



Law
Commission
Reforming the law

Law Commission

Form and Accessibility of the Law Applicable in Wales

Form and Accessibility of the Law Applicable in Wales

Law Com No 366

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The Law Commission

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FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES

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THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Bean, *Chairman*
Professor Nick Hopkins
Stephen Lewis
Professor David Ormerod QC
Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

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THE LAW COMMISSION

FORM AND ACCESSIBILITY OF THE LAW

APPLICABLE IN WALES

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THE LAW COMMISSION

FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES

To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

INTRODUCTION

- 1.1 Wales has a distinguished history of promoting accessible law. As the preamble to the Book of Iorwerth from 1240 notes, the 10th century laws of Hywel Dda involved a codification of the law and the ordering of it into published books:

And by the common counsel and agreement of the wise men who came there they examined the old laws, and some of them they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew ...

- 1.2 The Welsh Government's response to our consultation paper succinctly summarised the current challenges to accessibility of the law in Wales:

For Welsh laws to be accessible it is essential that they are intelligible, clear and predictable in their effect. They must also be easily available. At least three factors militate against this aim. The first is the volume of legislation with its plethora of interconnecting and cross-referenced provisions, which at the moment create something of a patchwork of law. The second is the process of devolution itself, which can make legislation within the devolved areas more complex than would otherwise be the case. The third is the extent to which legislation in its updated form, in other words incorporating amendments made in new legislation to existing legislation, is freely available to the public and available in both of our official languages.

- 1.3 As Professor Thomas Watkin pointed out in his consultation response, the needs of three readerships should be borne in mind when we consider how to address both the form and the accessibility of legislation. Professor Watkin listed them as follows:

Members of the legislature – who need to have a text before them which allows them to consider and decide upon the desirability of making changes to the law to give effect to policies with which they may or may not agree;

Legal professionals – who will need to know what changes to the law (as opposed to legislation) have been made, but may be taken to have known the law prior to the changes being made and the effect of those changes upon it;

Citizens subject to the law – who will at any time following the change being made need to know, perhaps for the first time, what the law on a particular topic is, may not be able to afford the services of legal professionals, and who will have no interest in knowing what the law was before the change and what changes were made, only what the law which affects them now is.

- 1.4 Professor Watkin went on to say that no one form of legislation could be expected to meet the needs of all of these people, but that their distinct needs should be “recognised and addressed, and the process of lawmaking, recording and publishing (in the broadest sense of rendering the law accessible) adapted to meet them.” We hope that the discussion and recommendations made in this report will be a step on the way to achieving this.

THIS PROJECT

- 1.5 This project was proposed to us by the Welsh Government as well as the Law Commission’s Welsh Advisory Committee. The Welsh Advisory Committee was established in 2013 to advise the Law Commission on the exercise of our statutory functions in relation to Wales, to help us identify the law reform needs of Wales and to identify and take into account specific Welsh issues in all of our law reform projects.
- 1.6 The project is part of the Law Commission’s Twelfth Programme of Law Reform. Our Twelfth Programme includes two projects reviewing the law applicable in Wales; the other deals with the simplification of planning law. In that project, which is currently at its scoping stage, we propose to make recommendations for the preparation of an initial piece of codified planning legislation for Wales, in accordance with the recommendations in this report. The project is described in chapter 7 and in the scoping paper that we are publishing contemporaneously with this report.¹ The development of our thinking in relation to that project has assisted the development of our thinking in this project.
- 1.7 In our consultation paper on the form and accessibility of the law applicable in Wales, published in July 2015, we set out concerns about the inaccessibility of the law and asked questions about how both the quality of the law and access to it could be improved.² In this report, we outline the responses we received to the consultation paper and make recommendations to the Welsh Government.
- 1.8 We recommend a programme of legislative activity which will be ground-breaking in the United Kingdom. It would lead to Wales creating codified bilingual

¹ Planning Law in Wales (2016) Law Commission Scoping Paper No 228.

² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223. This paper will be referred to as “the consultation paper”.

legislation for the future and presenting the law in ways that help citizens to access it.

- 1.9 It is important not to underestimate the significance of the commitment of effort and resources that will be required on the part of both the Welsh Government and the National Assembly to pursue a codification programme successfully to its conclusion. We have endeavoured to design a process that makes as much use as possible of existing practices and procedures and also one that can be undertaken at a faster or slower pace as resources permit.
- 1.10 We perceive a willingness to make this commitment at present, but we accept that governments' priorities change. This is an opportune moment to set in train structures and procedures in relation to consolidation and codification which will enable successive governments and the Assembly to continue this work at a pace appropriate to their priorities at the time. As the Welsh Government said in its consultation response:

While we in Wales do not have a blank canvas for statute law as we have inherited the law made in Westminster (giving rise to the particularly acute need to consolidate or codify), there is a window of opportunity in the coming years to create a new and more efficient structure for the new Welsh law. The quality of that structure is essential to the effective use of the lawmaking powers now held by the National Assembly, and will likely become even more important as devolution develops further.

- 1.11 Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, has observed that there is

an appetite for reform from judges, politicians, academics, the voluntary and advice sector and many more. The [consultation] paper also notes the willingness of the Assembly to innovate. All in all, there is a real opportunity for Wales to lead the way in producing better law. In fact it is an opportunity that the Assembly must grasp, as it is difficult to see how it can afford the cost of not doing so, as it will deliver better law and less cost than the Westminster model can.³

THE CONTEXT OF THE PROJECT

The requirement of accessible law

- 1.12 As Lord Bingham put it in his book on *The Rule of Law*:

The law must be accessible and so far as possible intelligible, clear and predictable.⁴

³ The Rt Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *The Law of Wales: Looking Forwards*, Speech at the Legal Wales Conference (9 October 2015). The full speech is available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/speech-lcj-legal-wales-speech.pdf> (last visited 15 June 2016).

⁴ T Bingham, *The Rule of Law* (2010).

- 1.13 Lord Bingham gave three reasons for this. First, as far as the criminal law is concerned, citizens need to know what it is that they must do or refrain from doing on pain of criminal penalty. He pointed out that one of the functions of criminal law is to deter criminal behaviour and citizens can only be discouraged if they understand what it is that they are being deterred from. Secondly and more generally, if citizens are to claim their legal rights and perform their obligations, they need to know what is required. He described the third reason as “rather less obvious, but extremely compelling”:

It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided.⁵

- 1.14 Accessibility is central to the rule of law. This is a constitutional principle within the United Kingdom that is also recognised more widely, for example as a fundamental principle of European Union law and in the jurisprudence of the European Court of Human Rights.⁶
- 1.15 Every person is subject to the law, regardless of whether they are aware of its requirements,⁷ and even of whether those requirements have been brought to their attention; an Act of Parliament takes legal effect “irrespective of publication”.⁸ This heightens the duty of government to ensure, in accordance with the rule of law, that citizens can access legislation as a matter of principle.⁹
- 1.16 The number of members of the public accessing legislation online is significant and increasing. According to the Office of the Parliamentary Counsel’s report, *When laws become too complex*, the United Kingdom’s online legislation service,

⁵ T Bingham, *The Rule of Law* (2010) pp 37 to 38.

