



**Law
Commission**
Reforming the law

Form and Accessibility of the Law Applicable in Wales Summary of Consultation Paper

Consultation Paper No 223 (Summary)

THE LAW COMMISSION – HOW WE CONSULT

About the Commission: The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones (Chairman), Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation paper: The form and accessibility of the law applicable in Wales.

Availability of materials: This consultation paper is available on our website at <http://www.lawcom.gov.uk>.

Duration of the consultation: 9 July 2015 to 9 October 2015.

How to respond

Please send your responses either:

By email to: welsh.law@lawcommission.gsi.gov.uk or

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If you send your comments by post, it would be helpful if, where possible, you also send them to us electronically.

After the consultation: In the light of the responses we receive, we will decide our final recommendations and we will present them to the Welsh Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at <https://www.gov.uk/government/publications/consultation-principles-guidance>.

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THE LAW COMMISSION

**FORM AND ACCESSIBILITY OF THE LAW
APPLICABLE IN WALES**

SUMMARY OF CONSULTATION PAPER

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FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES SUMMARY OF CONSULTATION PAPER

PART 1: THE CURRENT POSITION

CHAPTER 1: INTRODUCTION

- 1.1 This is a summary of the Law Commission consultation paper on the form and accessibility of the law applicable in Wales. This summary provides a brief overview of the issues we consider in the consultation paper and sets out all of the consultation questions we ask. Both the consultation paper and this summary are available in both Welsh and English, and are available at <http://www.lawcom.gov.uk/>.
- 1.2 The consultation paper and the suggestions put forward here represent our preliminary views about solutions to the problems identified. We welcome comments and feedback on the merits of those solutions and also on their costs and benefits. We will carefully review our understanding and develop proposals on the basis of the responses made to the consultation paper.

Background

- 1.3 In Wales, as in England, it is becoming increasingly difficult to find out what the law is. Legislation is amended and re-amended by the United Kingdom Parliament and by the National Assembly for Wales. Successive amendments to existing legislation by newer legislation can make it difficult to find a statement of the law that is accurate and up to date unless the legislation is consolidated on a regular basis. The legislative process and the way that legislation is drafted both contribute to the problem. In addition, there is no publicly available, free to use source of legislation that shows the legislation as it stands, including all the amendments made to date.
- 1.4 This lack of accessibility makes it difficult for people to understand the effect of the law without engaging in time-consuming and specialist research, and can lead to people relying on sources which are wrong or misleading. It is also difficult for those wanting to reform the law to see how the law stands and to decide what changes need to be made.
- 1.5 The Welsh Government has been aware of difficulties in this area for some time, as have the judiciary. The Lord Chief Justice, amongst others, has spoken of the need to take the opportunity to set up structures and practices to improve the situation while the National Assembly and Welsh Government are still young.¹
- 1.6 This project was proposed by the Welsh Government, particularly the Office of Legislative Counsel, and by the Law Commission's Welsh Advisory Committee as part of our Twelfth Programme of Law Reform. It is one of two projects relating

¹ See the Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "The Role of the Judiciary in a Rapidly Changing Wales", Legal Wales Conference (Cardiff 11 October 2013).

only to Wales. The other is looking at planning law in Wales.

Scope of the project

- 1.7 The terms of reference for this project as agreed between the Law Commission and the Welsh Government are

[t]o consider the current arrangements for the form, accessibility and presentation of the law applicable in Wales, and make recommendations to secure improvements of those aspects of both the existing law and future legislation.

- 1.8 This project concerns access to justice, but focuses on particular aspects of that important topic. Lord Thomas of Cwmgiedd, the Lord Chief Justice has said:

When there is a discussion of access to justice, it is generally a discussion about the availability of legal advice and representation (at a cost that is either covered by state funding or reasonable charges by lawyers) or the location of courts at a convenient point for the delivery of local justice. These are two vital considerations, but I do not think we should lose sight of two others, one of general application and one of particular application in Wales.

The first is good, well-drafted law ...There cannot be access to justice, unless the laws that govern us are first written in language that is intelligible and second organised in a way such as the laws on a particular subject can be found in one place and in an organised manner ...

... The second vital consideration – one particular to Wales – is language and bilingualism. As legislation has to be bilingual, it is important that bilingualism enhances access to justice by drafting that produces texts that read fluently in each language and are not merely a translation from one to the other.²

- 1.9 We are aware of the inquiry being carried out by the Constitutional and Legislative Affairs Committee on Making Laws in the Fourth Assembly. There is some overlap between the questions before the inquiry and this project. The Law Commission has given written and oral evidence to the inquiry and we shall take account of the report to be published in the autumn.³

Consultation process and report

- 1.10 We shall consult as widely as we can from 9 July to 9 October 2015. During that time, we will meet with stakeholders to discuss the issues and will receive formal consultation responses. We will then consider the consultation responses, carry out further research necessary and draft final recommendations for presentation

² The Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "The Role of the Judiciary in a Rapidly Changing Wales", *Legal Wales Conference* (Cardiff 11 October 2013).

to the Welsh Government. We hope to do so in time for our recommendations to be considered before the National Assembly elections in May 2016.

The problems

1.11 In summary, the problems are:

- (1) the sheer volume of primary and secondary legislation and the frequency with which it is amended;
- (2) a failure to consolidate or codify the legislation;
- (3) Parliamentary and National Assembly procedures, pressure on the time available for the scrutiny of legislation and pressure on Parliamentary Counsel and the Office of Legislative Counsel's resources;
- (4) the understandable desire of the Welsh government and Assembly Members to focus on areas of law where policy is driving reform with the result that there is little time for consolidation;
- (5) the lack of a single body with the responsibility for overseeing the health of the law overall and considering the impact of law reform in individual areas on the law as a whole; legislative counsel perform this role to an extent, but with limited powers;
- (6) drafting practices, the style and language used in legislation;
- (7) the form in which legislation is presented and updated following amendments, both in paper forms, and, increasingly on online databases and the non-availability of public, free to access sources of up to date legislation;
- (8) the incremental development of devolution in Wales which has compounded these difficulties; and
- (9) the fact that the law in Wales needs to be drafted and made available in both Welsh and English and both versions must be equally authoritative.

1.12 One problem particular to Wales is that functions under a large number of statutes have been transferred to the Welsh Ministers, but this is not apparent on the face of the statutes in question. The example below illustrates this (and other) issues.

1.13 Further complexity is introduced by the rapidly increasing divergence of the law applicable in Wales from that applicable in England, an inevitable consequence of devolution. The law in Wales relating to social care, housing and homelessness law, family law and education law is now significantly different from that applicable in England. We consider some of these areas of the law further below.

³ Information on the Constitutional and Legislative Affairs Committee, *Inquiry into Making Laws in the Fourth Assembly* may be found at:
<http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=9054> (

- 1.14 The following example illustrates some of the problems noted above.

Example

Wildlife and Countryside Act 1982 section 45.

This relates to Nature Conservation, Countryside and National Parks.⁴ “Environment” is a devolved subject under Schedule 7 to the 2006 Act and therefore within the Assembly’s legislative competence.

Section 45 reads:

Natural England (as well as **the Secretary of State**) shall have power to make an order amending an order made under section 5 of the 1959 Act designating a National Park, and –

(a) Section 7(5) and (6) of that Act (consultation and publicity in connection with orders under section 5 or 7) shall apply to an order under this section as they apply to an order under section 7(4) of that Act with the substitution for the reference in section 7(5) to the **Secretary of State** of a reference to **Natural England**... (emphasis added).

The section, as it applies to Wales, should actually read:

The Natural Resources Body for Wales (as well as **the Welsh Ministers**) shall have power to make an order amending an order made under section 5 of the 1959 Act designating a National Park, and –

(a) Section 7(5) and (6) of that Act (consultation and publicity in connection with orders under section 5 or 7) shall apply to an order under this section as they apply to an order under section 7(4) of that Act with the substitution for the reference in section 7(5) to the **Welsh Ministers** of a reference to **the Natural Resources Body for Wales**... (emphasis added).

A reader wishing to identify the relevant law as it applies to Wales would have to take the following steps.

- (1) Establish that the section applies to Wales. The reader may infer that the Act relates to Wales due to the fact that it is contained in an England and Wales statute and the Act has a number of specific references to Wales within it. There is no clear provision that defines how the Act *applies* to Wales.
- (2) Discover section 41A, which is not referred to in section 45, and which states:

⁴ This example was suggested to us by Keith Bush QC.

In relation to land in Wales, sections 42 to 45 (which relate to Natural Parks) have effect as if references to Natural England were references to the Natural Resources Body for Wales.⁵

- (3) Discover that the Secretary of State's functions under section 45 were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999.
- (4) Discover that the Government of Wales Act 2006 Schedule 11 paragraph 30 transferred all executive functions, including those under section 45, from the Assembly to the Welsh Ministers.

The need for consolidation

- 1.15 There is widespread demand for the legislation to be consolidated into fewer, up to date pieces of legislation, expressed in modern language and laid out in a style that is accessible to readers.
- 1.16 Consolidation is a complex, time-consuming process requiring expert drafting skills and Assembly time. In Westminster and also in Holyrood there are special procedures designed to expedite the passage of technical Bills. We discuss these procedures, and the options for consolidation or even codification of the legislation applicable in Wales below.

Making law available

- 1.17 We discuss the need for a free and up to date online source of legislation in Wales, and consider how other materials, such as textbooks and guidance, could improve understanding of the law in Wales.

The Welsh language

- 1.18 We examine Welsh as a legal language. We look at Welsh legal terminology, the form of bilingual legislation and bilingual drafting, drawing on practices in other jurisdictions and consider what methods of bilingual drafting might work best for Wales. We then consider how bilingual legislation is interpreted, drawing on the experiences of bilingual interpretation in jurisdictions such as Canada and Hong Kong.

The cost of accessibility

- 1.19 Our research and pre-consultation meetings with stakeholders in Wales suggest that there is a real demand for improvements in the accessibility of law in Wales.
- 1.20 However, in order for the Welsh Government to be able to make reasoned judgements about whether it is justifiable to spend public funds on any consolidation, codification or other work to make the law more accessible, the Government will need to know what the economic impact of those changes are likely to be.

⁵ Wildlife and Countryside Act 1981, s 41A. It is worth noting too that as it is displayed on Legislation.gov.uk, section 41A has not been brought up to date and refers to the defunct Countryside Council for Wales which was replaced by the Natural Resources Body for Wales.

- 1.21 Our final report will provide recommendations for reform and will be accompanied by an impact assessment.⁶ Impact assessments place a strong emphasis on valuing costs and benefits in monetary terms. However, there are important aspects of the present law, and of proposals for reform, that cannot sensibly be monetised. These include impacts on fairness, public confidence, and the benefits that could result from no longer having to battle against inaccessibility.
- 1.22 To take an example, there is considerable demand for the consolidation of legislation. If the Welsh Government were to fund an exercise to consolidate an area of law, such a project would involve costs such as:
- (1) legislative counsel's time to research and draft the consolidation; this would be the largest area of expenditure;
 - (2) Government lawyers and other officials' time to categorise the legislation and assist legislative counsel;
 - (3) Parliamentary time taken to consider the consolidated legislation;
 - (4) Government officials' time in preparing guidance and informing the relevant industries and the public of the consolidated legislation and its effect (even if the effect was not to change the law); and
 - (5) time taken in the relevant industries to understand and apply any changes in the legislation (even if there are no substantive changes to the law), forms, notices or guidance might need to be changed to refer to the new legislation, and training might need to take place.
- 1.23 A consolidation project might take several years to complete, so that the costs would be spread out over a long time and any benefits would not start to accrue for several years.
- 1.24 Benefits might include:
- (1) a reduction in the amount of time taken to look up relevant legislation for members of the public, Government lawyers, the Welsh Assembly's Research Service, lawyers in private practice, advisers and other professionals;
 - (2) a reduction in errors caused by members of the public not having access to the correct up to date legislation;
 - (3) a reduction in court costs as less time is taken in court where errors have been made as a result of inaccessibility, or less time is needed for lawyers and judges to find the correct law and possibly even less higher court time is needed where courts have made errors as a result of inaccessible legislation.
- 1.25 The costs would also have to be compared with any alternative options. As we discuss in chapter 7, consolidation may take place in a number of different ways

⁶ The Welsh Government publishes regulatory impact assessments for all primary legislation and most subordinate legislation.

and the costs and benefits of each procedure would need to be compared.

