite the views of consultees as to whether any other working tools would be of assistance in the production of bilingual legislation in Wales.**

1.70 A limited number of consultation responses were received for this consultation question.

1.71 The National Archives explained that it is working with a group of partners (UK Parliament, Scottish Parliament, Office of the Parliamentary Counsel, Scottish Parliamentary Counsels Office) "to develop a new, browser based drafting and amending tool for primary and secondary legislation". The National Archives are developing this tool so to produce "legislation in the emerging international standard format for legislation". The National Archives commented that the software is in its early days but that the Welsh Government are being kept informed.

1.72 Further, The National Archives made the following comment on technology for bilingual legislation:

Whilst Wales is alone in producing bilingual legislation in the UK, many other jurisdictions do produce bilingual legislation, including at the European level. Developing tools around common international standards for legislation documents is the best approach, in the long run, for expanding the range of tooling available to the National Assembly for Wales and the Welsh Government for managing bilingual legislation, without incurring excessive development costs.

1.73 The Welsh Language Commissioner focused on the role of technology. The Commissioner suggested that bilingual text drafting software be used which is "populated by sentences and terminology that would have been specified at the beginning of the process of developing policy". The Welsh Language Commissioner continued:

An important step would be to use the texts developed in creating policy and legislation to develop a corpus of Welsh policy and legislation that could be used as a resource to help draw up new legislation by populating the text drafting software above. On the basis of such a corpus machine translation software could be developed dealing specifically with Welsh policy and legislation. Developing such software would facilitate the work of translators and others who draft bilingual documents resulting from legislation. This could bring substantial financial savings as it would not be necessary to re-translate much of the text that was already bilingual.

1.74 The Welsh Language Commissioner referred to the BydTermCymru website, which is already in operation.

1.75 Keith Bush QC made two observations:

The author is aware of a view that legislative drafting should be an art rather than a craft. But it is inevitable that more corporate methods – desk instructions, standard styles and so forth – will become increasingly important. The only other suggestion the author has is that the Government's legislative drafters and academics and professional lawyers in Wales should develop a closer, more open relationship, in order to strengthen the understanding of each of the needs of the other.

# CHAPTER 12

## INTRODUCTION

- 1.1 This chapter looked at the interpretation of bilingual legislation in a system which laws are made in two languages are to be treated for all purposes as equal. Consultees offered some valuable insight in to ways of interpreting bilingual legislation as well the need for education to educate students on interpretation of bilingual legislation.
- 1.2 During consultation meetings, consultees gave their general experience of the use of the Welsh language in legal proceedings. In a meeting with a lawyer working in the private sector it was noted that many do not use Welsh in the court room as it is not considered the language of business. If Welsh is to be used in the court room, it will often be for giving evidence only. If such a perception is true, this will undoubtedly have an effect on the development of the interpretation of bilingual legislation.
- 1.3 In a meeting with a lawyer working in the private sector who also sits as a recorder, a different view was given. The lawyer gave the experience of the family court in North Wales, where Welsh is used much more frequently. The lawyer informed us that most of the judges in North Wales are fluent Welsh speakers and it is not unusual to hear cases entirely in Welsh.
- 1.4 The Welsh Language Commissioner emphasised the importance of preparing a judiciary that can interpret bilingual legislation. The Welsh Language Commissioner referred to the central role of the education system in preparing a bilingual workforce. This is a point David Gardner (administrative court lawyer for Wales) pick up on. He gave his experience of the use of Welsh in the courts. He noted that there are some bilingual judges but that translation services would have to be relied upon to ensure open justice in public hearings that take place in the administrative court. Mr Gardner highlighted that only one case has been heard in the administrative court in Wales in Welsh to date.
- 1.5 Inge Backer (Oslo University) considered interpretation of bilingual legislation from the perspective of the citizen. He explained how citizens might “expect to be informed of their legal position by reading the text of the statute”. Professor Backer considered how having the legislative text influences by a text in a language which the citizen might not understand may create a “legal trap”. Professor Backer highlighted how this is a difficult argument to reconcile with the notion of bilingual provisions having a single meaning, unless all citizens have a sufficient command of both languages. Professor Backer stated that the argument also runs contrary to equality of the languages too. Professor Backer concluded that “hopefully... bilingual texts can be resolved by having regard to other legislative material highlighting the intention of the legislators and the situation for which the statute should provide a remedy”.



**Consultation question 12-1: We welcome the views of consultees on the appropriate approach to the interpretation of bilingual legislation in English and Welsh.**