⁶ See, for example; *Black-Clawson International Ltd v Papierwerke Waldof- Aschaffenburg AG* [1975] AC 591, 638; *Fothergill v Monarch Airlines* [1981] AC 251; *R (on the application of Salih) v Secretary of State for the Home Department* [2003] EWHC 2273, *The Times* 13 October 2003; *R (on the application of Anufrijeva) v Secretary of State for Home Department* [2003] UKHL 36, [2004] 1 AC 604; *Christian v The Queen* [2006] UKPC 47, [2007] 2 AC 400; *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74); *Case 169/80 Administration des Douanes v Gondrand Freres* [1981] ECR 1931 at [17] to [18]; *Case 257/86 Commission of the European Communities v Italian Republic* [1988] ECR 3249.

⁷ As Toulson LJ pointed out, the maxim that “ignorance of the law is not an excuse” “is profoundly unsatisfactory if the law itself is not practically accessible”. *R v Chambers* [2008] EWCA Crim 2467 at [64]. The maxim itself is doubted in A Ashworth “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 *Modern Law Review* 1.

⁸ *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230.

⁹ This does not displace the need for legal advice in order to understand the precise impact of the law in circumstances where it may have important consequences.

www.legislation.gov.uk, has over 2 million individual visitors a month.¹⁰ The National Archives, which provides the service, regularly conducts research seeking to identify the categories of users of legislation.gov.uk.¹¹ This research has identified the majority of users as persons who are not legally qualified and who do not have access to the law via a commercial subscription service.

- 1.17 Even legal professionals can experience difficulty in accessing legislation. Surveys of members of the legal profession by the Office of the Parliamentary Counsel have revealed their discontent at the poor state of accessibility of legislation.¹² Research undertaken by the National Archives indicates that even amongst “a surprising number of lawyers” there is a lack of understanding of how legislation works. For example, “people reading legislation online assume the document they are looking at is current, in force and applies to where they live”.¹³
- 1.18 In our view the creation of codes will not only assist citizens and legal practitioners; it will also offer benefits to policy makers and legislators. In our law reform work we encounter situations where fragmented law hampers the development and delivery of government policy. For example, in the course of our current project to codify the law of criminal sentencing across England and Wales, we have been told that the complexity also impedes the rational development of the law. According to policy officials, the landscape has become so confused that they cannot always be confident when advising on the likely effects of proposed sentencing initiatives. Unintended consequences of new statutory procedures cannot reliably be identified and guarded against. We have now reached the point at which it is difficult to see how the existing morass of legislation can effectively be amended. Our joint project on electoral law has revealed how the current fragmented state of the legislation in that area wastes time and resources.¹⁴ Currently reform of the law governing elections requires not only an Act of Parliament to amend the Parliamentary Election Rules contained in the Representation of the People Act 1983 but also the amendment of more than a dozen separate statutory instruments governing other elections. Changing policy in a fragmented legislative framework is a time-consuming and inefficient process.

Why is the law inaccessible?

Problems of inaccessibility of the law in the United Kingdom as a whole

- 1.19 As we observed in the consultation paper, concerns about the state of the

¹⁰ Office of the Parliamentary Counsel, *When laws become too complex* (March 2013).

¹¹ The National Assembly for Wales, Constitutional and Legislative Affairs Committee’s Inquiry into Making Laws in Wales, Evidence from the National Archives (January 2015).

¹² Office of the Parliamentary Counsel, *When laws become too complex* (March 2013).

¹³ The National Assembly for Wales, Constitutional and Legislative Affairs Committee’s Inquiry into Making Laws in Wales, Evidence from the National Archives (January 2015).

¹⁴ Law Commission, Scottish Law Commission and Northern Ireland Law Commission, Electoral Law Interim Report (2016), available online at: http://www.lawcom.gov.uk/wp-content/uploads/2016/02/electoral_law_interim_report.pdf (last visited 15 June 2016).

accessibility of the law are not restricted to Wales; they exist throughout the United Kingdom. Legislation is voluminous. The United Kingdom now has four legislatures producing primary legislation. There are some 250,000 pieces of primary and secondary legislation in force today.¹⁵ The statute book is vast, and, whether measured by word count, number of pages or number of pieces of legislation produced annually, it has been growing rapidly.¹⁶

- 1.20 The law on a particular subject does not tend to be available in one place, but in what the Welsh Government described to us as a “patchwork” of primary and secondary legislation together with other materials, such as official guidance, that do not have legislative force but can affect legal rights and obligations. This makes it difficult for citizens to navigate the law and can impede understanding of what rights and obligations apply to whom and in which circumstances.¹⁷ This is exacerbated by the fact that the majority of legislation is secondary legislation, much of which consists of provisions amending other pieces of legislation.
- 1.21 It is common for a piece of legislation to be amended by a subsequent piece of legislation; this can be done either by way of textual amendment – providing for words, sentences, subsections or sections to be inserted into or deleted from the existing text – or by way of non-textual amendment, such as by providing that references in a particular piece of legislation to the Secretary of State are to be read as references to the Welsh Ministers.
- 1.22 In recent decades, amendments of these types have been made to the law of England and Wales without carrying out any sustained programme of consolidation – the process by which legislation is gathered together into a single legislative text document or series of documents in its up to date form. The effect is that the reader can only discover what the law actually provides by reading both the original and the amending legislation, having first identified the relevant amending legislation.
- 1.23 The Law Commission’s statutory functions under section 3 of the Law Commissions Act 1965 include preparing “from time to time at the request of the Minister comprehensive programmes of consolidation [...] and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister”. Between its establishment in 1965 and 2006, the Law Commission was responsible for 220 consolidation Acts, an average of slightly more than five per year. Since 2006, only two have been produced.¹⁸ This reflects the economic difficulties of the recent period and a consequent reduction in our funding.

¹⁵ The National Archives has recently completed a project recording all legislation passed in the United Kingdom. The figure of 250,000 is constantly changing. Office of the Parliamentary Counsel, *When laws become too complex* (March 2013); J Sheridan, “Using data to understand how the statute book works” (2014) 14(4) *Legal Information Management* 244-248.

¹⁶ Office of the Parliamentary Counsel, *When laws become too complex* (March 2013).

¹⁷ See, for example *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

¹⁸ The Charities Act 2011 and the Co-operative and Community Benefit Societies Act 2014.

- 1.24 The lack of necessary consolidation can be made up for to an extent by the publication of updated texts of legislation, in which the amendments made to a piece of legislation by subsequent legislation are inserted into the text by editors. The National Archives' website legislation.gov.uk, to which we have referred above, provides a comprehensive database of primary and secondary legislation in both English and Welsh,¹⁹ but the legislation is not comprehensively up to date with the incorporation of amendments. The position is being addressed as regards primary legislation, but considerable work is yet to be done as regards secondary legislation (statutory instruments). More up to date commercial websites exist, but are only available upon subscription and do not provide Welsh language texts.
- 1.25 Equally, legislation may be inaccessible because its language, style and structure are not easily understandable or navigable by users. We discuss standards for legislation in chapter 8 and drafting style in chapter 9.