- 1.26 In addition, we will be carrying out research on some case studies, providing a detailed analysis of costs of carrying out a particular proposal and recording, in as much detail as possible, the possible savings and other non-monetised benefits. For example, a solicitors firm could record how long it takes to look up the law in an area where there is a lack of consolidation, and could compare that with an area where there has been consolidation of the legislation. Government lawyers could compare the hours spent preparing a Bill in an area where there has been consolidation with the time spent preparing a Bill of a similar size in an area where consolidation has not taken place.
- 1.27 We ask consultees to keep the question of costs and benefits in mind when reading this summary and the full consultation paper.

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 2: THE LEGAL HISTORY OF WALES

Phases of devolution

- 2.1 The last two decades have seen major changes in the government of Wales and its constitutional status.⁷ In this chapter we provide a brief legal history of Wales, and the incremental development of devolution that Wales has experienced.
- 2.2 The Government of Wales Act 1998 established the National Assembly for Wales ('the National Assembly'). Executive powers, including powers to make subordinate legislation by statutory instrument in eighteen defined "fields", were transferred to the new Assembly, but it was given no primary legislative powers.⁸ Since then two further systems of devolution under the Government of Wales Act 2006 have followed in rapid succession.
- 2.3 The Government of Wales Act 2006 formally separated the executive and the legislature and created the Welsh Ministers.⁹ Many of the executive powers and duties of the Assembly, including powers to make subordinate legislation, were transferred to the Welsh Ministers. The Assembly was given power for the first time to enact primary legislation in the form of Assembly Measures. Assembly Measures have the same effect as Acts of the Assembly. Assembly Measures could be made where legislative competence was granted in that particular field, by an enactment of the Westminster Parliament or by an Order in Council known as a legislative competence order.¹⁰ The Welsh Assembly enacted some 22

⁷ See, generally, T G Watkin, *The Legal History of Wales* (2nd ed 2012) chapter 10; Supperstone, Goudie and Walker, *Judicial Review* (5th ed 2014) 21.17.1 – 21.18.2.

⁸ Government of Wales Act 1998, sch 2.

⁹ Government of Wales Act 2006, s 48.

¹⁰ Government of Wales Act 2006, s 94 and sch 5.

Measures between 2008 and 2011.¹¹

- 2.4 In 2011, following a referendum, a new devolution settlement came into force, under Part 4 of the Government of Wales Act 2006.¹² Part 4 confers vastly increased legislative powers on the Assembly.
- 2.5 The position remains dynamic. The Wales Act 2014 conferred tax-raising powers on the National Assembly.¹³ It also formally renamed “the Welsh Assembly Government” “the Welsh Government”.¹⁴ In the command paper *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* further devolution is now proposed.¹⁵
- 2.6 The powers of the Welsh Assembly and the Welsh Government are subject to the overriding sovereignty of the United Kingdom Parliament. Wales remains part of the single jurisdiction of England and Wales. As a result, legislation made by the Welsh Assembly is part of the law of England and Wales and extends throughout the jurisdiction, but applies only to Wales.¹⁶ Neither the current legislation nor the proposals in *Powers for a Purpose* change the structure of the jurisdiction.
- 2.7 Wales shares a system of courts and tribunals with England and these are administered by Her Majesty’s Courts and Tribunals Service, part of the Ministry of Justice. In addition, there are now several Welsh tribunals with responsibilities falling within devolved fields.¹⁷
- 2.8 The National Assembly and the Welsh Ministers have already created a substantial body of primary and secondary legislation, resulting in a divergence of the law applicable in England and that applicable in Wales in a number of important areas. Significant changes have already been made in areas such as education, planning and social services, housing and local government and will be made in other areas.¹⁸
- 2.9 As a result of these changes, Wales is developing a distinct legal personality. It has become meaningful to speak of Welsh law as a living system of law for the

¹¹ A complete list of Measures as passed by the Welsh Assembly may be found at www.legislation.gov.uk.

¹² Electoral Commission, Report on the referendum on the law-making powers of the National Assembly for Wales (June 2011).

¹³ Wales Act 2014, Part 2.

¹⁴ Wales Act 2014, s 4.

¹⁵ (2015) Cm 9020, referred to in the media as the ‘St David’s Day Agreement’.

¹⁶ Government of Wales Act 2006, s 108(6)(b).

¹⁷ The devolved tribunals include the Mental Health Review Tribunal for Wales, the Residential Property Tribunal, the Special Educational Needs Tribunal for Wales and the Welsh Language Tribunal.

¹⁸ At the time of writing, some 17 Acts have been passed by the National Assembly for Wales. Examples are discussed in chapter 4 below.

first time since the Act of Union in the mid- sixteenth century.¹⁹

CHAPTER 3: THE CURRENT LEGISLATIVE PROCESS AND THE WELSH GOVERNMENT

- 3.1 In this chapter, we look at the structure and operation of the National Assembly for Wales, the appointment of Assembly Members and the processes by which legislation is passed.

The National Assembly for Wales

- 3.2 Under the Government of Wales Act 2006 the National Assembly gained competence to make primary legislation and its executive and legislative branches were formally separated. The National Assembly remains a unicameral legislature, consisting of one chamber with no upper house. There are 60 Assembly Members, elected by the additional member electoral system. This makes it more likely that there will be no single political party with an overall majority in the National Assembly.

- 3.3 Committees play an important role of the conduct of National Assembly business and, in particular, in the scrutiny of primary legislation. The Constitutional and Legislative Affairs Committee scrutinises secondary legislation. The Presiding Office carries out similar functions to the Speaker of the House of Commons. The National Assembly is staffed by the Assembly Commission.

The Welsh Government

- 3.4 The Welsh Government consists of the First Minister, the other Welsh Ministers, and the Counsel General. The Counsel General is a member of the Cabinet, but not a Minister and is the law officer of the Welsh Government. All draft legislation must be approved by the Counsel General as well as the First Minister and Minister holding the relevant portfolio before it is introduced in the National Assembly.

The legislative process

- 3.5 Assembly Bills must pass through four stages of scrutiny before becoming Assembly Acts: the consideration of general principles by the Assembly or a responsible committee; detailed consideration by committee of the Bill and amendments tabled; consideration of the Bill by the whole Assembly, as amended, followed by a report; finally a motion is moved that the Bill be passed. The third stage may be extended and an additional report stage may be added.²⁰
- 3.6 The Assembly Commission published a report in 2015, entitled *The Future of the Assembly: Ensuring its Capacity to Deliver for Wales*. The report considered the challenges to the National Assembly of effective scrutiny in the future.

¹⁹ T H Jones, "Wales as a jurisdiction" [2004] *Public Law* 80. See Winston Roddick, "Law-making and devolution: the Welsh experience" [2003]; and Sir David Lloyd Jones, "The Machinery of Justice in a Changing Wales" (2010) 14 *Transactions of the Honourable Society of the Cymmrodorion* (New Series) 123.

The volume and complexity of legislative scrutiny being undertaken by the Assembly is increasing significantly and rapidly. It will reach the highest ever level between now and the end of the Fourth Assembly and we expect it to remain at that level into the Fifth Assembly ... The volume of legislation facing the Assembly can be attributed to increase in the amount of Bills, Bills being larger and more complex and the legislative process happening bilingually, for example. The Assembly also has a larger competency base and therefore the scope of legislation is broader.²¹

Consultation Question 3-1: We welcome consultees' views on the current legislative processes.

Special procedures for law reform bills

3.7 In the United Kingdom Parliament and also the Scottish Parliament, special procedures exist for Bills which are not politically controversial.²² Procedures are available at Westminster for:

- (1) Law Commission Bills, which effect substantive reform but are not controversial; and
- (2) statute law repeal Bills prepared as a result of a Law Commission and Scottish Law Commission report, to repeal enactments which are no longer of practical utility.

3.8 No such procedures exist in the National Assembly. We talk about consolidation later on in chapter 7, but here we ask whether procedures should be created for these other types of technical Bills.

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

Introduction

4.1 Legislation should convey its intended meaning to all its readers, whether or not they are legally trained. How legislation is written, or drafted, is fundamental to its accessibility. Poor drafting can contribute to the complexity of legislation. Good drafting can aid clarity and accessibility.

²⁰ Standing Orders of the National Assembly for Wales (March 2015) and Government of Wales Act 2006, s 111.

²¹ National Assembly for Wales, Assembly Commission, *The Future of the Assembly: Ensuring its Capacity to Deliver for Wales* (2015).

²² D Greenberg, *Craies on Legislation* (9th ed 2010) para 5.3.2.

Office of the Legislative Counsel

4.2 Responsibility for the quality of Bills rests with the Counsel General. The drafting of legislation is carried out by professional drafters in the Office of the Legislative Counsel (“OLC”). OLC drafts all Assembly Bills promoted by the Government and all Government amendments including amendments to Bills not promoted by the Government. Secondary legislation is usually drafted by lawyers in the Welsh Government Legal Service, not by OLC, but OLC drafters will then check it before it is laid before the National Assembly and scrutinised by the Constitutional and Legislative Affairs Committee.

4.3 The drafter’s role is to produce legislation which is clear, effective and as readable as possible, but it covers more than the drafting of legislation. Their role is to subject policy proposals to

[a] rigorous intellectual and legal analysis, and to clarify and express legislative propositions. The drafting stage is often the first at which the policy as a whole is subjected to meticulous scrutiny.²³

4.4 As the Office of Parliamentary Counsel (Westminster’s drafting office) explains in its guidance:

The need to preserve a stable and constitutional relationship between Parliament and the courts means that Counsel will always have an eye on a Bill’s long-term consequences for the health of the statute book, and the appropriate distinction between the legislative function of Parliament and the interpretative role of the courts. It is a responsibility of Counsel to protect the integrity of the legislative process, so that the judiciary’s settled understanding of the process and this distinction are not disturbed.²⁴

Drafting good legislation in Wales

4.5 OLC published *Legislative Drafting Guidelines* in 2012, prescribing best drafting practice with the aim of creating clarity. The Guidelines advise on the use of plain language, including plain words and clear sentences. They also look at the structure and organisation of legislation and how to draft amendments and repeals. If possible, where legislation is being amended, it should be consolidated, but this is not always possible. Where the legislation is not being consolidated, drafters try to express the changes as clearly as possible.

4.6 Amendments may be textual or non textual. A textual amendment changes the words of the earlier legislation, inserting, substituting or omitting text, so that an up to date version of the legislation should include the changes on the face of the statute.²⁵ A non-textual amendment changes the effect of the legislation without

²³ Office of the Parliamentary Counsel *Research and Analysis: When Laws Become Too Complex* (December 2011) p 15. This report was published as part of the Office’s Good Law Project.

²⁴ Office for the Parliamentary Counsel, *Working with Parliamentary Counsel* (2011) p 12.

²⁵ See, for example, Education (Wales) Measure 2009, sch 1, para 2 which amends Education Act 1996 s 326(4).

changing its wording.²⁶ Non-textual amendments can be more convenient to express in simple terms and can be used where it would be difficult to identify, at the time of drafting, all of the pieces of legislation that will be affected.

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?

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

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

Keeling schedules

- 4.7 One way of being clear about how legislation has been amended, is to produce a schedule showing the legislation as if it was, with words repealed being printed as struck through and highlighting words added. This is known as a Keeling Schedule, after the Member of Parliament who proposed it. A Keeling Schedule may be an appendix to the final Act, and therefore part of the legislation itself, or may be produced separately.

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?

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

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?