- 1.6 The Welsh Government simply noted that the interpretation of legislation is a matter for the courts but emphasised that Parliament has made clear Welsh and English texts of Assembly legislation are of equal standing.
- 1.7 The Welsh Language Commissioner took the opportunity to refer back to the need for co-drafting of bilingual legislation. The Commissioner referred to paragraph 12.33 of the consultation paper which stated “better legislative techniques which reduce the inconsistencies between language versions would obviously be one way of tackling the problem”. The Commissioner felt that employing co-drafting as the method of drafting would be “an important step towards reducing errors between Welsh and English versions of legislation and could improve expression in both languages and crystalize the policy objectives better”.
- 1.8 Thomas Watkin noted that the “key issue identified by the consultation paper is that the existence of two versions of a statutory text cannot be allowed to make no difference to the manner in which it is interpreted”. Professor Watkin emphasised that one version cannot be relied upon exclusively to determine the legislative intention when another language version exists.
- 1.9 The Association of Judges of Wales commented that Professor Watkin’s approach to the implementation of legislation is the “ideal”. This approach was sketched out in the consultation paper. The Association of Judges of Wales listed how the court could employ tools such as an “authoritative dictionary to a translation from a court accredited interpreter to expert evidence from a linguist and/or jurist” to assist with questions of bilingual interpretation. The Association of Judges of Wales also commented on the approach that should be taken to the actual interpretation. The Association explained that preference cannot be given to the language version of the legislation unless half the legislation is drafted in Welsh and the other half in English. Giving preference to the language version would mean that the English would prevail in the overwhelming majority of circumstances. This would “offend the “equal standing” principle”.
- 1.10 In contrast, the Presiding Officer of the National Assembly, Dame Rosemary Butler AM, commented on the approach to interpretation and stated that the interpretation of legislation should not always have to take account of both language versions because both versions have the same legal effect. However, when the first language text is unclear, then the second text should be consulted.
- 1.11 Huw Williams (Geldards LLP) considered how the emerging discipline of jurilinguists may offer a solution to questions of interpretation of bilingual legislation. Mr Williams suggested setting up a body of suitably qualified jurilinguists that could potentially sit alongside the judge as assessors.
- 1.12 The Association of Judges of Wales also considered the role of jurilinguists and interpreters. The Association argued:

If reliance is to be placed on an interpreter, regard should be had not only to the level of expertise of the interpreter (many if not all of our court interpreters are certified and accredited to a high standard) but whether two interpreters should be consulted. It could be that one interpreter and one other appropriately qualified person could be relied upon. In the course of trials involving foreign languages, when there may be two interpreters in the room, it is not unusual for there to be disagreement as to how a particular term should be translated. This is particularly so with older languages such as Roma or Chinese dialects or where there is an issue as to the interpreter's competence.

**Consultation question 12-2: Do consultees agree that all interpretation of the law enacted bilingually by the National Assembly or made bilingually by the Welsh Government will need to take account of both language versions?**

- 1.13 The majority of consultees agreed with the consultation question. Consultees that agreed included Citizens Advice Wales, Care Council for Wales, Edwin Hughes (lay magistrate) and Legal Wales.
- 1.14 The Welsh Language Commissioner also agreed with the consultation question and stated that this is the way law enacted bilingually should be interpreted if "the equal status of both languages" is to be maintained "in accordance with section 156(1) Government of Wales Act 2006 and fair play given to all parties in a case".
- 1.15 The Welsh Government also agreed with the view put forward by the Welsh Language Commissioner.
- 1.16 Keith Bush QC felt that "perhaps this statement goes too far". He stated:

In most cases it is likely that everyone will agree that the meaning of the two versions is exactly the same. Only in some cases will ambiguity as to the meaning of the legislation mean that the Court will have to consider how the meaning of the act is expressed in both languages. It is obvious, of course, that a party's legal advisors cannot carry out their work properly unless they have considered whether an argument arises based on the way in which a concept is expressed in both languages.

- 1.17 David Gardner (administrative court lawyer for Wales) also makes a similar point about practicality. He stated that in practice, it is only when there is thought to be a discrepancy between the language versions that account would need to be taken of both versions. He explained:

If, in every case where the Administrative Court is required to interpret a statute, the Court is required to consider both language versions, then the burden on the Court in terms of time and provision of bilingual judges will be extensive, unnecessary, and it will be (without extensive training to provide further bilingual judges) practically unachievable.

- 1.18 As noted above in the analysis of consultation question 12-1, the Presiding Officer of the Fourth Assembly is of a similar opinion to Keith Bush QC. The Presiding Officer submitted that it would not be necessary to take account of both language version when interpreting legislation “because both texts should have the same legal effect”. However, the Presiding Officer acknowledged that there will be situations where the first text is unclear and therefore the second text should be consulted.

**Consultation question 12-3: What approach should be adopted to the interpretation of bilingual legislation where different language texts bear different meanings?**

- 1.19 The majority of consultees thought that the approach should be to look at the both language versions and find a meaning most aligned with the purpose and intention of the legislation.
- 1.20 Thomas Watkin submitted that this is an issue “best left to the courts themselves to determine and develop as experience of interpreting such legislation grows”. Professor Watkin, however, made clear that give that both language versions are of equal standing, it would not be appropriate to rely on evidence of experts such as interpreters determining the meaning of words in one language only. Professor Watkin concluded that “a final determination needs to be made by a court capable of making such an adjudication for itself”.
- 1.21 Similarly, Keith Bush QC commented that a decision should be made on the basis that the language versions are equal and should be given equal consideration in line with section 156 of the Government of Wales Act 2006.
- 1.22 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, described a process whereby the “the intention of the legislator should be ascertained using the usual tools of statutory interpretation” if there a discrepancy between the two language texts. The Presiding Officer commented that equal weight should be given to both texts and a shared meaning rule should be applied by the courts. The Presiding Officer noted that it would be “clearly advantageous” for a bilingual judge to be assigned cases where there will be expert evidence on the meaning of a particular text.
- 1.23 The Welsh Government took a slightly different approach. It advocated interpreting each language version in line with usual tools of statutory interpretation and arriving at a single meaning “most harmonious with the purpose and scheme of the statute”.
- 1.24 Legal Wales agreed:
- The principles of statutory language should be applied to both languages to arrive at a single meaning most harmonious with the purpose and scheme of the Act.
- 1.25 Citizens Advice Cymru also referred to statutory interpretation tools and stated that “Welsh lawyers should undertake a purposive approach – which aims to identify the intended purpose of legislation when it was drafted, as opposed to its literal meaning”.