Inaccessibility of the law in Wales

- 1.26 In Wales, inaccessibility has been compounded by the nature and process of devolution. The devolution settlement has changed from the Government of Wales Act 1998, conferring executive powers only, to the first phase of operation of the Government of Wales Act 2006, under which the National Assembly for Wales could pass Measures, and then to the coming into effect of Part 4 of the Government of Wales Act 2006, giving the National Assembly for Wales the power to enact primary legislation in relation to subjects listed in schedule 7. Under the Wales Act 2014, tax-raising powers were granted to the National Assembly for Wales and, at the time of writing this report, a new Wales Bill has recently been introduced in Parliament.²⁰ Lawmaking in Wales is constantly changing.²¹
- 1.27 Laws applicable in Wales are made both by the United Kingdom Parliament and by the National Assembly for Wales. There have been successive textual and non-textual amendments to legislation made by both Parliament and the National Assembly.
- 1.28 The law on devolved subjects in the two countries increasingly diverges as their governments introduce new policies. In some cases, Parliament has changed the law in England but the National Assembly for Wales has not changed the same law in Wales. For example, the special educational needs legislation in Part 4 of the Education Act 1996 was replaced in England in September 2014 by Part 3 of the Children and Families Act 2014 and now only applies in Wales. In other cases the National Assembly has amended the law in relation to Wales but Parliament has not done so in England. For example, the Social Services and

¹⁹ In the case of Welsh legislation made in both languages.

²⁰ Wales Bill, Bill 5 (56/2). The First reading was held in the House of Commons with no debate on 7 June 2016.

²¹ For a history of Welsh devolution, see T G Watkin, *The Legal History of Wales* (2nd ed 2012) chapter 10 and Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 2.

Well-Being (Wales) Act repeals Part 3 of the Children Act in relation to Wales, but it is still in force in England.

- 1.29 Another problem is that powers given on the face of an Act of Parliament to the Secretary of State or another body have been variously transferred to the National Assembly for Wales as originally constituted, to the Welsh Ministers, and in some cases to other bodies. For example, section 45 of the Wildlife and Countryside Act 1982, as enacted, provides that the Countryside Commission (now a defunct body) and the Secretary of State have powers to amend certain orders, whereas in Wales these powers are now held by the Natural Resources Wales and the Welsh Ministers.²²
- 1.30 There is, as we have noted, no free-to-access up to date source of legislation online. The Welsh Government has established a website, *Cyfraith Cymru/Law Wales* and we make recommendations for its expansion. The British and Irish Legal Information Institute (BAILII, an independent charity) provides a database of case law, but not statutory or non-statutory guidance or explanations of the law.
- 1.31 Textbooks often exclude Welsh law entirely, or make reference to the fact that it is different in certain areas but do not attempt to spell it out comprehensively.²³
- 1.32 For all of these reasons, the law applying in Wales is particularly difficult to ascertain.

CONSULTATION

- 1.33 Consultation has been central to developing our understanding of the issues and our proposed solutions. We are very grateful to all those who have given their time and effort to helping us with this project. In particular, Richard Percival (Cardiff University) has provided us with advice both on the consultation paper and on this report. Sir David Lloyd Jones (after he stepped down as Chairman of the Law Commission) and Professor Watkin have given their time generously and commented on drafts. We have worked closely with Welsh Government and National Assembly personnel, who have given freely of their time.
- 1.34 We published our consultation paper on 9 July 2015 and consulted until 9 October. We held seminars at two Legal Wales conferences; in Bangor in

²² For a full explanation, see Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 1.47 to 1.50.

²³ Professor Watkin carried out a review of public law text books. He found that some provided good coverage of Welsh public law, such as C Turpin and A Tomkins, *British Government and the Constitution: Texts and Materials* (7th ed 2011), K Syrett, *Foundations of Public Law* (2011) and J Jowell, D Oliver and C Ocinneide, *The Changing Constitution* (8th ed 2015). In general, however, Professor Watkin found a distinct lack of coverage of Welsh public law. For example, one text published in 2013 of over 870 pages, included no coverage of devolution and only half a page on Wales. Another of 530 pages, spent 25 pages on devolution of which 5 pages covered Wales. A third published in 2011 of 770 pages in length spent 10 pages on devolution of which 2 covered Wales. Professor Watkin also noted numerous inaccuracies and lack of adequate explanation of the Welsh devolution settlement. We discuss legal textbooks in chapter 15 below.

October 2014 and in Cardiff in October 2015. We attended a seminar discussion for third sector organisations hosted by the Wales Council for Voluntary Action. We also held an Advisory Group meeting on 23 July 2015 at the Wales Governance Centre in Cardiff.

- 1.35 During the consultation period we travelled throughout Wales, speaking to stakeholders from a wide range of expertise and backgrounds: advice agencies, trade and other unions; charities and other third sector organisations; Welsh Government officials; National Assembly officials; Assembly Members; judges, lawyers and academics. We also met with stakeholders on the English side of the border. We held some 50 consultation meetings and received 47 written consultation responses and a further 28 responses to our questionnaire on the impact of inaccessibility.
- 1.36 All of these meetings and consultation responses have contributed to the formulation of the recommendations in this report. We have published alongside this report an analysis of consultation responses.²⁴

THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE INQUIRY

- 1.37 The National Assembly's Constitutional and Legislative Affairs Committee held an inquiry into the Fourth Assembly's Law-Making which gathered written and oral evidence and concluded with their report, *Making Laws in Wales*. The Law Commission submitted written evidence and appeared before the Inquiry to give oral evidence on matters including the Law Commission procedures for consolidation and technical Bills.²⁵
- 1.38 The Constitutional and Legislative Affairs Committee's report has since been discussed in the National Assembly and by the National Assembly's Business Committee, which has adopted some recommendations to be taken forward in the next Assembly.²⁶
- 1.39 There is some overlap between the issues considered in the Constitutional and Legislative Affairs Committee's inquiry and this project. The Committee made a number of recommendations which are relevant to our work. These concerned, for example, consolidation, legislative procedures, and the standardisation of Welsh language legal terminology. The Committee expressed a hope that their report would be seen as a useful contribution to our work in this project.²⁷ The Committee's report and the submissions made to its inquiry have been invaluable sources of information and have fed into the development of our policy.

²⁴ The Form and Accessibility of the Law Applicable in Wales (Consultation Analysis) (2016).

²⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).

²⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Fourth Assembly Legacy Report* (March 2016), where recommendations are made to monitor the impact of the report on *Making Laws in Wales* and to continue to promote changes to procedures and practices which benefit the quality of law made by the Assembly.

²⁷ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 22.

THE SCOPE OF THIS REPORT

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

To 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.

- 1.41 This project concerns access to the law in its up to date form, including primary and subordinate legislation, statutory and non-statutory guidance and other sources of law, such as the common law and case law. We look at how to ensure that law is made in a way that is accessible, including Welsh and English language versions, using modern language that citizens can understand. We also look at how to ensure that legislation is enacted and maintained in a consolidated form, so that legislation in a particular field – for example, education or planning – can be found, as far as possible, in a single document. We look at how best to publish legislation and explanations of the law online and how to mitigate the lack of textbooks covering Welsh law. We also look at the continuing development of Welsh as a legal language and how best to support it for the future.