Overviews

- 4.8 Welsh Acts include an overview section at the start of the Act and often an overview at the start of each Part, summarising what is in the legislation. The overviews are intended as signposting for the reader. They do not form part of the law and are not intended to be used to interpret the law.²⁷

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

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

Aspirational or “purpose” clauses

- 4.9 These clauses tend to impose a duty or obligation to work towards a goal which

²⁶ See, for example, Wildlife and Countryside Act 1981 ss 41A and 45, National Assembly for Wales (Transfer of Functions) Order 1999 and the Government of Wales Act 2006 sch 11.

²⁷ See, for example, Education (Wales) Act 2014, s 1.

is an aspiration, rather than a measurable target for which the duty-holder may be held accountable. They often express the broad purpose of the legislation. For example, section 5 of the Social Services and Well-Being (Wales) Act 2014 imposes a duty to on certain people to promote the well-being of those who need care and support. These purpose clauses express the underlying policy of the legislation, but may be difficult to enforce.

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

An Interpretation Act for Wales?

- 4.10 The Interpretation Act 1978 provides rules on the construction and interpretation of legislation. It provides fixed definitions that may be relied upon when interpreting other legislation, without the need to include those definitions in each piece of legislation. This allows legislation to be drafted more simply without reducing clarity and certainty.
- 4.11 Acts of the Scottish Parliament and instruments made under Acts of the Scottish Parliament are now subject to the Interpretation and Legislative Reform (Scotland) Act 2010. This remains very similar to the Interpretation Act 1978. The Scottish Law Commission has suggested that while Scotland should make provision for the interpretation of Scottish legislation, wherever possible, standardised interpretations should not differ between Scotland and England.
- 4.12 The Interpretation Act 1978 currently applies to legislation passed by the National Assembly. The question has been asked whether Wales needs its own Interpretation Act at this stage.

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

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

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

Introduction

- 5.1 In this chapter, we take a 'snap shot' of some aspects of the primary and secondary legislation as it currently stands. We consider five case studies, each of which represents a different devolved area of law and which, taken together, illustrate some of the issues the Welsh Government faces when it comes to carry out reform. They provide evidence of the incentives and disincentives to be considered when drawing up plans for consolidating legislation and developing proposals for a legislative system for the future.

Case study 1: Education

- 5.2 Education is a policy area in which the law as it applies in Wales and in England is diverging. 'Education and training' was one of the devolved fields set out in Schedule 2 to the Government of Wales Act 1998, and order and regulation-making powers under various Acts of the United Kingdom Parliament were duly transferred to the National Assembly.²⁸ Primary lawmaking powers relating to education were conferred under Parts 3 and 4 of the Government of Wales Act 2006, and the National Assembly has legislated in the area consistently.²⁹
- 5.3 The United Kingdom Parliament has, meanwhile, continued to pass legislation relating to education in parallel with the National Assembly. This has included, in some recent instances, legislation applicable to Wales, made on the basis of a legislative consent motion. Since the National Assembly has gained primary legislative powers, the presumption is that it should legislate for Wales on devolved matters.³⁰ However, there are circumstances when it is practicable and convenient to include devolved provisions in Parliamentary legislation. Where, for example, a Bill is in progress in Westminster it may be more convenient and a better use of resources, to include provisions applicable to Wales in that Bill.
- 5.4 This has left a patchwork of legislation that suffers from all of the usual problems of law in a politically active field which has not recently benefitted from consolidation. To this can be added the further complexity of devolved legislation. Education law in Wales is contained in numerous different pieces of legislation. This includes, depending on how widely 'education' is defined, anything from 17 to as many as 40 Acts of the United Kingdom Parliament, 7 Measures, 5 Acts of the National Assembly, and hundreds of statutory instruments.³¹
- 5.5 Relevant Acts of the United Kingdom Parliament which apply in both England and Wales contain parallel and increasingly divergent systems applicable in England and Wales which the discerning reader must unpick. A reader interested in the Education Act 1996 in its application to Wales only, for example, faces a

²⁸ The National Assembly for Wales (Transfer of Functions) Order 1999.

²⁹ For the legislative programme for the Fourth Assembly, see the First Minister's announcement, National Assembly for Wales, Record of Proceedings, 11 July 2011 and the updated statement by the First Minister on the legislative programme on 16 July 2013.

³⁰ See chapter 2 for discussion on the convention that exists between the United Kingdom Government and the Welsh Government where a Legislative Consent Motion is laid in the National Assembly if the United Kingdom Parliament wishes to legislate on a devolved subject.

³¹ Primary legislation enacted by the United Kingdom Parliament since 1999 which has a significant impact in the field of education in Wales includes: the Care Standards Act 2000; Learning and Skills Act 2000; Special Educational Needs and Disability Act 2001; Education Act 2001; Education Act 2002; Anti-social Behaviour Act 2003; Legal Deposit Libraries Act 2003; Health and Social Care (Community Health and Standards) Act 2003; Children Act 2004; Higher Education Act 2004; Education Act 2005; Childcare Act 2006; Education and Inspections Act 2006; Safeguarding Vulnerable Groups Act 2006; Further Education and Training Act 2007; Tribunals, Courts and Enforcement Act 2007; Children and Young Persons Act 2008; Education and Skills Act 2008; Health and Social Care Act 2008; Apprenticeships, Skills, Children and Learning Act 2009; Academies Act 2010; Children, Schools and Families Act 2010; Equality Act 2010; Education Act 2011; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Children and Families Act 2014; Criminal Justice and Courts Act 2015; Counter-Terrorism and Security Act 2015. In addition, there are hundreds of pieces of secondary legislation on education, applicable in Wales.

formidable task. C F Huws' description of the application of Part I of that Act – which makes vital general provision for education - is illuminating.

Part I of the Education Act 1996 currently contains 28 sections that are currently either in force or due to come into force. Seven of these apply to England only; 14 of the remaining 21 sections contain subsections that apply to one territory only.

...later legislation ... has amended the Education Act 1996, and this has meant that some sections have been repealed in relation to England, with amendments inserted, while other sections have been repealed in relation to Wales, with different amendments introduced. Furthermore, a large body of subordinate legislation created pursuant to the Act has resulted in further distinctions emerging between the law in England and the law in Wales.³²

- 5.6 The relevant statutes can also be unclear or even misleading on their face, requiring considerable legal expertise to understand their application to Wales.
- 5.7 An example raising several common problems was provided by Keith Bush QC to the National Assembly's Constitutional and Legislative Affairs Committee's inquiry into Making Laws in the Fourth Assembly.³³

Example

Section 569 of the Education Act 1996, currently reads as follows:

(1) Any power of the Secretary of State or the Welsh Ministers to make regulations under this Act shall be exercised by statutory instrument.

(2) A statutory instrument containing regulations under this Act made by the Secretary of State, other than one made under subsection (2A), shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(2A) A statutory instrument which contains (whether alone or with other provision) regulations under section 550ZA or 550ZC may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament."

(2B) A statutory instrument containing regulations under sections 332ZC, 332AA, 332BA, 332BB or 336 made by the Welsh Ministers is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(2C) Paragraphs 33 to 35 of Schedule 11 to the Government of Wales

³² C F Huws, "The Language of Education Law in England and/or Wales" (2012) 33 (2) *Statute Law Review* 252.

³³ Evidence submitted to the inquiry may be found at: <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=9054> (last visited 1 July 2015).

Act 2006 make provision about the National Assembly for Wales procedures that apply to any statutory instrument containing regulations or an order made in exercise of functions conferred upon the Secretary of State or the National Assembly for Wales by this Act that have been transferred to the Welsh Ministers by virtue of paragraph 30 of that Schedule.

(3) (Repealed)

(4) Regulations under this Act may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit or the Welsh Ministers think fit.

(5) Without prejudice to the generality of subsection (4), regulations under this Act may make in relation to Wales provision different from that made in relation to England.

(6) Subsection (5) does not apply to regulations under section 579(4).

On careful consideration it will be seen that, within a single section:

- (1) subsections (1), (4), (5) and (6) apply in relation to both England and Wales (although the effect of subsection (6) in relation to Wales is unclear);
- (2) subsections (2) and (2A) now apply only in relation to England; and
- (3) subsections (2B) and (2C) only apply in relation to Wales.

5.8 Education legislation needs to be understood by local education authorities, but also by head teachers and other providers of education, and a wide range of professionals working with children, as well as by parents and carers. The problem is by no means restricted to non-professionals. Ministers and officials can struggle to get a clear sense of the law and their powers under it, making it challenging to manage both day to day business and to contemplate further reform on a principled basis.

5.9 A rationalisation of the existing law seems desirable, but a very heavy legislative reform programme can make it difficult to find time for consolidation. The existing legislation changes frequently, and that can make it difficult for officials to get the necessary time and perspective to think through the benefits of rationalising the legislation. Officials in the Directorate have, with their colleagues in the Office of the Legislative Counsel, seized such opportunities as have presented themselves. Some consolidation was achieved, for example, in the School Standards and Organisation Act (Wales) 2013.

5.10 In addition, there is a constant stream of new secondary legislation, in which the detailed application of the primary legislation is set out. Some of these contain provisions liable to change from time to time, such as fees; others contain more

detailed policy and procedure that do not warrant primary legislative scrutiny.³⁴

Case study 2: Social Care

- 5.11 The position so far as the law relating to social care in Wales is concerned is different. As with education, this is an area over which the National Assembly has had some form of legislative competence since 1998.³⁵ Even before the Government of Wales Act 1998, Welsh social care policy was starting to diverge from the position in England. In March 1999, the United Kingdom Government published a white paper, seeking to take “a radical look at the way in which local services are planned and delivered for the people in Wales” and preparing for demographic changes affecting the future of social services in response to an ageing population.³⁶ The National Assembly for Wales then published *Improving Health in Wales – A Plan for the National Health Service and its Partners*, under which a series of papers were published, planning changes in the organisation and delivery of health and social care in Wales.³⁷
- 5.12 In recent years there has been increasing divergence in social care law between England and Wales.³⁸ Last year, major Acts were passed in both England and Wales, establishing different legislation governing social care for each country.³⁹ Exercising its powers under Part 4 of the 2006 Act, the National Assembly has strongly asserted its legislative independence, bringing into force an Act designed to “fully establish - without the need to look elsewhere – the law as it applies in Wales.”⁴⁰
- 5.13 The Welsh Government responded positively to recommendations made by the Law Commission in 2011 in our report on Adult Social Care.⁴¹ The report included recommendations for law reform, together with the consolidation of existing law. The Welsh Government announced its intention to create more sustainable social services and

for the first time - a coherent Welsh legal framework for social services, based on the principles we hold dear in Wales. It will simplify the web of legislation that currently regulates social care in Wales and will make access to services much easier and more

³⁴ An example of more detailed procedure may be found in the Education (Induction Arrangements for School Teachers (Wales) Regulations 2015, SI 2015 No 484 (W.41).

³⁵ Government of Wales Act 1998, sch 2 field 12 and Government of Wales Act 2006 parts 3 and 4.

³⁶ Building for the Future: A White Paper for Wales (1999) Cm 4051.

³⁷ National Assembly for Wales, *Improving Health in Wales – A plan for the National Health Service and its partners* (2001).

³⁸ For a consideration of the legislative landscape see Adult Social Care (2010) Law Commission Consultation Paper No 192; and J Williams, “A New Law on Adult Social Care: A Challenge for Law Reform in Wales” (2012) 33(2) *Statute Law Review* 304.

³⁹ The United Kingdom Parliament has enacted the Care Act 2014 in relation to England.

⁴⁰ Counsel General Theodore Huckle QC, update on access to legislation delivered to the National Assembly on 19 February 2013 available at <http://www.yoursenedd.com/debates/2013-02-19-statement-update-on-access-to-legislation> (last visited 1 July 2015).