**Consultation question 12-4: Should courts in England and Wales apply a shared meaning rule? If so, in what circumstances should it apply?**

- 1.26 Consultees offered limited comments on whether courts in England and Wales should apply a shared meaning rule and in what circumstances. Citizens Advice Wales noted that thought should be given to the shared meaning rule but no comments were made as to the circumstances in which it should apply.
- 1.27 The Welsh Government reiterated the view that the most appropriate approach would be to apply current principles of statutory interpretation. This way, interpretation focuses on the intention of the legislature rather than a comparison of language versions.
- 1.28 Keith Bush QC argued that shared meaning rule should not be applied inflexibly as this “would be contrary to the reality that exists in Wales” as it “presumes that the wording in question has been selected by means of equal process”. Mr Bush emphasised that there is a possibility that one language version “is quite a mechanistic translation of the other”. Mr Bush noted that it would be better not to analyse each word in detail but rather take into account the “meaning of both languages, together with everything else that is known about the provision”.
- 1.29 Local authorities from North Wales did not offer specific comment on the shared meaning rule but highlighted that the form of interpretation would “need to address the practical scenario that the vast majority of statutory interpretation is likely to use the English version only and many cases can possibly pass before the problem manifests itself”.

**Consultation question 12-5: In interpreting a bilingual text should account be taken of its drafting and legislative history? If so, how is that to be ascertained? In particular, should greater weight be given to the language in which the initial draft was prepared?**

- 1.30 All consultees expressed that in interpreting bilingual text, account should not be taken of its drafting and legislative history.
- 1.31 The Welsh Language Commissioner reiterated the equal standing of both English and Welsh in accordance with the Government of Wales Act 2006. The Welsh Language Commissioner argued that greater weight should not be placed on the language which was drafted first. The Commissioner also stated that the drafting history should not be considered. Reasoning given was that to do this would not be in accordance with the principle of equal standing of both English and Welsh.
- 1.32 The Welsh Government concurred with the Welsh Language Commissioner. The Welsh Government also referred to principle of equal standing of the both language versions. The Welsh Government set out how Bills “are laid, scrutinised and amended in both Welsh and English” and stated that the method for producing a Bill is “irrelevant to the proper interpretation of the legislation”. The Welsh Government made clear that when the courts interpret legislation it is concerned with the intention of the legislature not the intention of the legislative drafter.
- 1.33 Keith Bush QC agreed with the view of the Welsh Language Commissioner and the Welsh Government and stated that to do so would be contrary to section 156 of the Government of Wales Act 2006.

- 1.34 Legal Wales and the local authorities in North Wales were of the same view. The regional local authorities noted that “such a system would give priority to one of the other of the languages and the concept of equal status would be undermined”.

**Consultation question 12-6: Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?**

- 1.35 The majority of consultees considered how expert evidence could be used in the court. Keith Bush QC stated that the Welsh language should be treated as “foreign” or as “technical jargon” and a Welsh speaking judge should be a member of the court. David Gardner (administrative court lawyer for Wales) draws on the discussion in consultation paper and also notes that a bilingual judge would appear to be the most appropriate.
- 1.36 The Welsh Language Commissioner reflected on the practicalities of the current situation in which there are not enough judges capable of interpreting bilingual legislation. Again the Welsh Language Commissioner highlighted the importance of preparing a workforce which will, in future, meet the needs of bilingual legislative interpretation.
- 1.37 The Welsh Language Commissioner addressed the short term position. She concluded that translators would not be suitable. Rather, special officers would be needed who “possess linguistic and legal skills of high standard”. The Commissioner described that the officers would “need to be closely connected with the process of standardizing legal terms and have an awareness of Welsh and English legal and linguistic sources to refer to” when advising the court. The Welsh Language Commissioner specified that such officers would need to undertake linguistic and legal training.
- 1.38 Thomas Watkin argued that for both language versions to be treated as equal, it would not be appropriate for the court to rely on “interpreters, expert witnesses and other such professionals to determine the meaning of words and phrases in one language but not the other”. Professor Watkin commented that a decision should be made by a court that is capable of making “such an adjudication for itself”. Professor Watkin then considers circumstances in which the court cannot make the adjudication for itself. Under such circumstances “provision should exist for remitting the issue to a form capable of... providing an authoritative answer”. Professor Watkin suggested a chamber of the Court of Appeal, “suitably staffed with bilingual judges”. Professor Watkin made clear that the approach to the interpretation of bilingual legislation should be a matter for the courts.
- 1.39 The Welsh Government advocated a similar position to that of Professor Watkin. It noted that expert evidence may not be adequate and the ideal position would be to have “sufficient judges skilled in Welsh language”. However, the Welsh Government acknowledged that this would not be practical in the short term and considered a role for “a second “assessor” Welsh speaking judge to cases when questions about the consistency of Welsh and English texts of legislation arise unexpectedly”. The Welsh Government acknowledged that this might be difficult as the bilingual laws of Wales can be heard across the England and Wales jurisdiction.