Matters raised by consultees that are outside the scope of this project

- 1.42 In meetings and in consultation responses, matters were raised which are relevant to the issues covered in this project, but are beyond its scope. We mention these issues in order to represent accurately the views of consultees and the relevance of these issues to the accessibility of the law in the eyes of stakeholders. These are issues that the Welsh Government may wish to explore in due course.
- 1.43 Several consultees raised questions relating to access to justice and the increasing numbers of litigants in person appearing before the courts. For example, Citizens Advice Cymru stated that the clarity of legal language is “evermore important” in light of reductions in the availability of legal aid and the “alarming rise in litigants in person”. Citizens Advice Cymru thought that “clerks, lawyers and policy makers” will need to keep the rise in litigants in person in mind when drafting law as there is a “greater need for information to be accessible to the public”.
- 1.44 Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales made a similar point:

If legal aid is not available and lawyers are too expensive for the ordinary person to afford, then 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. That is to say, we need better-drafted law and better-organised law.²⁸

- 1.45 Whilst issues of access to justice are outside the scope of this project, we have taken to heart the need for legislation to be accessible to the ordinary citizen who does not have the benefit of professional legal advice.
- 1.46 Several consultees expressed concerns about a lack of legal and judicial training on the law applicable in Wales and for those practising through the medium of Welsh. Law courses and even judicial training primarily cover the law of England. Several mentioned training sessions on new areas of law where the law of England was covered but not the divergent law of Wales.
- 1.47 Those working in the courts told us of the lack of availability of suitable resources to look up the law in the courts. Courts rarely had computers linked to the internet in the courtroom, and the buildings rarely had wireless connections to the internet. This meant that if an unexpected point arose, it was difficult to look it up. This was not limited to Wales, but was exacerbated in Wales by the absence of legal textbooks providing up to date Welsh law.
- 1.48 Some consultees complained of a lack of communication and collaboration between the legislatures in England and Wales and a lack of communication between the Welsh and United Kingdom Governments. An example given was a lack of communication between both governments with regard to the Civil Procedure Rules, which has meant that the Civil Procedure Rules have not been updated correctly. The Association of Judges of Wales advocates the setting up a UK/ Wales Government Office to co-ordinate work.
- 1.49 The Association of Judges of Wales referred to the “little appreciation in England of the impact of Welsh devolution and the powers of the National Assembly to change the law as it applies in Wales”, making a wider point about the need for continued communication between the legal communities in both countries.

THE COST OF INACCESSIBILITY

- 1.50 Governments have to decide how best to spend their limited resources. In order to help the Welsh Government decide what steps to take to improve access to the law, we have looked at the costs of inaccessibility and attempted to weigh the costs and benefits of our recommendations. These are published alongside this report in an economic impact assessment.²⁹
- 1.51 In the consultation paper we asked consultees to provide information and examples of the costs and benefits of the proposals we made.³⁰ Consultees

²⁸ 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 (11 October 2013).

²⁹ The Form and Accessibility of the Law Applicable in Wales (Impact Assessment) (2016).

³⁰ For a discussion on the costs of accessibility, see Form and Accessibility of the Law Applicable in Wales (2015) Consultation Paper no 223, paras 1.61 to 1.71.

pointed out the difficulty of quantifying the cost of inaccessible law; we agree that this is a difficult task.

- 1.52 It is more or less self-evident that there is a cost. If it is difficult to find out what the law is, it will take longer to carry out a piece of legal research, which could have consequences on other work. It may be impossible or at least disproportionately expensive for a citizen to find the law. A person might decide not to pursue certain commercial or other projects because they cannot easily determine what their legal position is.
- 1.53 A lack of clarity as to what the law is can contribute to a tendency against bolder or more imaginative decisions. David Michael (Neath Port Talbot County Borough Council) pointed out that
- Lawyers working with inadequate materials against strict time limits will sometimes err on the side of caution or give advice which is so qualified that it is of limited value.
- 1.54 We have asked about these things in consultation and have been given descriptive examples, but we cannot provide a monetary estimate for the costs to the economy as a whole.
- 1.55 Dame Rosemary Butler AM, Presiding Officer of the Fourth Assembly, wrote:
- It is not possible to quantify the costs and benefits of consolidation and/or codification at this stage. However, I can say with confidence that the time taken for research by Assembly lawyers would be significantly reduced. I am also advised that the same applies to lawyers and officials in other parts of the public sector. This would achieve resource efficiencies and possibly even cash savings. Codification in particular would have a significant impact in terms of time saving, particularly if secondary legislation, guidance, directions, circulars and other relevant legislation were all linked to the relevant code.
- 1.56 We published a questionnaire and circulated it at consultation meetings. We received 28 completed questionnaires and these have been analysed in the consultation analysis and used to develop our impact assessment. In summary, the questionnaires showed a cost in time, a lack of confidence in results of legal research and errors. This supported the evidence we heard from consultees in meetings.
- 1.57 Resources will be needed to implement the recommendations we make in this report. In particular, additional legislative counsel will be needed to draft codes and to staff the code office whose setting up we recommend, more personnel will be needed to enhance and develop the *Law Wales/Cyfraith Cymru* website in the manner we suggest and editors will be needed to carry out work to catalogue and improve the availability of up to date Welsh legislation at the National Archives on legislation.gov.uk.
- 1.58 The current economic situation has not only contributed to the disorderly statute book that the Welsh Government and people have inherited; it continues to hamper the provision of the resources needed to address that disorder. With this in mind, we have endeavoured to fashion a model for producing more accessible law that makes as much use as possible of existing mechanisms and procedures

and avoids the proliferation of new ones. It will also enable more or fewer resources to be devoted to the project of producing more accessible law, depending on the desired pace of improvement and the scale of the resources available. We believe that the future benefits of improvements to the accessibility of the law for all citizens in the longer term will far outweigh the cost, making savings for the future.

THE STRUCTURE OF THIS REPORT

- 1.59 Following this introductory chapter, chapters 2 to 6 discuss the consolidation and codification of the law applicable in Wales and make recommendations for the structures and procedures required to carry out a codification programme.
- 1.60 Chapter 2 looks at codification and consolidation in principle and recommends a programme of codification, as we define it in that chapter. Chapter 3 recommends procedures for the delivery of codification, in particular the standing orders and committee work required. We recommend procedures to ensure that Bills do not take up unnecessary time in the full Assembly while receiving an appropriate level of scrutiny. In chapter 4 we look at how to preserve codes once made, so as to avoid the fragmentation of legislation in the future. Chapter 5 makes recommendations about secondary legislation.
- 1.61 In chapter 6 we discuss the development of a codification programme and propose the establishment of a Code Office led by the First legislative Counsel and reporting to the Counsel General.
- 1.62 Chapter 7 discusses the case studies that we used in the consultation paper to illustrate areas which might benefit from codification together with discussion of approaches to the priorities for codification. We look most closely at the planning law in Wales project that the Law Commission is currently undertaking as a model for the procedures we are recommending.³¹
- 1.63 In chapters 8 and 9 we turn to legislative standards and drafting techniques, as well as considering the documentation that is produced to help parliamentarians and general readers to understand Bills and legislation.
- 1.64 Chapters 10 to 12 look at issues relating to bilingual legislation. We make recommendations as to a system for the standardisation of legal terminology in the Welsh language and how best to achieve real parity between the Welsh and English language versions of legislation. We consider how the courts might approach the interpretation of bilingual legislation in the future.
- 1.65 In chapters 13 and 14 we move from making the law to publishing the law; we consider how best to provide access to the law online, free at the point of access and how to ensure that the information provided is useful to citizens, legal and non-legal professionals and those working in government. We make recommendations for the *Cyfraith Cymru/Law Wales* website to become a legal portal providing access to a wide range of law applicable in Wales, including both legislation and official guidance. Finally, chapter 15 discusses the provision of instruction and guidance upon the law in Wales, to students, practitioners and the general public.