⁴¹ Adult Social Care (2011) Law Com No 326.

understandable to those who need them. This Bill will give people a strong voice and real control. It will cover social care services for both children and adults, and will, as far as it is possible and appropriate, integrate the arrangements for both of these groups so that social care services are provided on the basis of need and not of age.⁴²

- 5.14 The Social Services and Well-Being (Wales) Act 2014 was the result. It goes beyond the Law Commission's recommendations (and beyond the Care Act in England). It consolidates the legal framework for children's services as well as those provided to adults. The Act also – like the English Act – takes significant steps towards encouraging greater integration of health and social care services in Wales. It is a large Act and was a large Bill, 151 pages long as introduced into the National Assembly. A very large number of amendments were proposed during its passage.⁴³ The social care team and policy officials had the challenging task of extricating the Welsh law from the England and Wales legislation whilst consolidating existing Welsh law and introducing wide-ranging reforms. At the same time, the National Assembly struggled to keep up with the sheer number of amendments, some from the Government as policy was refined, and some from Assembly Members in response to the Bill.
- 5.15 The Act received Royal Assent on 1 May 2014. It is not proposed to bring the Act into force until 2016 to allow time for the drafting of the necessary subordinate legislation and for guidance to be reviewed or written afresh.
- 5.16 In some areas, the Act consolidates and restates the current legal position. In other areas, the Act provides for changes in law but not in practice, such as with adult safeguarding. In yet other areas, the Act will radically reform social care law by introducing reforms that are new in policy and practice.
- 5.17 The benefits to the Welsh Government and to all those who will be operating under the new legislation are of course not yet clear, but the Welsh Government predicted that significant savings would result from the reforms.⁴⁴ The new Act is comprehensive and presents a fresh start from which policy and practice may develop.
- 5.18 It has not escaped criticism, however. Professor Luke Clements has suggested that "if the aim was comprehensibility, it fails: it is often opaque and frequently

⁴² Gwenda Thomas, Deputy Minister for Children and Social Services, in her introduction to the Welsh Government's Consultation Documents on the Social Services (Wales) Bill (2012).

⁴³ 120 amendments were proposed. See <http://www.senedd.assembly.wales/mgDecisionDetails.aspx?lId=5664&Opt=1> (last visited 1 July 2015).

⁴⁴ Social Service and Well-Being (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, Welsh Government (Jan 2013).

reads like a regulation”.⁴⁵

- 5.19 Professor John Williams of Aberystwyth University refers to this Act while discussing the complexity which can result from the substantive law being spread across different pieces of legislation⁴⁶ which can make it difficult for practitioners and the public to find out what the law actually is. He goes on to call for codification and consolidation of Welsh law in order to improve accessibility and consistency.
- 5.20 Producing the Act has been a significant draw on the resources available to the Welsh Government and the National Assembly. It has taken up considerable time in the National Assembly, in addition to the work required of ministers, policy officials, lawyers and legislative counsel.

Case study 3: Waste and the environment

- 5.21 The National Assembly has competence to legislate in relation to “prevention, reduction, collection, management, treatment and disposal of waste”.⁴⁷
- 5.22 Much of the law relating to waste which applies in Wales and England emanates from the European Union. The relevant legislation therefore frequently does no more than transpose EU Directives.⁴⁸ In effect, both legislatures operate within the same system, which limits the freedom of successive governments to pursue separate policy agendas. Moreover, as a matter of practice, the Welsh Government works closely with and benefits from work carried out at the UK-wide Department for Food and Rural Affairs (Defra). Defra is a much larger operation and has resources which it would not be practical for the Welsh Government’s Natural Resources Directorate to deploy.
- 5.23 Some argue that there is, in fact, very little divergence between Welsh and English law in this area, although there are exceptions, particularly in subordinate legislation. There are plausible positive reasons for maintaining the similarity. The waste industry works across both countries and there are no persuasive incentives to create cross-border differences which could increase costs for those operating in the waste industry.
- 5.24 The legislation is fragmented and the European Union legislation can be complicated and difficult to understand. Provisions are spread across numerous Acts, such as Part 2 of the Environmental Protection Act 1990, the Control of

⁴⁵ Professor Clements of Cardiff University has published a commentary of the Social Services and Well-Being Act 2014: The Social Services and Well-Being Act 2014: an overview (1 December 2014) available at: <http://www.lukecllements.co.uk/wp-content/uploads/2014/12/SS-Well-being-Act-update-07.pdf> (last visited 1 July 2015). In other articles on his website, www.lukecllements.co.uk (last visited 1 July 2015), Professor Clements highlights problems with the legislation and criticises the amount of the detailed law left to be made in subordinate legislation.

⁴⁶ Professor John Williams was also legal adviser to the Health and Social Care Committee of the National Assembly during the passage of the Social Services and Well-Being Bill.

⁴⁷ Government of Wales Act 2006, part 4 and sch 7 para 6.

⁴⁸ Examples include the Waste Framework Directive, Landfill Directive, Mining Waste Directive, Storage of Metallic Mercury Considered as Waste Directive, Packaging Waste Directive, Waste Electrical and Electronic Equipment Directive, Batteries Directive, End of Life Vehicles Directive.

Pollution (Amendment) Act 1989 and the Waste and Emissions Trading Act 2003, with numerous statutory instruments made under those Acts and under the European Communities Act 1972. Statutory instruments include non-textual amendments to the primary legislation.

- 5.25 We have heard from stakeholders that much of the legislation relating to waste has been in place for years, and is well understood by the industry and regulatory authorities. Consolidation or restatement could cause unnecessary cost and confusion, as it would necessitate retraining staff, the drafting and publication of new guidance, and revising administrative practices where the law is not really changing. Nor is the current law, however complex it may be, necessarily inaccessible to those operating in the industry. Given that much of the complexity springs from European Union law, it would in any event need to be reproduced in any consolidation, and the key players appear to have a good understanding of the legislation as it stands.
- 5.26 There might, however, be benefit in consolidating and simplifying the whole of the environmental legislation applicable in Wales and reviewing the substantive law at the same time, thereby providing a complete overhaul. It might be that this exercise would avoid some of the difficulties that piecemeal restatement could cause or exacerbate. Equally, the benefits that an exercise on this scale could bring might be enough to offset the disadvantages noted above.

Case study 4: Town and Country Planning

Devolution of town and country planning

- 5.27 Until the 1990s planning legislation and planning policy was identical in its form and substance for England and Wales.⁴⁹ However, a more distinctive approach to the planning system in Wales began to emerge in the early 1990s. This was due to the differences in the organisation of local government in the two countries, and the issue of some planning policy documents by the Welsh Office which applied solely to Wales.
- 5.28 “Town and Country Planning” has been devolved to some degree since 1999, and is now included in schedule 7 to the Act, giving the National Assembly power to make primary legislation in the area.
- 5.29 In recent years the Planning Directorate in the Welsh Government has been active in promoting a specific planning system for Wales. Wales has its own national planning policy, *Planning Policy Wales*, which is supplemented by Technical Advice Notes. *Planning Policy Wales* is considerably longer and more detailed than its English equivalent.⁵⁰ The Planning Directorate has also commissioned a number of extensive research reports into the planning system in Wales. These reports have made numerous recommendations for changes to

⁴⁹ H Williams and M Jarman, “Planning policies and development plans in Wales – change and coexistence” [2007] *Journal of Planning and Environmental Law* 985, 986.

⁵⁰ The *National Planning Policy Framework*, which is supplemented by Planning Practice Guidance.

the Welsh planning system, some of which have been taken forward.⁵¹

- 5.30 The Planning (Wales) Act 2015 received royal assent on 6 July. It is the first piece of primary legislation on town and country planning made by the Welsh Government.

Source of confusion in town and country planning in Wales

- 5.31 There are two principal sources of confusion in town and country planning law in Wales.

- 5.32 First, there is confusion as to whether the law is the same in Wales as it is in England. Throughout the process of devolution, Parliament in Westminster has continued to pass legislation on town and country planning, parts of which apply to Wales and parts of which do not.⁵² The Planning (Wales) Act 2015, meanwhile, makes some changes which are the same as changes that have been made in England previously, but also some which introduce entirely new policies.

- 5.33 Parts of the planning systems in England and Wales are very different. England's system is based on the principle of "localism" and only has local plans (which are prepared by the local authority) and neighbourhood plans (which are prepared by the community).⁵³ However, the Welsh system is more centralised, and the intention seems to be to continue that trend. The Planning (Wales) Act 2015 introduces a national development framework (which is prepared by the Government) and strategic development plans (prepared by strategic planning panels) and local development plans (which are prepared by local authorities).

- 5.34 The problems are exacerbated by the large numbers of amendments made to primary legislation since 2004, which have not fully been brought into force. Some have commenced in relation to England, but not Wales, others have commenced only in respect of particular types of case. This makes it difficult to find out what the law is, and also difficult to draft subsequent amendments.

- 5.35 At the same time, parts of the planning systems in England and Wales are almost identical, for example, appeals against planning decisions and enforcement against breaches of planning control.

- 5.36 The law applying to England and that applying to Wales are both contained in the same pieces of, often much-amended, primary legislation. There is no legislation that separately states planning law as it applies to Wales. It is up to the individual to puzzle out which provisions apply to Wales and which do not. The Planning (Wales) Act 2015 also makes all of its changes in the form of amendments to the Town and Country Planning Act 1990, which means that the new Welsh

⁵¹ See, for example, the Planning (Wales) Bill and Positive Planning consultation, run by the Welsh Government from 4 December 2013 to 26 February 2014. The consultation documents and report may be found at: <http://gov.wales/consultations/planning/draft-planning-wales-bill/?lang=en> (last visited 1 July 2015).

⁵² See, for example: the Planning and Compulsory Purchase Act 2004 and the Localism Act 2011.

provisions will continue to be mixed in with English provisions for some time at least.

- 5.37 Secondly, the law of town and country planning both in England and in Wales is not consolidated, but is spread across numerous pieces of primary and secondary legislation. Much of the planning legislation since 1990 has amended the Town and Country Planning Act 1990, which was the last consolidation. As a result, the 1990 Act has become unwieldy. There are also various other Acts which deal with land use and planning.⁵⁴ It is necessary to look at a number of statutes to determine the law in one area.

The future

- 5.38 There are good reasons why it might be thought appropriate for Wales to have a different planning system from England. England has a population of 56 million and 340 planning authorities, with a scale of development to match. It may be that different legal structures would be appropriate for a country of 3 million people with 25 planning authorities⁵⁵. The Planning (Wales) Act 2015 is the first stage of creating a more specific planning system for Wales. At the request of the Welsh Government the Law Commission is undertaking a project on "Planning and development management in Wales".⁵⁶

- 5.39 In 2013, the First Minister announced to the National Assembly that the Welsh Government intended to bring forward a

further planning consolidation Bill [that] will bring together all existing Acts and further streamline the planning process.⁵⁷

- 5.40 No timetable has yet been announced for this work.

Case study 5: Local government

- 5.41 The Welsh Government has advocated joint working between public bodies in general and collaboration between local authorities since the publication of its paper *Making the Connections* in 2004.⁵⁸ There are currently 22 local authorities in Wales. Funding pressures contributed to a commitment to changing the structure of local government in Wales to reduce the number of local authorities so as to avoid duplication of services and create economies of scale. This process involves first passing a paving Bill to enable reorganisation to be designed, then legislation to implement the precise reorganisation arrangement.

⁵³ "Neighbourhood plans" were introduced in England by the Localism Act 2011. These enable local communities to create a development plan which directs development in their area. These operate on a tier below the "local plans" which are created by the local planning authority.

⁵⁴ C Mynors, *Simplifying Planning Law: a More Radical Approach* (not published).

⁵⁵ 22 local authorities and 3 National Parks.

⁵⁶ For more information, see <http://lawcom.gov.uk/> (last visited 1 July 2015).

⁵⁷ National Assembly for Wales, Record of Proceedings, Plenary: Statement: Progress on Implementing "Energy Wales", 14 May 2013.

⁵⁸ The Welsh Assembly Government vision for public services, *Making the Connections: Delivering Better Services for Wales* (October 2004).

- 5.42 The most significant legislation in this field has been heavily amended, is old and uses language that is outdated. When trying to restate the meaning of Part 4 of the Local Government Act 1972 in the Local Government (Democracy) Wales Act 2013, drafters struggled to understand what the 1972 Act had intended.⁵⁹
- 5.43 The language of the 1972 Act is archaic and there has been a substantial amount of amending legislation since then.⁶⁰

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.