- 1.40 Huw Williams (Geldards LLP) suggested how a body of legally qualified jurilinguists could be set up to sit as assessors alongside the court. An alternative suggested by Legal Wales was that the “court should be assisted by an interpreter from the Welsh Language Unit as a court appointed assessor”.

**Consultation question 12-7: Consultees are invited to express their views on the future needs for legal education and training to take account of bilingual legislation and how these may best be met.**

- 1.41 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, stated that legal education and training will increasingly need to take account of bilingual legislation. The Presiding Officer also commented that all lawyers in England and Wales should understand in which areas of law there is a difference between the law applicable in Wales and in England and how to research the law as it correctly applies in each country.
- 1.42 The Welsh Government shared a similar view. It commented that there is a general need “for raising of awareness amongst lawyers and citizens as to the divergence of, and differences between, the laws applicable in England and those in Wales”. The Welsh Government explained that this means in terms of substance and linguistic provision.
- 1.43 Throughout the Welsh Language Commissioners’ consultation response, there is ample reference to the need for education that prepares a workforce that meets the demands of the Welsh language. The Welsh Language Commissioner argued that the education system needs to increase the number of proficient Welsh speakers that it will enable them to work in posts in the Welsh civil service. There should be a focus on Welsh being a working language of policy in the civil service, rather than focusing on legislative drafters. The Welsh Language Commissioner also identified a need for “bilingual solicitors who have first class drafting skills in Welsh and English”. The Welsh Language Commissioner noted that the responsibility to draw up bilingual legislation is not the only responsibility resting with Welsh Government, but it also has a responsibility to all the organisations that interact with that legislation.
- 1.44 The Welsh Language Commissioner considered ways of achieving this. She stated that there is a “prominent place for Welsh universities in this matter” but that the education system in general should “ensure that pupils have high-standard linguistic skills before they reach the University”. The Commissioner also made clear that the initial burden lies on the Government “by means of its policy and curricular activities the Welsh Government must plan appropriately” an education system that prepares a Welsh speaking workforce.
- 1.45 Thomas Watkin compared the position to that of European Union law and emphasised the importance of every law graduate having “an educated awareness of the issues involved”:

Given that European Union law is made multilingually and that many of the treaties which are binding upon the United Kingdom in international law (and sometimes incorporated into domestic law) are also multilingual, it is difficult to see what excuse there can be for not dealing with the question of how laws are to be interpreted in the context of there being more than one language version of them. The Welsh dimension is merely one further example of a phenomenon which already affects the interpretation of legislation in the UK as a whole, albeit that it introduces a novel normality to the issue in England and Wales. In that such legislation requires approaches to its interpretation which a monolingual text does not, all those studying the interpretation of legislation which may be bilingual or multilingual need to be aware of the relevant techniques and approaches. At the very least, every law graduate should have an educated awareness of the issues involved.

- 1.46 Edwin Hughes (lay magistrate) stated that there should be a focus on training in Welsh language for law students. Linenhall Chambers focused on practicing lawyers and reflected on their own experience, commenting that “accredited training of practitioners through seminars and literature” should be encouraged. Linenhall Chambers suggested that literature could be produced “by practitioners within Chambers perhaps in co-operation with Bangor University”.

**Consultation question 12-8: In particular, should the study of bilingual legislation and its interpretation form a compulsory part of university law degree courses in Wales? If so, for whom should it be compulsory?**

- 1.47 The overwhelming majority of consultees agreed. Consultees that agreed included Legal Wales, the Association of Judges of Wales, the Care Council for Wales and the Welsh Language Commissioner. Law Society Wales stated that legal education requirements are a matter for the Solicitors Regulation Authority.
- 1.48 The Welsh Government agreed that the study of bilingual legislation and its interpretation should form a part of university law degree courses in Wales:

It is unrealistic to expect all law students, even in Wales, to grapple with the technicalities of Welsh language statutory interpretation, but it is absolutely essential that they should realise that those technicalities will impact on their ability to give the correct advice in many areas of practice. They should be aware of the need to properly equip themselves to deal with those matters fully and properly as and when the need arises. Not to do so is certain to put them at risk of findings of negligence as became commonplace in the case of those lawyers who failed properly to acquaint themselves with knowledge of the implications of EU law and human rights law after 1972 and 1998 respectively.

- 1.49 The Presiding Officer of the National Assembly, Dame Rosemary Butler AM argued that the “basic principles of bilingual legislation and interpretation” should be compulsory as a part of all law degrees across England and Wales, “so that lawyers understand that both texts have equal standing, with more detailed study available for those intending to practise in Wales”.