³¹ Planning Law in Wales (2016) Law Commission Scoping Paper No 228.

CHAPTER 2

CONSOLIDATION AND CODIFICATION

INTRODUCTION

- 2.1 When we look up the law on a particular topic, it helps if we can find it all in one place, in as few documents as possible and ideally set out in a single narrative. The traditional method of amending existing statutes is to enact one or sometimes several subsequent statutes which either set out textual amendments to the original statute or alter its effect without amending its text.¹ This requires the reader to look not only at the original statute but also at the subsequent ones and to appraise the effect of the later ones upon the earlier. This is a time-consuming task, difficult for lawyers and particularly so for other readers.
- 2.2 To some extent, these difficulties can be helped by improved access to a database of legislation with amendments incorporated into the text; we make recommendations as to this in chapter 13. Access to such a text removes the need to track down and incorporate the effect of textual amendments, but it does not assist much with ascertaining the existence and effect of non-textual amendments, nor with the problem of identifying all the legislation that governs a particular field.² The present chapter introduces our proposals for improving legislation at the level of statute itself and for maintaining the integrity of the improved text – consolidation and codification.
- 2.3 In the consultation paper we considered a number of models for creating and maintaining a body of accessible Welsh law. We presented as options consolidation, codification and what we termed control mechanisms, such as legislative impact assessments and legislative advisory and/or design committees. In particular, we considered the nature and advantages of legislative consolidation and made a case for a form of codification.³
- 2.4 In the consultation paper each of these options was considered in a separate chapter, in isolation from the others. This led some consultees to view them as alternatives. For example, the Wales Governance Centre saw

codification as by far the most effective and innovative way to radically improve both the substance and the accessibility of the law in Wales. Accordingly, we do not see either consolidation or bureaucratic control mechanisms as playing a significant role.

¹ We discuss the difference between textual and non-textual amendments in the consultation paper at paras 4.44 to 4.47. A textual amendment is a provision altering the words of an earlier piece of legislation by inserting, substituting or omitting text. A non-textual amendment changes the effect of a legislative provision without changing its wording.

² For example, the scoping work on our planning law project has discovered the existence of almost 50 pieces of legislation relating to planning in Wales. See Planning Law in Wales, Law Commission Scoping Paper (2016) No 228.

³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapters 7 (consolidation), 8 (codification) and 9 (control mechanisms in the Government and legislature).

- 2.5 Having considered the consultation responses in the round, we do not see these options as mutually exclusive. Consultation meetings and responses supported our developing view that combining aspects of them could benefit lawmaking in Wales. In this report, we make recommendations that draw together the benefits that can be gained through a combination of aspects of each of those options. This chapter and the two that follow consider consolidation and codification, while our recommendations as to machinery within government are contained in chapters 6 and 8.

CONSOLIDATION AND CODIFICATION

What do consolidation and codification mean?

- 2.6 The terms “consolidation” and “codification” are used in different contexts to mean different things. We define here what we intend consolidation and codification to mean for the purposes of this report and our recommendations.

Consolidation

- 2.7 Consolidation is the process by which existing statutory provisions, spread across different statutes, are replaced with a single Act or a series of related Acts.⁴ Consolidation rationalises existing legislation. At its narrowest, consolidation merely restates the law without changing the substance. The new text produces precisely the same legal effect as the texts it replaces. Consolidation may, however, be accompanied to a greater or lesser extent by alteration of that legal effect; we say more about this below.
- 2.8 Consolidation is essentially a remedial process, solving problems of fragmentation for so long as the law remains unchanged. A government is, however, likely at some point to wish to change the law in the consolidated area by further legislation either amending the consolidated statute or making fresh provision in parallel to it. Indeed, by making the effect of the law clearer and easier to understand, consolidation can provide a good starting point and foundation for future reform. Subsequent reform leads, however, to the legislation becoming fragmented again; the cycle of legislative accretion resumes, generating a renewed need for consolidation. The planning legislation of England and Wales is a good example of this process: it was consolidated in 1990 but the consolidated legislation has been repeatedly amended and supplemented since then, with the result that the legislation is once again fragmented.⁵

Codification

- 2.9 As we explained in the consultation paper, the term “codification” can be understood in a number of different ways⁶. Many continental European countries have codes whose drafting style is different from that employed in common law

⁴ For a more detailed explanation of what “consolidation” means, see: Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.4 to 7.10.

⁵ For example, see Planning Law in Wales, Law Commission Scoping Paper (2016) No 228, chapter 6.

⁶ For a more detailed explanation of what “codification” can mean, see: Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, pp 140 to 160.

jurisdictions, tending to set out legal principles which the courts apply to individual cases. In common law jurisdictions, by contrast, law is made both by judicial precedent and by legislation; the legislation is detailed, and judicial interpretation of it is focussed on determining the legislative intention underlying its wording.⁷ We did not propose codification on the continental model.

- 2.10 The term “codification” can also imply that all of the law on a particular subject is brought together in a single piece of legislation. A “subject” for these purposes can be understood in a wide sense, as in a criminal code or a code of contract law. Codification may also consist of statutory restatements of a narrower subject-matter, such as the 19th century Sale of Goods Act 1893 or the Partnership Act 1890. Whilst these were drafted as self-standing pieces of legislation, they could equally take the form of chapters within a larger code.
- 2.11 The term can also refer to the process of reproducing judge-made law (the common law) in legislation.
- 2.12 We have not envisaged for Wales the introduction of codes on the continental model briefly described above. Nor have we envisaged a programme of bringing into statute areas of law that presently remain governed largely or entirely by the common law. That has largely been done in a process that started with nineteenth century codifications such as the two we have referred to and others in, particularly, the field of criminal law.
- 2.13 What we call a “code” in this report has something in common with the statutory restatements referred to above. A code will be an Act of the National Assembly which should stand upon enactment and in the future as the only statement of primary legislation on a given topic. The process of codification encompasses production of an Act of this kind and the labelling of an appropriately comprehensive Act or Bill as a code. We discuss both of these features further below.
- 2.14 There are two main differences between codification as we envisage it and consolidation as traditionally understood. One essential feature of codification is that it is a means of providing a rational format for future legislation. Codification of statute law implies that codes should, once created, stand as the main – or, if possible only – source of primary legislation covering their subject-matter. It also implies that the status of a code as the comprehensive and up to date source of law should be preserved notwithstanding subsequent amendments of its terms or further legislation in the area, both of which should be incorporated into the code. In short, codification preserves for the future the advantages achieved by consolidation.
- 2.15 The other difference is as to the degree of alteration of the substance of the law that might accompany the exercise. We discuss this next.

⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.4 to 8.10. As we explain in the consultation paper, the accounts of these models is over-simplistic. The nature of codes differs in civil law jurisdictions and can include following other judges’ decisions without a formal system of precedent. In our common law system, it is anachronistic to see statute law as subordinate to the common law.