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?

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?

⁵⁹ For an example, see Local Government Act 1972, s 55.

⁶⁰ This is not an exhaustive list, but amending legislation includes Localism Act 2011, Charities Act 2011, Local Democracy, Economic Development and Construction Act 2009, Local Government and Public Involvement in Health Act 2007, Local Government Act 2000, Local Government and Rating Act 1997, Local Government (Wales) Act 1994, Charities Act 1993, Local Government Act 1992.

PART 2: DEVELOPING SOLUTIONS

CHAPTER 6: PUBLISHING THE LAW: WEBSITES, TEXTBOOKS AND OTHER SOURCES

Introduction

- 6.1 Ensuring that legislation is available to the public is essential to accessibility. This is best achieved by providing up to date legislation online in an easily navigable way. In addition, accurate secondary materials, such as guidance and textbooks may provide the most useful tools to help citizens to understand the law. In our view, access to law applicable in Wales is currently deficient, though progress is being made. In this chapter, we consider how the situation could be improved.

Publishing statute law

- 6.2 The United Kingdom Government is responsible for ensuring that United Kingdom statute law is available to the public and the Queen's Printer publishes English and Welsh and also Welsh primary and subordinate legislation. This position was reviewed and reaffirmed during the passage of the Government of Wales Act 2006 in order to ensure that legislation could be found in "a consistent form and from a single location". It is beyond the scope of this project to consider where the ultimate institutional responsibility for the publication of Welsh legislation should lie.
- 6.3 Legislation available online is not the authoritative version of an Act of Parliament or subordinate legislation.⁶¹ There is no statutory obligation on the Queen's Printer to publish legislation online. In other jurisdictions, such as New Zealand and Australia, the Parliamentary Counsel Office is under a statutory obligation to publish legislation electronically as well as in printed form and, as far as practicable, on a website maintained by or on behalf of the Government, free of charge at the point of access.⁶²

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?

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

Current online legislation services

- 6.4 There are several services currently available that provide access to legislation online. Some are free of charge and some are available only by subscription. We discuss the various services available and consider the benefits and disadvantages of them in relation to the requirements of an online service for Wales.

⁶¹ The Queen's Printer's version is the authoritative version of legislation. See Interpretation Act 1978 s19(1)(c).

⁶² New Zealand Legislation Act 2012.

Public services

6.5 We look at:

- (1) Legislation.gov.uk - The United Kingdom's statute law database maintained by National Archives, which provides a specific Wales area and Welsh legislation search functions, but does not yet publish all legislation in its current up to date form including amendments;
- (2) Defralex – The Department for Environment, Food and Rural Affairs' database of legislation and guidance it is responsible for, hosted by legislation.gov.uk where legislation can be searched by subject matter;
- (3) Bailii – The British and Irish Legal Information Institute, a charitable trust, providing an online database of caselaw and legislation (as enacted) and other sources;
- (4) Wales Legislation Online – A free online database, funded by the Welsh Government and hosted by Cardiff University providing access to Welsh legislation, which was in operation from 1999 until 2012 when it was discontinued;
- (5) Law Wales/Cyfraith Cymru – The new Welsh Government database, launching in July 2015, with the aim of providing a guide to the law applicable in Wales, and including overviews of relevant areas of law and links to legislation.gov.uk for legislation.

Commercial services

6.6 Commercial services provide online UK statute law databases and other sources of law, guidance and commentary on a subscription basis. For example, Westlaw UK and LexisNexis provide fully consolidated and annotated legislation. Neither provides Welsh language versions of legislation.

What should a legislation database for Wales look like?

6.7 There is significant demand for access to legislation in an up to date form. We discuss the essential features of an online resource for legislation in Wales. We suggest that the key features might be:

- (1) The legislation must be up to date, incorporating amendments;
- (2) The database must make clear what legislation applies to Wales;
- (3) The legislation should be accessible via a general web search, using a search engine, for example Google;
- (4) The legislation should be accessible through the database's internal search engine, including search by subject matter;
- (5) Legislation should be organised by subject matter, as seen on Defralex;
- (6) It should be possible to view Welsh language legislation alongside English language legislation.

6.8 A challenge facing the creation of a successful online database is ensuring the available resources to complete and maintain it. We ask whether a system of “open source editing” would be helpful. If legal experts from outside the database could update legislation or other materials, in addition to the managers of the database, that might increase the efficiency with which the legislation is edited. The experts could be legal practitioners or academics and their work could be verified by a team of editors. The drawbacks would be an increased risk of inaccuracies, the time taken to check the work and whether there would be sufficient incentives for legal practitioners or academics to want to undertake this work.

6.9 We consider the role of “big data”, which refers to large sets of data that can be analysed in order to reveal trends, associations and patterns.⁶³ We note that a database for Wales should have the capacity to take advantage of opportunities that big data might provide in the future.

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?

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

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?

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

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?

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

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

Accessing secondary materials

6.10 In addition to legislation, we consider how other sources might be improved and also how to improve access to them. We look at the explanatory notes, published alongside Bills and the work being carried out by the Office of Parliamentary Counsel as part of the Good Law Project.

6.11 We also consider guidance, including statutory guidance. If guidance is to be

⁶³ National Archives announced a “Big Data for Law” project in February 2015. Information can be found on their website at: <http://www.legislation.gov.uk/projects/big-data-for-law> (last visited 1 July 2015).

published, it must be accurate. There may also be several sources of guidance and it can be difficult to understand which guidance is accurately describing legal obligations and which is stipulating best practice. Defra has undertaken a “smarter guidance” initiative and we consider how best to ensure that the meaning and weight of guidance is clear and that it does not usurp the authority of the primary source of the law, the legislation.

- 6.12 In addition to guidance, commentary may be provided, in the form of legal journals and online legal databases. There are several recent or current Welsh law journals, including The Welsh Legal History Society Journal; the Cambrian Law Journal; The Wales Law Journal. The Statute Law Review also often publishes articles on Welsh law and published an edition specifically on Welsh legislation in 2012. There is, however, not a substantial range of academic commentary on the law as it applies in Wales.

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

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

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?

Textbooks

- 6.13 The law is complex and textbooks can be invaluable in making the law accessible, by dissecting and explaining the law. There are currently no comprehensive textbooks that look at the law in Wales only. Textbooks addressing the law in England and Wales do not commonly consider the divergent law in Wales in detail, although there are notable exceptions.⁶⁴
- 6.14 The University of Wales Press has commissioned a “Public Law of Wales” series, to include textbooks on the Administrative Court in Wales; planning law and practice and legislating for Wales.⁶⁵ There are also plans to publish a Welsh language series of law textbooks, by Bangor University Law School with funding from the Coleg Cymraeg Cenedlaethol.

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

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?

⁶⁴ See for example, Liz Davies, Jan Luba QC and Connor Johnston, *Housing Allocation and Homelessness* (4th ed, 2015) which is to include a comprehensive account of the Housing (Wales) Act 2014.

⁶⁵ University of Wales website: <http://www.uwp.co.uk> (last visited 1 July 2015).

CHAPTER 7: CONSOLIDATION OF LEGISLATION

- 7.1 As we note above, there is a considerable and widespread demand for the consolidation of legislation applicable in Wales.

What is consolidation?

- 7.2 The process of consolidation is to replace existing statutory provisions, which are to be found in a number of different statutes, with a single Act or a series of related Acts.

Consolidation is the restatement or re-enactment of the statutory law, the form and not the substance, in a single reorganised form, bringing all the scattered relevant statutory legislation together in one statute, in order “to consolidate and reproduce the law as it stood before the passing of that Act.”⁶⁶ The long title says it is a consolidating statute. The principal purpose is to facilitate the user. Consolidation may be a prelude to reform; more commonly it is the consequence of reform, or at least change.⁶⁷

- 7.3 Amending legislation without consolidating it produces a complex result. It can create a convoluted and obscure web of statutes, all of which readers need to get to grips with before they can understand the law which applies. For those who have access to a commercially produced database of legislation, the problem is less severe, because the database provider incorporates the amendments and provides an up to date version of the legislation. However, where legislation has become fragmented over the years, even these resource are unlikely to present a coherent picture of the law.
- 7.4 Consolidation requires more than pulling together all the provisions which are currently in force. A consolidation exercise is intended to preserve the law as it stands and repeal the various earlier pieces of legislation. However, there is usually scope for modernising language and removing the minor inconsistencies or ambiguities that can result both from successive Acts on the same subject and more general changes in the law. In addition, the legislation can be restructured and provisions relating to Wales can be separated from those relating to England.
- 7.5 In Westminster and Holyrood there are special legislative procedures designed to give consolidation Bills “a fair wind, whilst protecting the system from abuse”.⁶⁸ The essential feature of the procedure in the United Kingdom Parliament is that Bills are introduced in the House of Lords and, after a second reading, referred to the Joint Committee on Consolidation etc Bills for detailed consideration. For an ordinary Bill second reading is where the principles or policy which inform the Bill are debated, before it is sent to a public Bill committee for line by line scrutiny.⁶⁹ If the Joint Committee is content with the Bill, the other parliamentary stages are

⁶⁶ *Gilbert v Gilbert* [1927] EWCA cited in A Samuels, “Consolidation: A Plea” (2005) 26(1) *Statute Law Review* 56.

⁶⁷ A Samuels, “Consolidation: A Plea” (2005) 26(1) *Statute Law Review* 56..

⁶⁸ D Greenberg, *Craies on Legislation* (9th ed 2010) para 5.3.2.

⁶⁹ Generally speaking, there is enormous flexibility and consequent variance from the usual within the Westminster system.

largely formal.⁷⁰ The Joint Committee has jurisdiction over two types of consolidation Bill:

- (1) consolidation Bills, whether public or private, which are limited to re-enacting existing law;
- (2) Bills to consolidate any enactments with amendments to give effect to recommendations made by the Law Commission or the Scottish Law Commission or both of them, with any report containing such recommendations. These Law Commission consolidations are by far the most common form of consolidation. They allow some latitude when it comes to changing the law to create a coherent, modern piece of legislation. However, changes which significantly alter the substance or effect of the law are not permitted.⁷¹

7.6 Consolidation may also be carried out as part of a law reform Bill. However, the consolidating parts of such a Bill will be subject to the full scrutiny of Parliament, so that amendments might be made to parts of the legislation where there is no intention to change the law.

Consolidation in Wales

7.7 The Welsh Government is very much alive to the benefits of consolidating the legislation applicable in Wales. Consolidation would have the added benefit of allowing Welsh legislation to be disentangled from English legislation.⁷² However, no special procedures exist for consolidation in the National Assembly for Wales, so any consolidation Bill would have to be subjected to the full procedures and scrutiny of the Assembly.

Developing a model for consolidation

7.8 In order to develop an effective programme of consolidation, it will be necessary to explore different types of consolidation and also appropriate legislative procedures within the National Assembly to support the consolidation process. We ask consultees for evidence from different types of consolidation exercises in order to create a suitable model for Wales. We give two examples: the Tax Law Rewrite project and the project to simplify immigration law.⁷³

⁷⁰ House of Commons Standing Orders 58; House of Lords Standing Order 51.

⁷¹ The scope of amendments that can be made under this procedure is limited to producing a satisfactory consolidated text and excludes changes of legislative policy, whether or not controversial.

⁷² Counsel General, Speech on Access to legislation, given 26 September 2012 to the Association of Welsh District Judges. The First Minister has announced a commitment to consolidation. In his annual statement to the National Assembly on the legislative programme, in 2011 and again in 2013, he announced an intention to consolidate existing legislation to make the planning system more transparent and accessible. See National Assembly for Wales, Record of Proceedings, 12 July 2011.

⁷³ R Kerridge, "The Income Tax (Earnings and Pensions) Act 2003" [2003] *British Tax Review* 257, as quoted in D Salter, "The tax law rewrite in the United Kingdom: plus ça change plus c'est la même chose?" [2010] *British Tax Review* 671; Secretary of State for the Home Department, Simplifying Immigration Law, The Draft Bill (November 2009) Cm 7730 p 3.