1.50 The Association of Judges of Wales agreed with the view of the Presiding Officer but highlighted that it is also something that lawyers need to be aware of and therefore bilingual legislation and its interpretation should form part of postgraduate courses and professional exams. The Association also noted how divergent law needs to be covered in constitutional law modules as part of the LLB courses, “postgraduate training for solicitors, barristers, Ilex members and judges”.

1.51 Teaching of divergent law was something that Citizens Advice Wales also commented on:

At the professional/vocational stage of education, the training of practitioners is centralised and does not require a knowledge of devolution.

We believe that this is potentially problematic, since the law of Wales is diverging more and more from that pertaining only to England. We think that law schools in Wales will need to give careful consideration to developing a distinct Welsh qualification for practitioners in Wales, to reflect the fact that the body of law is distinct. We acknowledge that this will have inevitable implications for practitioners who practise on both sides of the border.

1.52 The Welsh Language Commissioner’s view on the need for education has been explored more fully in consultation question 12-7. However, the Welsh Language Commissioner gave a detailed description of the education that should be provided by universities:

Specifically, in the context of this consultation, it is necessary for Welsh universities to respond to the challenge of creating a bilingual legal workforce by providing academic courses specifically tailored for the needs and the reality of legislating bilingually in Wales. This means that there is a need for law courses to teach, exemplify and interpret bilingual legislation and raise awareness of the considerations associated with bilingual enactment. This should be compulsory for Welsh medium and English medium students as well as those who do not foresee that they will live in Wales in the future. There is a need to increase the opportunities to study through the medium of Welsh as well as to run a campaign to draw attention to this need to be able to use both languages in the area of the law. Furthermore, I am of the opinion that high-level linguistic training should be ensured for students studying law in order to prepare them for a situation in which they will be drafting or interpreting legislation bilingually. This training could also be offered to students studying other relevant subjects. This training should be available in the form of continuous professional development plans for people who are already practitioners in the area along the same lines as schemes such as the sabbatical scheme to increase the skills of practitioners in the area of education<sup>40</sup> and should be part of legal practice courses (LPC).



- 1.53 Huw Williams (Geldards LLP) noted that “at a basic level an understanding of bilingual legislation and its interpretation should form part of the devolution element of Constitutional Law”. Mr Williams then considered how students’ skills could be developed if they chose to take modules or course taught through the medium of Welsh. Mr Williams informed us that Geldards LLP has recently recruited its first trainee that took modules in Welsh and consequently received funding from the ‘Coleg Cymraeg Cenedlaethol’.
- 1.54 Mr Williams highlighted that alongside these ambitions for Welsh legal education in Wales, the lack of legal textbooks needs to be considered. Mr Williams then gave his view of Welsh in a legal context:

Furthermore, the challenge that taking a legal course in Welsh presents should not be underestimated. One might almost go so far as to say that it is not for the faint hearted! This is because the student is grappling with the challenge of legal as distinct from everyday language for the first time and must then also do so in Welsh. At the same time many core sources such as Law Reports or soft law materials will only be available in English and this will continue to be the case.

The point was also made to me that even a confident user of Welsh in everyday settings and in their native dialect may still not feel sufficiently confident in “standard legal Welsh” to use it in their practice.

Overall, I think that developing a body of practitioners with sufficient confidence to use Welsh in the courts and in day to day practice is going to require persistence and a constant effort over many years. This will only happen if there is confidence that the funding of both courses and students is maintained. The current initiatives through Coleg Cymraeg Cenedlaethol should be maintained and used as a foundation for further progress. Security of funding is particularly important to my mind if teachers of law are to be encouraged to make the effort to develop Welsh language teaching skills.

This view seems to draw on some of the views explored when considering Welsh language legal terminology, and some of the difficulties people experience with it.

- 1.55 Keith Bush QC also referred to the ‘Coleg Cymraeg Cenedlaethol’ and informed the Law Commission that it is bearing fruit in the form of an increase in students choosing to study modules in Welsh.
- 1.56 The Wales Governance Centre agreed that all students studying a law degree in Wales should be aware that legislation is drafted bilingually but accepted that English medium students would not be able to interpret the legislation. The Wales Governance Centre mentioned their devolution module which teaches students:

... about the role of the Office of the Legislative Counsel and the Legislative Translation Unit of the Welsh Government in developing Assembly Bills; the procedures the Welsh Government applies to its legislative drafting; the status of English and Welsh texts of legislation and access to legislation issues that exist in the United Kingdom and what might be done to address them.

The Wales Governance Centre mentioned the teaching of devolution in United Kingdom universities and argued that all students should be given the opportunity to learn about devolution in the United Kingdom. In Wales, the Centre argued that teaching of devolution should be compulsory. The Wales Governance Centre added that it is also important for law degrees to equip students with research skills that would allow them to identify divergent law. The Centre commented:

It should be customary practice that students, at undergraduate and postgraduate level, have numerous opportunities to interpret and apply legislation made by the National Assembly for Wales and the Welsh Government. As future lawyers in a devolved United Kingdom, we believe that students should be trained to be able to interpret and apply different sources and bodies of laws made at all levels, from EU down to local government.

1.57 The importance of teaching bilingual legislation became more evident to us in some of the consultation meetings it attended. A lawyer working in private practice commented that often solicitors are not aware of the Welsh speaking Practice Direction. The lawyer informed us that there was a case where a judge adjourned because the claimant wanted to give evidence in Welsh but was not made aware of this right beforehand.