Consolidation, codification and reform

- 2.16 Both consolidation and codification may be accompanied by a greater or lesser measure of alteration of the substantive effect of the law. In Westminster and other common law jurisdictions, consolidation Bills go through expedited procedures, which take up less of the legislature's time and provide less scrutiny. This is in recognition of the fact that consolidation does not make substantive or significant changes to the law. As a result, Parliamentary consolidation procedures do not allow for law reform. However, it is not always possible, or at all events satisfactory, to consolidate existing law without removing inconsistencies or ambiguities or remedying slips that can result from successive pieces of legislation covering the same subject matter.⁸
- 2.17 The consultation paper discussed various models as to the degree of alteration of the effect of the law permitted in a consolidation exercise that exist in the United Kingdom Parliament,⁹ in New Zealand¹⁰ and in New South Wales.¹¹ The degree of alteration that they permit is of limited scope and would not generally be described as law reform. We suggested in the consultation paper that codification could usefully be accompanied by a greater measure of reform than typically accompanies a consolidation exercise in the United Kingdom Parliament.¹² We return to this topic in chapter 3.
- 2.18 We also suggested in the consultation paper that, where appropriate, some bringing of rules derived from judge-made law into statutory form might also improve the accessibility of the law in a particular area. We had in mind, for example settled case law establishing rules within the subject area of a code that could usefully be made more accessible by their inclusion in the code, as well as case-law that supplements particular statutory provisions by, for example, filling gaps or supplying definitions of undefined statutory terms. Such determinations should, we suggested, be made on a case by case basis.¹³
- 2.19 In short, codification as we have envisaged it differs from traditional consolidation in that (a) it is accompanied by a greater measure of reform of the legislation than is traditional in consolidation and (b) once a code is on the statute book, further legislation within its subject area (whether amending or adding to the existing text) is effected by amendment of or addition to the code and not in separate

⁸ The procedures at Westminster are described in chapter 3.

⁹ The procedure under the Consolidation of Enactments (Procedure) Act 1949, discussed in Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.19 to 7.21; the "Law Commission consolidation" procedure, discussed in paras 7.28; and the making of pre-consolidation amendments, discussed in paras 7.29 to 7.32.

¹⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.64 to 7.74.

¹¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.75 to 7.78.

¹² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 8.134.

¹³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.75 to 8.77.

freestanding legislation.¹⁴

Lessons from consultation

- 2.20 In the consultation paper, we asked two questions about the desirability, first, of consolidation:

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?

- 2.21 In addition, we welcomed

consultees' views on the drawbacks and benefits of each of the models of consolidation described above, including pure consolidation and consolidation combined with law reform.¹⁵

Support for rationalising and simplifying legislation

- 2.22 Though consultees were not specific as to the detail of what they understood by consolidation, there was overwhelming support for some form of rationalisation and simplification of legislation applying to Wales. The increasing divergence of law between England and Wales was seen as leading to a pressing need for this process to happen as soon as possible.

- 2.23 The Welsh Government noted that the statute book across the whole of the United Kingdom would benefit from consolidation. Consolidation in Wales and England would

involve disentangling often complex legislation which applies to both countries in different ways.

- 2.24 If it were to pursue consolidation, the Welsh Government hoped that it would not be doing so in isolation.

- 2.25 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) agreed that there is a need for consolidation in Wales and stated that a consolidation process should

“proceed field by devolved field, starting with the fields of most impact on the citizen and on businesses in Wales”.

- 2.26 Meri Huws (Welsh Language Commissioner) also saw advantages in the consolidation of legislation. Nick Bennett (Public Services Ombudsman for Wales) noted “that to facilitate searching for laws it would be useful to have access to a consolidation of Welsh law e.g. all local government provisions in one place.”

- 2.27 The Law Society Wales commented that

¹⁴ This “code discipline” is discussed in chapter 4.

¹⁵ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, p 139, consultation questions 7-2 and 7-3.

there is a particular need for consolidation in Wales because of the period of executive lawmaking and the increasing England-only amendments to England and Wales legislation. Those areas of the law in Wales which have seen landmark new Assembly Acts such as social care, housing, planning and the environment would benefit from a consolidation exercise. Consolidation has featured in lawmaking and over time has been an effective tool.

- 2.28 However, some consultees considered that publishing an updated statute book online was more feasible than introducing a programme of consolidation. Emyr Lewis (Blake Morgan LLP) highlighted the challenge presented by consolidation. He noted that the process would “involve considerable time and resource to implement” and would be “unlikely to cover all relevant topics”; investing in publishing of law could give the citizen access to accurate up to date versions of legislation.
- 2.29 Universities Wales took a similar position and saw consolidation as only part of the solution. They focused on the more immediate benefits that improvements to the publishing of legislation would offer. Universities Wales recommended that, if consolidation was pursued, this should be approached incrementally. Areas of most immediate priority or areas to be targeted for reform should be focussed on.
- 2.30 On the other hand, Daniel Greenberg (Berwin Leighton Paisner LLP) explained how a proper consolidation achieves much more than an updated text of the sort produced by a law publisher. He set out a compelling case for consolidation. He described a thorough consolidation programme as “urgently required” and identified the benefits of consolidation versus online publication:

In cases where the law has become complicated for one of a variety of reasons, and what is needed is re-presentation in a form which is easier to absorb, consolidation legislation has a vital role to play. This is not mere editorial work, such as can be achieved by the editors of electronic texts: it is expert legal work, where the requirement not to impose substantive change requires as great expertise as that of a painter who is asked to restore an ancient and valuable painting while preserving picture, colour, texture and nuance.¹⁶

The scope for substantive law reform in consolidation

- 2.31 Some consultees emphasised the advantages of traditional consolidation, while others considered that greater scope for substantive reform was required for consolidations to be successful.
- 2.32 Keith Bush QC expressed the view that the need for a legible, bilingual body of Welsh legislation was so great that the focus should be on consolidation. This would involve no substantive changes to the law, and would therefore deserve a speedy legislative procedure in the National Assembly for Wales.
- 2.33 David Michael (Neath Port Talbot County Borough Council) thought that

¹⁶ Daniel Greenberg is a former member of the Office of the Parliamentary Counsel and is a drafter whose recent work has included drafting legislation for the National Assembly for Wales.

traditional consolidation would be of limited effect and that consolidation with a limited element of law reform would give rise to greater benefits. Marie Navarro (Your Legal Eyes) and the Legal Wales Foundation agreed with this view, as did Dr Sarah Nason (University of Bangor), although her comments were confined to administrative justice in Wales. The Law Society Wales also noted that its members supported consolidation with law reform. Huw Williams (Geldards LLP) suggested that different models of consolidation would be suitable to specific subject areas. For example, education law may be more suitable for traditional consolidation whilst local government law may be suitable for a programme of consolidation with reform.

- 2.34 Whilst there were differences of opinion as to the priorities, several consultees saw merit in consolidation being combined with reform and no consultee objected to this in principle. For reasons further developed in chapter 3, we see merit in procedures that enable consolidation or codification projects to involve some degree of substantive law reform.

The advantages of codification

- 2.35 Most consultees expressed support, in principle, for codification. A number of consultees stressed that a failure to initiate a programme of codification would be a missed opportunity. Some expressed caution and a few took the view that any benefits would be outweighed by the problems codification could cause. Generally, consultees acknowledged and highlighted the benefits of consolidation and codification for accessibility of the law. Many consultees also observed that for codification to be successful, the institutional actors, the Welsh Government and the National Assembly for Wales, would need to commit time and resources to it.