Lessons from other jurisdictions

- 7.9 In the consultation paper, we look at models in other jurisdictions. In New Zealand, there is a statutory obligation to consolidate legislation, imposed by the Legislation Act 2012. A three yearly programme of consolidation is published detailing a series of planned revision Bills, which aim to redraft the earlier law, so that it is rationalised, arranged more logically, removes inconsistencies, obsolete and redundant provisions, and modernises expression, style and format.⁷⁴
- 7.10 We also look at consolidation in New South Wales, Australia, which includes a rolling programme of two “miscellaneous provision” Bills, introduced into Parliament every year to modernise and simplify the statute book.

Discussion

- 7.11 A rolling programme of consolidation for Wales has significant appeal if supported by procedures and standing orders in the National Assembly so that the time for other legislation is not taken up excessively. However, there are a number of issues to be considered. If the Office of the Legislative Counsel was to take on this task, the resources and other work of the drafters would have to be considered. They already have a very full programme of drafting. Consolidation could be carried out where substantive law reform has already been completed, or where reform is not planned in a particular area.

Consolidation: only a partial solution

- 7.12 Consolidation is attractive in principle but there are certain shortcomings. Consolidation is a labour-intensive process, requiring the time and attention of highly skilled drafters who have to be able to satisfy themselves and the legislature that their work is exhaustive and has not changed the law, in order to benefit from any procedures for the reduced scrutiny of consolidation Bills.
- 7.13 It is difficult to measure the costs and benefits of consolidation and to ensure that the benefits outweigh the costs.
- 7.14 Consolidation can be counter-productive. With no scope to reform the law, any need for law reform, identified during the process, cannot be satisfied.
- 7.15 Consolidation only brings the law together to date. Without changing the approach to the way the law is made, the problem simply starts again with new legislation being made to amend the consolidating Act.⁷⁵

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

⁷⁴ Legislation Act 2012, Part 2, sub-part 3, s 31 sets out the powers of a revision Bill.

⁷⁵ See, for example, the Powers of Criminal Courts (Sentencing) Act 2000 which consolidated sentencing legislation but was amended within a year and several times within the next three years. For more information, see the Law Commission’s project on Criminal Sentencing Law at: www.lawcom.gov .

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?

Consultation question 7-3: We welcome consultees' views on the drawbacks and benefits of a strict consolidation or consolidation combined with law reform.

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

- 8.1 At the Legal Wales conference in Cardiff in October 2013, the Lord Chief Justice, Lord Thomas of Cwmgiedd, suggested that Wales should look towards a codified form of legislation. He said

In Wales, there is a huge advantage that Welsh legislation has but a short history. There is no reason, therefore, why it cannot develop its own innovative style... Furthermore, Wales can begin its own sensible organisation of Welsh law into a Code with chapters into which new laws can be inserted and old laws amended, much along the lines of what is done in most states. Westminster is burdened by history. It is therefore a model that does not have to be followed.⁷⁶

- 8.2 In Chapter 8 of the consultation paper, we examine this proposal. Codification of law has a long history and, in recent times, a close connection with the Law Commission. In what follows, we consider first the different ways in which the concept of a code is used, in an effort to resolve some ambiguities. Secondly we briefly review the history of codification following the establishment of the Law Commission in 1965. We then consider the extent to which the reasons for the (apparent) failure of codification as a project over those years apply to current conditions in Wales. Finally, we ask consultation questions about establishing a system of codified law applicable in Wales.

- 8.3 When considering codification, it is important to bear in mind that consolidation is an essential element of codification.

What is a code?

- 8.4 The most fundamental distinction is between common law jurisdictions, like England and Wales⁷⁷ and the many jurisdictions worldwide that have sprung from

⁷⁶ Lord Thomas of Cwmgiedd, Legal Wales Conference (October 2013).

⁷⁷ Within the United Kingdom, Northern Ireland is a common law jurisdiction, while Scotland is described as having a mixed system, with elements of pre-code European law co-existing with common law features. It shares this status with South Africa, whose traditions derive from Dutch law and the law of England and Wales, and also with Quebec and Louisiana (with a legal system derived from France and England and Wales).

it, and jurisdictions based on civil law.⁷⁸ The modern European tradition, usually dated to the creation of the Napoleonic French civil code in 1804, is for the law to be stated in codes intending to cover certain areas of law comprehensively, expressed in terms of broad principle.⁷⁹ The task of the judges is to apply these principles to the facts of a case, but the system does not rely on the development of a structure of case-law precedents, as in common law countries.

- 8.5 In common law jurisdictions, such as England and Wales, the starting point is the common law. This is the law made and declared by judges in deciding individual cases. Parliament may then intervene by passing legislation, but it does so on the basis of the accumulated wisdom of the common law. Such legislation, as befits an intervention in the richly detailed flow of the common law, is itself detailed in style and seeks to cover every possible eventuality that occurs to the drafter, unlike the broad principles of the continental codes. And, once Parliament has legislated, judges will make decisions on the legislation, authoritatively explaining and interpreting what Parliament has done.
- 8.6 We provisionally consider that the most suitable form of codification for Wales would be the bringing together of the statutory law on a single subject into one instrument without substantially changing the boundaries between statute law and case law. Where this is done without any (or any significant) change in the substance of the law, it is consolidation, as discussed in chapter 7 of the Consultation Paper. However, it is important here for two reasons. First, it is associated with substantive law reform. Secondly, it can have implications for the form of the law on a continuing basis.
- 8.7 Two examples are provided by law reform projects that have been, or are being implemented by legislation in Wales: Adult Social Care, largely implemented by the Social Services and Well-Being (Wales) Act 2014 and Renting Homes, largely implemented by the Renting Home (Wales) Bill, currently before the National Assembly.⁸⁰ The result of these projects was wholesale reform, completely recasting the legal structure. But the starting point was the seriously flawed nature of the relevant statute law. The result is effectively codification with reform of the relevant areas of the law.

Codification in other jurisdictions and Law Commission codification

- 8.8 We look at models from other jurisdictions: the Canadian Criminal Code, the United States of America, Australia and New Zealand.

⁷⁸ Both “common law” and “civil law” are potentially ambiguous terms. “Common-law” can refer both to the nature of the jurisdiction, and to judge-made law as opposed to statute law within such a jurisdiction. We use the term “judge-made law” or “case-law” for the latter in the remainder of this discussion. “Civil law”, in addition to describing continental code jurisdictions, can refer to the law that is not criminal law within a common law jurisdiction, but we do not use the term in that sense.

⁷⁹ In fact, codes had been established in some of the German states during the second half of the 18th century. The Roman law foundations of modern European law were themselves subject to codification by the Byzantine Emperor Justinian between 529 and 534: B Nichols and E Metzger, *An Introduction to Roman Law* (Oxford University Press 1975) p 38 to 42.

⁸⁰ Adult Social Care (2008) Law Commission Scoping Report, p 12. It and our final report Adult Social Care (2011) Law Com No 326. Our report, Renting Homes: the Final Report (2006) Law Com No 297, was followed up by our further report Renting Homes in Wales/Rhentu Cartrefi yng Nghymru (2013) Law Com No 337.

8.9 The Law Commission was established in 1965 with codification as one of its central roles. In the introduction to our Tenth Programme of Law Reform, we reappraised whether projects with codification as their principal outcome were “realistic and whether effort and resources should explicitly be given to achieving that outcome.” The Commission took the view that the increasing complexity of the common law, the increased pace and layering of legislation, and the influence of European legislation, made codification ever more difficult but concluded that we would continue to try to codify at the same time as reforming, where possible.⁸¹

8.10 The problems were, first, that there was inadequate interest within Government departments in codification, or law reform more generally. Secondly, there was limited support outside the Law Commission for at least the grander schemes of codification. Finally, Parliament was ill-equipped to legislate for codes. A large scale codification would involve an unrealistic investment of Parliamentary time.

Codification and Wales

8.11 We consider that there may be a greater appetite for codification in Wales today. The range of law to be considered for codification in Wales will be less than that in England and Wales as a whole, even under a reserved powers model. The National Assembly has not been equally active in all areas. More than half of the 39 Measures and Acts passed by the Assembly are devoted to the three subject areas of education, social welfare and local government. While this is not an indicator of the volume of statute law requiring consideration as part of a codification process, it may be an indicator of priority.

8.12 The seriousness of the problems of inaccessibility of the law has itself propelled the issue up the agenda of policymakers. Dissatisfaction with the form of the law in Wales extends not just to the legal professions and the judges, but also to politicians and policymakers and wider civil society stakeholders. The National Assembly is a new legislature. It has shown itself open to procedural innovation and is more likely to accept some reform of procedure than might be the case at Westminster.

8.13 We consider that the possibility of making legislation in new ways provides a real opportunity to create a novel and more embedded form of common law codification. We discuss below how best to exploit these opportunities. In particular, we consider whether codification might be more successful if the development and maintenance of codes could be seen to be effectively overseen by the National Assembly.

Reform proposals

8.14 Here we set out our consultation questions about a possible codification system for Wales. These include a structure for determining what should be codified, a codification office within the Welsh Assembly, procedural rules for the creation of codes and legislation to allow codes to have a different status from other primary legislation and to allow them to be revised and updated.

⁸¹ Law Commission, Tenth Programme of Law Reform (HC 605, 2008) pp 5 to 6.

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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 WELSH ASSEMBLY

Introduction

- 9.1 In chapter 9 of the consultation paper we consider one approach to avenues for reform which could prevent further problems of the sort we have described elsewhere. Here we discuss the possibility of harnessing the machinery of government to ensure that legislation is well designed and accessible from the start.
- 9.2 We draw in particular on lessons from New Zealand. New Zealand has notable similarities to Wales - it is a small country, in terms of population, with a unicameral legislature and a common law legal system. New Zealand has also tried and tested models which the Welsh Government and legislature can learn from. The New Zealand approach requires new legislation to conform to set standards by inserting controls into the development of policy and drafting processes before a Bill reaches the National Assembly.
- 9.3 We first set out the existing procedures for the design and control of legislation.

The Welsh Government

- 9.4 At the commencement of the current National Assembly's term, the First Minister set out a legislative programme covering the whole of the life of an Assembly. The programme was then updated with a legislative statement every year. The annual legislative statement is made in July, again by the First Minister, usually in the last week of the National Assembly term, and gives more details of the Bills that the Welsh Government intends to bring forward in the legislative year starting in the following September. In addition to Government Bills, the legislative programme also aims to allow time for Government consideration of Assembly Members' Bills and other non-Government legislation.⁸² The National Assembly passed seven Bills in each of the calendar years 2013 and 2014.

⁸² The following account is largely based on Welsh Government Legislation Handbook (3rd ed November 2014) or information supplied by the Welsh Government.

- 9.5 Internally, the development of the programme is administered by a central unit, the Legislative Programme and Governance Unit. The unit advises the Bill teams assembled in departments to work on Bills, and the lead minister on the Bill (the minister in whose portfolio the Bill falls, or, if more than one portfolio is engaged, one of those ministers appointed by the First Minister). It also advises the First Minister and the Minister responsible for Government Business (currently the Minister for Finance). The Legislative Programme and Governance Unit also provides the secretariat to the Legislative Programme Board, which provides overall strategic management of the legislative programme, as part of the more general Programme for Government.

Existing controls on legislation in Wales

Impact assessments

- 9.6 The Welsh Government has developed a sophisticated system of impact assessments. These are designed to draw out the implications of all policy developments – not just legislation – and thus to improve the quality of policy making and ultimately legislation. Some of the impact assessments provide a method for judging the effect of a policy development on particular groups of people within Welsh society, or on the environment, the economy and culture.
- 9.7 The aim is that the impact assessments form a part of the policy process throughout. They are seen by the Welsh Government as important tools designed to influence and support policy-making, and forming a key element of the appraisal of proposals.