1.58 Sarah Nason (Bangor Universtiy) made a unique point about support for university academics “who have learnt Welsh to a certain standard but who ideally require further training and support to be able to conduct research and teaching through the medium of Welsh”. Dr Nason emphasised that the Research Excellence Framework is built in such a way that it would be “largely unheard of” for an academic to take time out of their working day to study Welsh. Dr Nason argued:

Supporting those lecturers who wish to improve their own Welsh is one way of ensuring that the impacts of bilingual interpretation of legislation are properly understood and that Welsh medium legal education provision is extended.

Dr Nason also agreed that bilingual legislation and interpretation should be included in public law/ constitutional law. Dr Nason highlighted that a large proportion of students that study in Wales come from legal jurisdictions where “bilingual legislation is a fact of day to day legal practice and where bilingual justice may be a constitutional right”.

**Consultation question 12-9: Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?**

- 1.59 The majority of consultees agreed that issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales. Consultees that agreed included Edwin Hughes (lay magistrate), Legal Wales, Huw Williams (Geldards LLP) and Keith Bush QC.
- 1.60 Thomas Watkin agreed that “at the very least, every law graduate should have an educated awareness of the issues involved”. The Care Council for Wales shared a similar view and noted that it would be “valuable to include an understanding of working with legislation developed in more than one language as part of the training for anyone wishing to enter the legal or related professions”. The Care Council for Wales suggested that the Welsh language could be an optional module for those with proficiency.
- 1.61 The Welsh Language Commissioner also agreed and highlighted how “students go from Wales to study in England and students from England come to Wales to study law and they could ultimately be based in Wales or in England”. Issues of bilingual interpretation are not exclusive to people studying in Wales. The Welsh Government were of the same view and supported the prospect of students within a shared jurisdiction being made aware of the implications of law-making in two languages.
- 1.62 As detailed above, the Presiding Officer of the National Assembly, Dame Rosemary Butler AM, also agreed with the consultation question and highlighted that teaching of divergent law should also be covered.

# APPENDIX A

## List of consultees

Name of individual	Organisation
Professor Dawn Oliver	University College London
	LexisNexis UK
Lynda Willis	Torfaen County Borough Council
Delyth Jones	Conwy County Borough Council
Will Macgregor	
Dr Catrin Fflur Huws	Aberystwyth University
	Care Council for Wales
Tracy Elliot	Cerebra
Professor Thomas Watkin	
William Robinson	Institute of Advanced Legal Studies
Huw Rhys Thomas	National Farmers Union Cymru
Julie Burton	Julie Burton Law
Angela Williams	Law Commission's Welsh Advisory Committee
	Welsh Language Commissioner
Edwin Hughes	Lay magistrate
Professor Noel Lloyd	Aberystwyth University
	Public Services Ombudsman for Wales
David Michael	Neath Port Talbot County Borough Council
	Linenhall Chambers
Huw Williams	Geldards LLP
Keith Bush QC	
Christopher Jessel	
	Association of Judges of Wales
Dame Rosemary Butler AM	Presiding Officer of the National Assembly for Wales
	Wales Council for Voluntary Action
Marie Navarro	Your Legal Eyes
Sarah Lewis	University of Wales Press

	National Trust
	Residential Landlords Association
	Legal Wales Foundation
	The Law Society Wales
	Citizens Advice Wales
Emyr Lewis	Blake Morgan LLP
Daniel Greenberg	Berwin Leighton Paisner LLP
	Universities Wales
	Association of London Welsh Lawyers
David Gardner	Administrative court lawyer for Wales
	The National Archives
	Welsh Local Government Association
	Local authorities from north Wales including Anglesey, Gwynedd, Flintshire, Denbighshire, Wrexham and Conwy
	Wales Governance Centre
Dr Sarah Nason	Bangor University
Graham Ross	
Professor Inge Backer	Oslo University
Lord Chief Justice of England and Wales, The Rt Hon. Lord Thomas of Cwmgiedd	
	Welsh Government

## APPENDIX B

### List of consultation meetings attended

Name of consultee	Date of consultation meeting
Welsh Local Government Association	13 July 2015
Law Wales website launch	14 July 2015
Country Land and Business Association	14 July 2015
University of South Wales	15 July 2015
University of Swansea	15 July 2015
Judicial Appointments Commission	20 July 2015
SOLACE Cymru	21 July 2015
Judicial Appointments Commission Commissioner	22 July 2015
Form and Accessibility of the Law Applicable in Wales Advisory Group meeting	23 July 2015
30 Park Place Chambers	23 July 2015
Marie Navarro	17 August 2015
Emyr Lewis	17 August 2015
Wales Office	17 August 2015
Professor Thomas Watkin	19 August 2015
Welsh Language Commissioner	19 August 2015
HHJ Jarman QC	19 August 2015
Civitas Chambers	19 August 2015
The National Archives	23 August 2015
Welsh Government, departmental lawyer	25 August 2015
Citizens Advice Wales	25 August 2015
Watkin and Gunn LLP	25 August 2015
Justice for Wales campaign	25 August 2015
Will Macgregor	27 August 2015
LexisNexis UK	8 September 2015
University College London	8 September 2015
Daniel Greenberg	8 September 2015
St John's Buildings Chambers	9 September 2015