- 2.36 The Welsh Government was

of the view that the important issue is that an authoritative and comprehensive statement of the law is available together. It is important also to establish a coherent structure setting out the law by subject. Thought would need to be given also to the extent to which secondary legislation should be incorporated and how supporting “soft law” would be accessed [...]

Codifying the common law in some areas would, if feasible, also improve access to the law though many argue that some of the common law is not suited to being reflected in statute and more generally its inherent flexibility could be lost.

- 2.37 Professor Thomas Watkin also expressed support for codification:

There can be little doubt that the needs of [citizens] would be well-served by a code, consolidating the law or at least the legislation on a particular topic – such as education, health or planning. Nor should there be any doubt that, in a democracy – or at least in a democracy where legal advice is not free at the point of need – the needs of [citizens] should be paramount. The needs of [members of the legislature] and [legal professionals], however, must also be met for democratic government to function and function efficiently.

To meet the needs of [citizens], a code of law on a particular topic not only needs to be made, it needs to be subsequently maintained, or else the advantages of its creation are gradually lost. The creation and maintenance of such a code or codes requires therefore a steadfast political will to undertake the exercise, see it through to completion and thereafter resource its continued maintenance. Without such a clear, prior commitment, it is not worth starting the exercise.

2.38 The importance of ensuring that adequate resources are invested in a programme of codification, including the professional capacity required to manage the process, was noted by the Welsh Local Government Association. The Association of London Welsh Lawyers emphasised that, given Welsh devolution is still comparatively young, now is a “great opportunity” to codify Welsh law, and this opportunity should be seized. The Welsh Local Government Association made a similar point.

2.39 The Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, also expressed support for codification:

As I have said publicly, the element of the consultation which I consider to be of fundamental importance, and which has the potential to make the greatest contribution to the future development of Welsh law, is in respect of codification. I can understand that in some respects consolidation of the law could be seen as a more attractive, and somewhat easier, option. However, I remain firmly of the view that codification presents a more sensible and long-term solution, and I fully endorse the direction the consultation takes in this regard.

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

2.40 Daniel Greenberg raised two objections to codification. First, Mr Greenberg considered that it would be unrealistic to expect the disciplines inherent in maintaining the integrity of a code to be obeyed. Secondly, Mr Greenberg suggested that it is not necessarily the case that free standing legislation is less helpful to the reader than absorption into a pre-existing code. We consider these objections in detail below.

What should codification involve?

2.41 In the consultation paper we asked two questions about what kind of codification, if any, would be desirable for Wales:

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?

Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?¹⁷

2.42 Consultees expressed differing views as to whether the aim of codification should include the bringing of judge-made law into statutory form, as well as reorganising statute law. Mr Bush QC noted that the bringing of judge-made law into statutory form may not necessarily be “practical”. Dr Sarah Nason said that the codification of common law principles may “stultify progressive development” of those principles.

2.43 However, the Association of London Welsh Lawyers supported the suggestion that codification should include bringing judge-made law into statutory form. They argued that it would improve the accessibility of the law because judge-made law is uncertain and the process of identification and interpretation of judge-made law is not accessible to those not trained in it. The Association acknowledged that this form of codification should not fundamentally alter the relationship between statute law and judge-made law.

2.44 The Association of London Welsh Lawyers also noted benefits for bilingualism in Wales, in the following terms:

If statute law is to be authentic in both languages, would court decisions, and the reasoning for them, also need to be available and authentic in both languages? If law is to be found in the decisions of judges, one assumes that that would have to be the case, adding a considerable burden of additional work and cost. If the sole authoritative source of the law were a code, the work of drafting and maintaining it in two languages should be manageable. Whilst judge-made decisions would have relevance as to the interpretation of the code, their significance would be limited, especially if the code were regularly updated so as to incorporate or reject such judicial interpretation. Hence, the need for dual language – or translated – judgments would be less.

2.45 The views of the Association of London Welsh Lawyers were consistent with those expressed by the Association of Judges of Wales. The judges considered that the incorporation of judge-made law into codes would continue to enable judges to interpret and supplement the law, pending future review by the legislature which might incorporate the judge-made law developments into the statutory code.

Restatement of the law outside competence

2.46 Ideally, a code would include all of the relevant legislation on that topic. However, any codification or consolidation exercise in Wales will be constrained by the

¹⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, p 156, consultation questions 8-1 and 8-2.

legislative competence of the National Assembly. The effect of section 108 of the Government of Wales Act 2006, when taken together with Schedule 7 to that Act, is that there are subjects in relation to which the National Assembly is unable to make provision, even by way of restatement of the existing law. The result is that where a legal topic which is in need of consolidation or codification is made up of several subjects, some of which are within competence and some of which are not, the National Assembly will be limited as to what it can achieve.

- 2.47 An example from family law illustrates the limitations of this power. The Association of Judges of Wales wrote:

Ideally, those provisions of the Children Act 1989 relating to public law proceedings which currently remain applicable to Wales supplemented by those parts of the [Social Services and Well-Being] (Wales) Act 2014 which apply to children in Wales would be re-enacted in 1 statutory code with explanatory footnotes referring to the relevant subordinate legislation in force in Wales (whether arising under the [Children Act] 1989 or 2014 Wales Acts).

[...]

In public law children work, there is [...] a broad division (i) between the competence of Westminster, able to legislate substantively in this area and (ii) the competence of the National Assembly which is responsible for many of the agencies providing key services supporting family law, eg Cafcass Cymru, local authorities in Wales, the Adoption Service operating on an all-Wales basis.

- 2.48 Accordingly, the relatively straightforward codification process identified above would require the transfer of legislative competence in respect of public law family (if not public and private law) provision to secure this objective.

The case for consolidation and for codification

- 2.49 Consultees clearly stressed the need for the rationalisation and simplification of the legislation that applies in Wales. They almost unanimously supported a programme of consolidation as a means of drawing together fragmented and complex legislation into a rational and coherent framework. The majority of consultees also considered that a process of consolidation should provide scope for more than mere restatement of the existing law. In order to improve the intelligibility of the legislation, there should be scope for substantive reform. This would enable a greater degree of modernisation and simplification of the substantive legal rules to be achieved.
- 2.50 We recommend that a process should be undertaken of bringing together existing legislation which is currently scattered across various pieces of legislation of the United Kingdom Parliament and/or the Assembly in a piece of Assembly legislation. We see an important role for improved access to an official database of legislation incorporating amendments to legislation and we discuss this in chapter 13. We also recognise the advantages of consolidation over editorial amendments as described by Daniel Greenberg above.
- 2.51 In the context of Wales, such a process would have the additional advantages of

presenting to the reader the law that applies in Wales in an accessible form. It would also curb the tendency for Westminster statutes to exist in different forms in England, in Wales and, sometimes, in Scotland and Northern Ireland too.