The New Zealand approach

- 9.8 New Zealand's unicameral legislature, the House of Representatives, has twice as many members as the Welsh Assembly and its population, at 4.5 million, is larger than that of Wales, at about 3 million.

The Legislation Advisory Committee

- 9.9 The Legislation Advisory Committee was established by the then Minister of Justice in February 1986 and has enjoyed a close relationship with the New Zealand Law Commission since that time. The President of the Law Commission chairs the Committee, and the Commission undertakes research work for it.⁸³
- 9.10 It has a twofold role in relation to the quality of legislation. First, it sets standards, set out in guidelines on the process and content of legislation.⁸⁴ The Committee's second major function is the monitoring of Government legislation against its guidelines after publication and during the Parliamentary passage of the Bill. In particular, if its review raises issues of inconsistency with the guidelines, it makes

⁸³ For information on the Legislation Advisory Committee see <http://www.justice.govt.nz/publications/legislation/legislation-advisory-committee> (last visited 5 June 2015); Sir G Palmer QC, "Improving the Quality of Legislation - the Legislative Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review*. The Committee had its origins in one of the pre-Law Commission law reform advisory committees, that on public and administrative law.

⁸⁴ Legislation Advisory Committee Guidelines, *Guidelines on Process and Content of Legislation* (2014).

a submission to the Parliamentary Select Committee which, in the New Zealand system, will be considering the Bill in detail. The New Zealand Law Commission provides the reports to the Committee that form the basis of its submissions to the Select Committees.⁸⁵ The Legislation Advisory Committee thus sets the standards to be used *internally* within Government, but then monitors adherence to those standards *externally* in a way that informs the Parliamentary scrutiny process.

- 9.11 Sir Geoffrey Palmer QC was the Justice Minister at the time when the Legislation Advisory Committee and the New Zealand Law Commission were created, in 1986. In 2006, he was President of that Law Commission, and accordingly also chair of the Legislation Advisory Committee. That year, he gave a subsequently published speech where he said of the Committee:

It seems to me to be benign, but peripheral. Indeed the experience of the Committee over 20 years has led to the conclusion that most of the problems with legislation occur early in its design phase. It is often too late to perform major surgery on a Bill after it has been introduced ... Remodelling a Bill is difficult. The work needs to go into the original design. In New Zealand, almost all Bills go to Select Committee for public scrutiny and submissions, and the Select Committees alter the details of the legislation extensively in light of the submissions. However, wholesale revisions to the architecture of a Bill, while not unprecedented, are difficult to accomplish.⁸⁶

- 9.12 It was as a result of this perception that a new approach was adopted with the establishment of the Legislation Design Committee. Again, the chief architect of the Committee was Sir Geoffrey Palmer QC

The Legislation Design Committee

- 9.13 The Legislation Design Committee was established in 2006. It was also chaired by the President of the Law Commission. The New Zealand Cabinet Manual, dated 2008 describes the Legislation Design Committee as follows:

a ministerial committee that receives research and advisory support from the Law Commission. The Committee provides high-level, pre-introduction advice on the framework and design of legislation, with the goal of ensuring that policy objectives are achieved and the quality of legislation is improved ... Ministers and departments are encouraged to seek formal or informal advice and assistance from the committee at an early stage on projects that are significant in terms of their scope, involve complicated Legislation Design issues, require an innovative approach, or are likely to raise issues about the overall

⁸⁵ To browse and search Legislation Advisory Committee submissions made to Select Committees see <http://www.lac.org.nz/submissions/> (last visited 5 June 2015).

⁸⁶ Sir G Palmer QC, "Improving the Quality of Legislation - the Legislative Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review*. Sir Geoffrey Palmer QC had previously been Deputy Prime Minister, Attorney-General, Minister of Justice and Minister for the Environment, and from 1989 to 1990 Prime Minister, in addition to a distinguished career as a legal academic in America and New Zealand.

coherence of the statute book ... The Committee may also approach departments to offer assistance on relevant projects.⁸⁷

9.14 The Legislation Design Committee undertook its task as “guide, philosopher and friend to departmental officials generating difficult legislation”⁸⁸ on a series of Bills from 2006 to 2011.⁸⁹ The Committee was initially a standing advisory body, available to Government departments or agencies if its advice were sought. In late 2007, following a successful evaluation of its contribution, a more formalised procedure was adopted. The Committee still operated on an advisory basis, rather than having a screening role as part of the internal structures for the approval of legislative proposals in New Zealand.⁹⁰

9.15 The Legislation Design Committee has now, however, ceased to function.⁹¹

A new Legislation Design and Advisory Committee?

9.16 There has been a recent increase in governmental demand for better quality and more efficiently produced legislation. In 2014, the New Zealand Productivity Commission published a report entitled “Regulatory institutions and practices”, which outlined some serious problems with legislation. For example, the report observes that legislation quality checks are “under strain”, and explains that the New Zealand Law Commission’s review of Bills produced in 2013 found that over half of those Bills were deficient in some way.⁹² Subsequently, the Attorney General of New Zealand has recommended that the Legislation Design Committee be revived and merged with the Legislation Advisory Committee, to form a Legislation Design and Advisory Committee.

9.17 It is intended that this Committee would operate in a broadly similar way to the Legislation Design Committee, providing advice on Bills in their early development. However, the main difference is that, if the Attorney General’s recommendations are adopted, the new Committee would be composed of a smaller number of people, drawn entirely from the public service. The Attorney General envisages that external advisers, such as academics and lawyers, would still play a role, by for example, serving as members of sub-committees set up on an ad hoc basis to assist with editing the guidelines and LAC manual. This re-focusing of attention on improving legislation is to be welcomed.

⁸⁷ New Zealand Department of the Prime Minister and Cabinet Office, *Cabinet Manual* (2008), p 92, paras 7.34 to 7.36..

⁸⁸ Sir G Palmer QC, “Improving the Quality of Legislation - the Legislative Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 *Waikato Law Review*.

⁸⁹ Sir G Palmer QC, “Law-Making in New Zealand – is there a better way? The Harkness Henry Lecture 2014” (2014) 22 *Waikato Law Review* 4, 13 to 14.

⁹⁰ The New Zealand Law Commission, *Briefing for the Minister Responsible for the Law Commission* (2011). Available here: <http://www.lawcom.govt.nz/content/corporate-information#item1> (last visited 1 July 2015).

⁹¹ The New Zealand Law Commission, *Briefing for the Minister Responsible for the Law Commission* (2011). Available here: <http://www.lawcom.govt.nz/content/corporate-information#item1> at 17 (last visited 1 July 2015).

⁹² New Zealand Productivity Commission, *Regulatory institutions and practices* (16 July 2014).

A Legislation Office for Wales?

9.18 Sir Geoffrey Palmer QC recently presented an alternative hybrid model, a new Legislation Office.⁹³ It would be located in the National Assembly under the general control of the Counsel General. This change would be accomplished by a Legislative Standards Act, for which the Counsel General would be, in effect, the responsible minister.⁹⁴ The First Minister and Cabinet would remain responsible for the policy of the legislation. The Office of the Legislative Counsel would be transplanted to the new Legislation Office, and would form the backbone of its permanent membership. Bill teams for particular pieces of legislation would be assembled by seconding officials from the relevant Welsh Government department for the duration of the drafting and legislative process. This team would produce the information, analysis and a draft Bill to be published with a white paper for pre-legislative consideration by the National Assembly and stakeholders.

9.19 We found this proposal useful in considering how codification might work in Wales.

Reform options

9.20 We consider two options for Wales to create a structure for effective legislative design and oversight.

Using the impact assessment process

9.21 One option would be to use the existing apparatus of impact assessments to include legislation design issues. This is attractive in that it uses existing structures, but there are significant risks. In particular, a “legal impact” approach may not be so well suited to the development of policy as the other impact assessment elements.

A Legislation Design Committee for Wales

9.22 The other option could be to create a Legislation Design Committee based on the New Zealand model.

9.23 In New Zealand, the Committee was chaired by the President of the Law Commission. There is no exact equivalent in the Welsh context, but the Counsel General would seem the obvious choice. That would move away from the New Zealand model, in which all of the members of the Committee were civil servants or, in the case of the chair, a statutory office holder, to include a political figure.

⁹³ The text of Sir Geoffrey Palmer’s speech given on 25 March 2015 in Cardiff as part of the Law Commission’s 50th anniversary is available on the Law Commission website at <http://lawcommission.justice.gov.uk/leslie-scarman-lectures.htm> (last visited 1 July 2015). See Sir G Palmer QC, “Improving the Quality of Legislation - the Legislative Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 *Waikato Law Review*.

⁹⁴ Whether the National Assembly has the power to legislate for such a proposal can be argued both ways. However, that may change as a result of proposals for developing devolution made during 2015: see Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020; and The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014). We deal with questions relating to the role of the National Assembly in determining its own procedures and its legislative process below.

- 9.24 Such a committee could, however, take on a more significant formal role in Wales at key stages in the development of a legislative proposal, such as early design; the green paper/public engagement stage; the crystallisation of policy during the white paper stage; instructing parliamentary counsel; and the final draft of the Bill before introduction. If it worked, this approach could provide a mechanism for ensuring that considerations of legislative design were more integrated into the process of developing policy. The risk is that any proposal for changing the arrangements for the preparation of legislation amounts to interfering in the domestic business of government.
- 9.25 In any event, the establishment of a Welsh legislative design committee could amount to a mere bureaucratic reorganisation of the roles of individuals who are already all closely engaged in the development of the legislative programme.
- 9.26 The one potential role of a Welsh legislative design committee that, arguably, is not covered by existing legal actors is consideration of legislative design at the earliest stages of policy development, including public engagement.

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?

Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?

Consultation question 9-3: We would also welcome consultees’ views on alternative models.

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

- 10.1 The Welsh language has the status of an official language in Wales, but the English language is currently the dominant language. The 2011 census recorded a population of 3.06 million, with 23.3% of those born in Wales being able to speak Welsh. In 2012-13 it was estimated that 11% of the population of Wales were fluent in Welsh.⁹⁵ Welsh is not a community language anywhere apart from Wales (and a small settlement in Patagonia). Trying to treat Welsh no less favourably than English, in the face of the dominance of the English language on the world stage, is no easy matter.
- 10.2 The Welsh language has official status in Wales today. In particular, legislation provides for the following:
- (1) the Welsh and English languages are to be treated on the basis of equality in the conduct of proceedings of the National Assembly for Wales;
 - (2) equal standing is given to Welsh and English texts of Measures and Acts of the National Assembly and subordinate legislation; and
 - (3) there is a right to speak the Welsh language in legal proceedings in Wales.⁹⁶

CHAPTER 11: LEGAL TERMINOLOGY AND DRAFTING

Introduction

- 11.1 The suitability of Welsh as a medium for modern legal communication and debate has been established. The development of modern standardised terminology in Welsh is making good progress. In particular, a body of Welsh language legal terms has already been defined in legislation since the National Assembly started legislating in Welsh in 1999.

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?

- 11.2 There is a greater difference between spoken and written Welsh than between spoken and written English. The difficulty of “legal Welsh” may be an impediment to the accessibility of legislation and other documents, and using Welsh in legal proceedings. The National Assembly publishes a glossary (from English to Welsh) of technical and legislative terms with draft Bills.

⁹⁵ For this and further statistical information on the Welsh language, see Hywel M Jones, *A statistical overview of the Welsh language* (Welsh Language Board, 2012) chapter 6 and Hywel M Jones, “Pa ddyfodol i'r Gymraeg yn 2012?” (“What future for the Welsh language in 2012?”) (BBC Cymru Fyw, 2012) which can be found at: <http://bbc.co.uk/cymrufyw/32691390> (last visited 1 July 2015).

⁹⁶ Welsh Language (Wales) Measure, s 1.

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.

The form of bilingual legislation and drafting bilingual legislation

- 11.3 Primary legislation enacted by the National Assembly is produced in facing page format in English and Welsh. Statutory instruments are produced in a two column format with English and Welsh side by side.

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.