Linenhall Chambers	9 September 2015
Administrative Justice Conference, Bangor University	10 September 2015
St John's Buildings Chambers	11 September 2015
Wales Council for Voluntary Action – Alliance for Alliance focus group	17 September 2015
Nerys Hurford	21 September 2015
National Trust	21 September 2015
Lay magistrate	22 September 2015
District Judge Godwin	24 September 2015
Aberystwyth University	24 September 2015
Focus group arranged by Aberystwyth University	24 September 2015
Lawyers in Local Government (LLG)	25 September 2015
National Farmers Union Cymru	25 September 2015
HMCTS and Judicial College	28 September 2015
Carers Wales	28 September 2015
Office of the Parliamentary Counsel	30 September 2015
Mr Justice Hickinbottom	8 October 2015
National Assembly for Wales, Assembly Commission	13 October 2015
ATL Wales and Barnado's Cymru	13 October 2015
Police National Legal Database	22 October 2015
Department for Environment, Food and Rural Affairs, Defralex	17 December 2015
Welsh Government officials	Various dates
Assembly Members	Various dates
Welsh Government policy people	Various dates

## **APPENDIX B**

### **CONSULTATION QUESTIONS**

#### **PART 1: THE CURRENT POSITION**

##### **Chapter 1: Introduction and overview**

- 13.1 Consultation question 1-1: We ask consultees to provide information and examples of the costs and benefits of the proposals we make in this consultation paper.

##### **Chapter 3: The current legislative process and the Welsh Government**

- 13.2 Consultation Question 3-1: We welcome consultees' views on the current legislative processes.
- 13.3 Consultation question 3-2: Do consultees think that a special procedure for non-controversial Law Commission Bills should exist in the National Assembly?

##### **Chapter 4: Drafting and interpreting legislation**

- 13.4 Consultation question 4-1: Do consultees think that the current practice strikes the right balance between simplicity and precision in legislation passed by the National Assembly?
- 13.5 Consultation question 4-2: Would there be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines?
- 13.6 Consultation question 4-3: Do consultees currently experience difficulty reading amended legislation?
- 13.7 Consultation question 4-4: Should Keeling schedules be produced alongside Bills, where the Bill amends other pieces of legislation, and be published alongside the Bill in the explanatory notes?
- 13.8 Consultation question 4-5: Should Keeling schedules be formal schedules to an amending Bill that become law when the Bill is enacted?
- 13.9 Consultation question 4-6: What features would consultees like to see in Keeling schedules, or other documents showing amendments, to make the changes as clear as possible?
- 13.10 Consultation question 4-7: Do consultees find overviews helpful in navigating or understanding legislation?
- 13.11 Consultation 4-8: Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?
- 13.12 Consultation 4-9: Do consultees find aspirational clauses a helpful addition to legislation?
- 13.13 Consultation question 4-10: Do consultees find the Interpretation Act 1978 and its Scottish and Northern Irish equivalents useful?



- 13.14 Consultation question 4-11: Do consultees think that there should be an Interpretation Act for Wales at this stage?
- 13.15 Consultation question 4-12: What do consultees think the benefits of an Interpretation Act for Wales would be? What would an Interpretation Act for Wales need to cover?

### **Chapter 5: The condition of legislation in Wales: Case studies**

- 13.16 Consultation question 5-1: We ask for information concerning consultees' experience of working with these areas of law as they apply to Wales. Does the state of the legislation lead to problems in practice? We would welcome examples of the sorts of problems that arise.
- 13.17 Consultation question 5-2: Do consultees consider that the law as it applies in any of the areas described above would benefit from consolidation? What would the benefits be? Are there any problems or disadvantages in consolidating the relevant law, including costs?
- 13.18 Consultation question 5-3: Are there other areas of devolved law where you have identified problems related to the form and accessibility of the law? Please provide examples. Do you think these areas would benefit from consolidation?

## **PART 2: DEVELOPING SOLUTIONS**

### **Chapter 6: Publishing the law: websites, textbooks and other sources**

- 13.19 Consultation question 6-1: Should the Government's responsibility for the publication of statute law free of charge be the subject of a statutory duty?
- 13.20 Consultation question 6-2: If so, should the duty extend to making legislation available online?
- 13.21 Consultation question 6-3: Do consultees think it important that an online legislation database for Wales clearly identifies the legislation of the United Kingdom Parliament, and parts of that legislation, that apply to Wales?
- 13.22 Consultation question 6-4: Do consultees attach importance to legislation being accessible through a general web search?
- 13.23 Consultation question 6-5: Do consultees consider that legislation should be accessible through a database's internal search engine, including being searchable by subject matter?
- 13.24 Consultation question 6-6: Should Welsh language legislation be capable of being viewed alongside English language legislation on [legislation.gov.uk](http://legislation.gov.uk)?
- 13.25 Consultation question 6-7: Do consultees agree that a database of legislation applicable in Wales should be organised by subject matter, following the *Defralex* model structure, with clear and detailed sub-divisions? Should this be done by way of links from *Cyfraith Cymru/Law Wales* to [legislation.gov.uk](http://legislation.gov.uk) or in a section of [legislation.gov.uk](http://legislation.gov.uk)?

- 13.26 Consultation question 6-8: Should legislation available on an online legal database for Wales be editable by volunteer legal experts?
- 13.27 Consultation question 6-9: If so, what safeguards should be put in place?
- 13.28 Consultation question 6-10: Do consultees find explanatory notes helpful? Could they be improved?
- 13.29 Consultation question 6-11: How could explanatory notes best be presented?
- 13.30 Consultation question 6-12: Should guidance and/or commentary be included on an online legislation resource for Wales? If so, how detailed should its coverage be?
- 13.31 Consultation question 6-13: Have consultees experienced difficulties due to the limited availability of textbooks on the law applicable to Wales?
- 13.32 Consultation question 6-14: What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?

#### **Chapter 7: Consolidation**

- 13.33 Consultation question 7-1: Do consultees think there should be procedures in the National Assembly for technical legislative reform, such as consolidation Bills?
- 13.34 Consultation question 7-2: Do consultees think that there is a need for consolidation in Wales? If so, do consultees have a view on a particular area of the law in Wales that would benefit from a consolidation exercise?
- 13.35 Consultation question 7-3: We welcome consultees' views on the drawbacks and benefits of each of the models of consolidation described above, including pure consolidation and consolidation combined with law reform.
- 13.36 Consultation question 7-4: We invite consultees to provide examples and evidence of the problems they experience from a lack of consolidation, in terms of time or other costs. In addition, we ask consultees to provide examples and evidence of the costs and benefits they think would result from consolidation.

#### **Chapter 8: Codification**

- 13.37 Consultation question 8-1: Do consultees agree that the objective of codification in Wales should be to bring the common law into statutory form, and/or reorganise statute law?
- 13.38 Consultation question 8-2: Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?
- 13.39 Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?

- 13.40 Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?
- 13.41 Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?
- 13.42 Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?
- 13.43 Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?
- 13.44 Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?
- 13.45 Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?
- 13.46 Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?
- 13.47 Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?
- 13.48 Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?
- 13.49 Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?
- 13.50 Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to bills to those designed to ensure better codification, rather than alternative substantive provision?
- 13.51 Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?

### **Chapter 9: Control mechanisms in the Government and legislature**

- 13.52 Consultation question 9-1: We ask consultees whether a “legislative impact” assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government?
- 13.53 Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?
- 13.54 Consultation question 9-3: We would also welcome consultees’ views on alternative models.
- 13.55 Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models.

## **PART 3: THE WELSH LANGUAGE**

### **Chapter 10: Welsh as a legal language**

- 13.56 There are no proposals or consultation questions posed in this chapter.

### **Chapter 11: Legal terminology and drafting**

- 13.57 Consultation question 11-1: We invite the views of consultees as to how the process of standardising and keeping up to date Welsh legal terminology should be continued and funded. In particular, what manner of body should be responsible for performing this role?
- 13.58 Consultation question 11-2: Accordingly, we invite the views of consultees as to what, if anything, can be done to make Welsh legal terminology more accessible to legal professionals and to the public.
- 13.59 Consultation question 11-3: We invite the views of consultees as to whether the form or presentation of bilingual legislation could be improved and, if so, in what ways.
- 13.60 Consultation question 11-4: Do consultees agree with our analysis of the objectives of bilingual drafting?
- 13.61 Consultation question 11-5: Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?
- 13.62 Consultation question 11-6: Does the system presently employed by the Welsh Government satisfactorily achieve the objectives of bilingual drafting?
- 13.63 Consultation question 11-7: Would there be any advantage in the Welsh Government’s seeking, as a long term objective, to move from its current model to a system of co-drafting?
- 13.64 Consultation question 11-8: What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?
- 13.65 Consultation question 11-9: We invite the views of consultees as to whether any other working tools would be of assistance in the production of bilingual legislation in Wales.

## **Chapter 12: The interpretation of bilingual legislation**

- 13.66 Consultation question 12-1: We welcome the views of consultees on the appropriate approach to the interpretation of bilingual legislation in English and Welsh.
- 13.67 Consultation question 12-2: Do consultees agree that all interpretation of the law enacted bilingually by the National Assembly or made bilingually by the Welsh Government will need to take account of both language versions?
- 13.68 Consultation question 12-3: What approach should be adopted to the interpretation of bilingual legislation where different language texts bear different meanings?
- 13.69 Consultation question 12-4: Should courts in England and Wales apply a shared meaning rule? If so, in what circumstances should it apply?
- 13.70 Consultation question 12-5: In interpreting a bilingual text should account be taken of its drafting and legislative history? If so, how is that to be ascertained? In particular, should greater weight be given to the language in which the initial draft was prepared?
- 13.71 Consultation question 12-6: Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?
- 13.72 Consultation question 12-7: Consultees are invited to express their views on the future needs for legal education and training to take account of bilingual legislation and how these may best be met.
- 13.73 Consultation question 12-8: In particular, should the study of bilingual legislation and its interpretation form a compulsory part of university law degree courses in Wales? If so, for whom should it be compulsory?
- 13.74 Consultation question 12-9: Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?