Drafting bilingual legislation

- 11.4 The use of Welsh as a language of statutory drafting is a very recent development. Prior to the advent of devolution there was no experience in the United Kingdom of making legislation in a bilingual form. The Government of Wales Act 2006 gives equal status to English and Welsh in National Assembly legislation.⁹⁷
- 11.5 The National Assembly and Welsh Government have been required to develop their approach to preparing legislation in two languages. In doing so, they have sought guidance from other common law jurisdictions, most notably Canada, where co-drafting takes place. We also consider processes adopted in Hong Kong where both English and Chinese are official languages.
- 11.6 In Canada, full co-drafting is used by the Canadian Federal Government. Drafters work closely together, each preparing drafts in different languages. We consider this procedure in detail in the consultation paper.⁹⁸
- 11.7 One model used in Canada is known as the “New Brunswick method”. A proposal is made by a Government department in English. An English and a French drafting lawyer attend meetings with the instructing department, which are usually held in English. The lead drafter then prepares a draft Bill and shares it with the other lawyer, who comments on it and prepares a draft in French. Each drafter works on his own document. The drafters communicate back and forth between them as they proceed, and the draft is then agreed by both drafters and the instructing department.

The developing practice in drafting bilingual Welsh legislation

- 11.8 The current system for drafting by the Office of the Legislative Counsel is for initial drafts to be produced in one language and translated into the other. The initial text is usually in English. OLC is responsible for ensuring that the Welsh and English texts are legally equivalent. The Welsh text of a Bill or an amendment is always produced at a stage before both the English and Welsh texts are finally settled. Translators and OLC drafters sometimes identify ways in

⁹⁷ Government of Wales Act 2006, s 156.

⁹⁸ S Lortie and R C Bergeron, “Legislative Drafting and Language in Canada” (2007) 28(2) *Statute Law Review* 83 at 103.

which the English text could be altered to improve the linguistic quality of the Welsh. The production of the Welsh text often highlights problems with the English which would not otherwise have been identified. OLC drafters and the legislative translators then work together to resolve the issues, changing one or both texts in an attempt to produce clearly expressed English and Welsh, which respects the natural idiom of both and achieves the same legal effect. Occasionally, OLC drafters produce text in both languages – usually when late changes are made to Bills or amendments before publication. These are then checked from a linguistic standpoint by the legislative translators. Bilingual drafters will also raise any Welsh terminology issues that occur to them with the legislative translators at any stage in the process.

- 11.9 Pre-consultation suggested that the fact that policy is first formulated in the English language makes the full co-drafting model difficult if not impossible to employ. Although public consultation is bilingual, responses in Welsh are translated into English, for the benefit of the non-Welsh-speaking officials. The policy instructions are drafted in English, as are the legal instructions. In both cases English is the common working language. In discussions with lawyers and policy officials, English is likely to be the common language once again. The use of Welsh in the pre-drafting stage would either require every internal meeting and document to be bilingual or would require certain Bill projects to be resourced entirely by Welsh speakers. Most of the conceptual work will have taken place in English before it reaches the drafters. If the drafters were to decide to “co-draft”, the lead drafter in Welsh would have to translate those concepts into Welsh and do so within the legislative framework of a statute book which is for the most part in English only. Furthermore, many laws made by the National Assembly or the Welsh Government are made in order to be part of a larger legal framework.

Discussion

- 11.10 In our view the principal objectives of bilingual drafting should be:
- (1) fidelity to the intention of the promoters of the Bill;
 - (2) consistency of meaning between the different language texts of the same provision;
 - (3) clarity of communication to two audiences;
 - (4) efficiency in the maintenance of a bilingual legal order; and
 - (5) achieving effective equality between the two languages;

- 11.11 However, we also agree with Keith Bush QC who identifies a further objective:

Our vision of the essence of co-drafting is that it is any technique for drafting in more than one language which seeks to assure to the text in each language sufficient autonomy to protect the natural forms and traditions of that language. The ideal to be achieved is 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. The desirability of striving towards this aim is not based on sentiment alone. Anyone familiar with the way in

which official documents were, and often still are, translated from English into Welsh will understand that the product, rigidly yoked to the original, may be so unnatural in its mode of expression that it becomes unintelligible to the ordinary reader.⁹⁹

Consultation question 11-4: Do consultees agree with our analysis of the objectives of bilingual drafting?

Consultation question 11-5: Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?

Consultation question 11-6: Does the system presently employed by the Welsh Government satisfactorily achieve 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?

Jurilinguists and editors

- 11.12 In Canada, drafters receive the support of jurilinguists, who are specialists in legal language. They keep up to date with the evolution of the language and seek to ensure that both versions of the legislation convey the same meaning. The Welsh Government also employs jurilinguists as part of the Welsh Government's translation service.

Consultation question 11-8: What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?

Special tools

- 11.13 The Welsh Government's translation service has produced an English-Welsh legislative vocabulary and legislative translation style guide. The OLC also have comprehensive drafting guidance as discussed in chapter 4 above.

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.

⁹⁹ K Bush (now QC), "New Approaches to UK Legislative Drafting: The Welsh Perspective" (2004) 25(2) *Statute Law Review* 144 at 147.

CHAPTER 12: THE INTERPRETATION OF BILINGUAL LEGISLATION

Introduction

- 12.1 A system in which laws are made in two languages which are to be treated for all purposes as of equal standing has created novel challenges for those required to interpret and apply them.¹⁰⁰ In particular, the question arises as to what are the appropriate means of determining the meaning of texts in different languages.
- 12.2 In this chapter we address the way in which bilingual and multilingual texts are interpreted in international law, in EU law, in Canada and in Hong Kong before considering possible approaches which may be adopted in Wales.

International law

- 12.3 We consider the approaches taken in international law to the interpretation of treaties in different languages under the Vienna Convention on the Law of Treaties.¹⁰¹

The approach of the courts in this jurisdiction to the interpretation of plurilingual treaties

- 12.4 Although the bilingual legislation which is produced by the National Assembly and the Welsh Government is the first of its kind to be produced in this jurisdiction, our courts have a long experience of interpreting international instruments.¹⁰² Here, they have shown a willingness to refer to authentic foreign language texts. Thus in *Post Office v. Estuary Radio*, a case concerning the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 as implemented by the Territorial Waters Order in Council, 1964, the Court of Appeal considered, obiter, that where there was an ambiguity in the Order in Council it would be permissible to have recourse to the Convention in its various authentic foreign language texts.¹⁰³
- 12.5 However, subsequent cases reveal a great variety of judicial opinion as to the approach to be adopted. We consider some of these in the consultation paper.

¹⁰⁰ See, for example the Practice Direction on Devolution Issues. Civil Procedure Rules, Practice Direction 3N, para. 12.1 to 12.3. Available here https://www.justice.gov.uk/courts/procedure-rules/civil/rules/devolution_issues (last visited 1 July 2015). Section 44 of the Constitutional Reform Act 2005 provides that if the Supreme Court thinks it expedient in any proceedings, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisers appointed by it.

¹⁰¹ Vienna, 23 May 1969, 1155 United Nations Treaty Series 331.

¹⁰² See, generally, E Borge, "The Vienna Rules on Treaty Interpretation before Domestic Courts" (2015) 131 *Law Quarterly Review* 78; R Gardiner, "Treaty Interpretation in the English Courts since *Fothergill v. Monarch Airlines* (1980)" (1995) 44(3) *International and Comparative Law Quarterly* 620. In doing so, they do not simply apply the canons of construction or the interpretative principles applicable to domestic legislation. See, for example, *R. v. Governor of Ashford Remand Centre ex parte Postlethwaite* [1988] AC 924 per Lord Bridge at [947]; *Assange v. Swedish Prosecution Authority (Nos. 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471 per Lord Phillips at [15].

¹⁰³ *Post Office v. Estuary Radio* [1968] 2 QB 740 at [760]. *Obiter* is a latin word for "by the way". Obiter is words or opinion of the Court that are unnecessary for the decision of the case.

The approach of the Court of Justice of the European Union (“CJEU”)

- 12.6 The European Union currently legislates in 23 languages and all language versions of a piece of legislation are equally authentic. The CJEU adopts a much less literal interpretative approach than is customary in the United Kingdom. The CJEU places provisions of Community law in context, interpreting them in light of provisions of Community law as a whole and with regard to their objectives.¹⁰⁴
- 12.7 Where the CJEU has found in favour of a particular language version, there tends to be another factor at play. This might be consistency with a wider purpose of the legislation. Alternatively, it might be some point of superiority of one or more texts over others: in one case, clarity, and in another, self-contradiction or ambiguity.¹⁰⁵

The interpretation of bilingual legislation in Canada

- 12.8 In Canada, the French and English versions of bilingual legislation at the federal and provincial levels are enacted as law and both are equally authentic.¹⁰⁶
- 12.9 Statutory interpretation of bilingual enactments begins with a search for the meaning shared by the two language versions. A critique by the Counsel General of the Canadian Department of Justice of the “shared meaning rule” concludes that a more reliable approach to interpreting bilingual legislation is to apply the accepted canons of statutory interpretation to both versions of a bilingual statute to arrive at a single meaning most harmonious with the purpose and scheme of the Act.¹⁰⁷
- 12.10 In the consultation paper, we also consider the approach taken in Hong Kong.

Discussion

- 12.11 Section 156(1) of the Government of Wales Act 2006 provides that the Welsh and English versions of the text of laws which are enacted or made in both English and Welsh shall have equal standing. In our view, this requires reference to be made to both versions of the text when interpreting bilingual statutes. Any other reading would undermine the official status of Welsh as declared in the

¹⁰⁴ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 at [20].

¹⁰⁵ See Case 9/79 *Wörsdorfer v Raad van Arbeid* [1979] ECR 2717 above where, as we pointed out, the Court did add that that its interpretation was borne out by the purpose of the provision and the principle of equal treatment of the sexes in matters of social security entitlement.

¹⁰⁶ Constitution Act 1867 (UK), s 133; Official Languages Act, R.S.C., Ch. 31, para. 13 (1985). See *AG (Quebec) v. Blaikie et al*, [1979] 2 SCR 1016 at [1022]. See, generally, M Beaupre, *Interpreting Bilingual Legislation* (2nd ed 1986); P Côté, *The Interpretation of Legislation in Canada* (2000); R Sullivan (ed.), *Driedger on the Construction of Statutes* (3rd ed 1994).

¹⁰⁷ P Salembier, “Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule” (2003) 35 *Ottawa Law Review* 75.

Welsh Language (Wales) Measure 2011.¹⁰⁸

- 12.12 We consider that the starting point must be that the bilingual texts of Welsh legislation are intended to bear a single meaning. We consider that it will be necessary to develop a body of rules concerning the approach to the identification of that meaning.
- 12.13 It seems to us that the principal objectives of interpretation of bilingual legislation in English and Welsh should be to ascertain and to give effect to the intention of the legislature and to maintain the equal status of the two languages. However, these two objectives will not always be achievable to the full extent and there will sometimes be a tension between them.¹⁰⁹

Consultation question 12-1: We welcome the views of consultees on the appropriate approach to the interpretation of bilingual legislation in English and Welsh.

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?

Consultation question 12-3: What approach should be adopted to the interpretation of bilingual legislation where different language texts bear different meanings?

Consultation question 12-4: In particular, should courts in England and Wales apply a shared meaning rule? If so, in what circumstances should it apply?

Consultation 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?

Consultation 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?

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.

¹⁰⁸ C F Huws, "The day the Supreme Court was unable to interpret statutes" (2013) 34(3) *Statute Law Review* 221 at 222; C F Huws, "The law of England and Wales: translation in transition" (2015) 22(1) *International Journal of Speech Language and the Law* (forthcoming).

¹⁰⁹ See, in the context of EU law, T Schilling, "Beyond Multilingualism: On Different Approaches to the Handling of Divergent Language Versions of a Community Law" (2010) 16 *European Law Journal* 47 at 51 et seq.; L Solan, "The Interpretation of Multilingual Statutes by the European Court of Justice" (2009) 34 *Brook Journal of International Law* 278 at 279 et seq.

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?

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?