- 2.52 Any such process should be accompanied at least by the degree of substantive alteration of the effect of the law permitted by the procedures that exist in Westminster and are discussed in chapter 4. “Pure” consolidation – involving no change at all to the effect of the law – rarely produces a satisfactory text and has not been practised at Westminster for many years.
- 2.53 We recommend that the process should be capable of being accompanied by a greater degree of alteration of the substance of the law than is permitted by the procedures at Westminster. As we pointed out in the consultation paper, the limited scope that those procedures offer for improving legislation in the course of consolidation lead to effort being expended in preserving features of the law that may not be worth preserving.¹⁸ In chapter 3 we make recommendations as to procedures in the Assembly that could accommodate Bills that bring legislation together along with law reform.
- 2.54 Many consultees also recognised the limitations of solely pursuing consolidation. Without a mechanism for preserving the product of a labour-intensive consolidation exercise from future fragmentation, the benefits of consolidation are quickly lost. A number of consultees therefore expressed strong support for codification because it is, as the Lord Chief Justice pointed out, a “long term solution” to the problems that we identified in chapter 1. The key advantage that we perceive in codification is that it would preserve intact the simplified and modernised legislation produced by the process we have just described. Comprehensive codification would also enable citizens to look up the law governing a particular area in a single place.
- 2.55 We recommend that the ultimate goal of the Welsh Government and the National Assembly should be the organisation of primary legislation into a series of codes dealing comprehensively with particular areas of devolved law. We recognise that this goal will only be achieved slowly, for two reasons.
- 2.56 First, the scale of the task is such that progress can only be achieved in stages; the Law Commission’s own experience, described in the consultation paper, counsels against attempting to plan an entire scheme of codification at once.¹⁹ Secondly, it would be unrealistic in present conditions to expect resources to be made available to carry out all of, even, the work that can immediately be seen to be required. We are endeavouring in this report to chart a course that we think Wales could profitably follow; the speed of progress will depend on the resources that can be made available. A serious commitment of resources will be required if the project is not to falter but, beyond that minimum, a higher or lower level of resources can be allocated as circumstances permit.
- 2.57 We suggest that the process should begin as follows. First, those areas in which

¹⁸ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 8.130.

¹⁹ See Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.32 to 8.60.

the law is in most need of being brought together in Assembly legislation should be identified and the process of bringing the legislation together should be undertaken. We make some suggestions as to the identification of such areas of law in chapter 7, where we review the case studies that we presented in the consultation paper and consultees' suggestions as to how the process of identification should be approached.

- 2.58 Where the resulting piece of Assembly legislation contains the whole of the primary legislation on a discrete topic, or represents a stage in the creation of a text containing the whole of the legislation on a discrete topic, the legislation should operate as a code. We explain what we mean by this in chapter 4. In essence it involves the observance of a discipline designed to preserve the integrity of the text when the law is amended or supplemented by future legislation.
- 2.59 We envisage that many of these exercises are likely to produce Acts that can stand as codes, though we recognise that the exercises will vary in scope and that some of the resulting Assembly legislation will not necessarily be suitable to operate as a code. We therefore continue also to refer in this report to consolidation Bills, by which we mean Bills bringing together fragmented legislation in a piece of Assembly legislation that is not (for the present at least) intended to stand as a code.
- 2.60 However, in order for codes to develop as a comprehensive statement of the law, and for those statements to remain intact, we consider that the process should be undertaken with the creation of codes as the ultimate objective. In this report we use the term "codification Bills" to refer to Bills that bring existing law together with a view to standing as codes.
- 2.61 The difference that we see between codification Bills (as we envisage them) and consolidation Bills, lies in the element of law reform that we envisage as accompanying a codification exercise and the discipline to preserve the integrity of the resulting text. Codification should be capable of being accompanied by a greater measure of alteration of the substantive law than is traditional in consolidation at Westminster, and in chapter 3 we make recommendations as to procedures in the Assembly that might accommodate that. If our ambitions for codification in Wales are to be realised we anticipate that the main legislative effort will be the enactment of codification Bills that consolidate legislation along with reform and with a view to creating a code to be kept intact.
- 2.62 We envisage that consolidation alone will be pursued, for example, where devolved competence does not extend to dealing with an area of law sufficiently comprehensively for the resulting product to stand as a code. In those circumstances, consolidations may not be accompanied by reform extending beyond what can be done in a consolidation at Westminster, though our recommended assembly procedures will allow for such a greater measure of reform where appropriate. Another case where only consolidation may be practicable is where it is necessary to address problems of fragmentation urgently but the resources are not available to undertake at the same time the task of overhauling the legislation sufficiently thoroughly for the resulting product to be fit to stand as a code.

- 2.63 Whilst consultees largely endorsed our preliminary view that codification should primarily involve the reorganisation of statute law, we consider that, where appropriate, judge-made rules of the sort we describe in paragraph 2.18 above may usefully be incorporated into a code. This would be done on the basis of a careful assessment of the merits of doing so case by case.²⁰ We remain of the view that codification should not fundamentally alter the relationship between statute law and judge-made law.
- 2.64 Codification might be undertaken along with the introduction of reforms decided upon as a matter of government policy. We anticipate, however, that it may be more commonly undertaken together with reform of what might be described as being of a “technical” nature. The expression “technical reform” can be a misleading one as it means different things to different people and its boundaries are at best imprecise. An example of what we mean by it here is provided by the project we are currently undertaking for the Welsh Government on planning law in Wales, described further in chapter 7. We explain in chapter 7 that, in view of the policy-driven reforms already effected by the Planning (Wales) Act 2015, the reforms that we envisage recommending will be limited to the simplification of the law by way of streamlining and rationalising procedures.
- 2.65 The exercise that we envisage will not be limited to amendments to produce a satisfactory consolidation of the existing texts, as in traditional Law Commission consolidation. We are looking outside the existing texts themselves with a view to identifying possible improvements, upon which we shall consult. We shall likewise consult upon the desirability of incorporating into the new text ancillary rules derived from judge-made law.
- 2.66 Our experience of law reform generally is that a distinction can be observed – albeit not one that can be rigidly drawn – between law reform exercises that involve formulation of new policy as to the rights and obligations that the law should provide and law reform exercises that avoid doing that. An example of the former in our recent work is our project on insurance law. We recommended a change in the law to prevent an insurer rejecting an insurance claim on the grounds of the insured’s breach of a policy term in cases where that breach could not have caused or contributed to the occurrence of the loss claimed for.²¹
- 2.67 Conversely, an example of a project in which we have eschewed the formulation of new policy is our joint project on electoral law, in which we recommend bringing together fragmented and in some cases antiquated legislation but have avoided recommending reform that might alter the result of an election.²² Another is our report and draft Bill on wildlife law, in which we have undertaken a similar exercise but have avoided recommending any changes to the level of protection of particular species of wildlife save where required in order to comply with an

²⁰ We discuss possible approaches to this in Planning Law in Wales, Law Commission Scoping Paper (2016) No 228.

²¹ Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment (2014) Law Com No 353; Scot Law Com No 238.

²² Electoral Law (2016) Law Commission, Scottish Law Commission and Northern Ireland Law Commission Interim Report, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/02/electoral_law_interim_report.pdf (last visited 15 June 2016)

international obligation of the United Kingdom.²³ Exercises of this sort, like the exercise we are undertaking in relation to Welsh planning law, strike us as suitable accompaniments to codification.

- 2.68 We have mentioned above two objections to codification advanced in consultation by Daniel Greenberg. We acknowledge that there may be occasions where enacting free standing legislation will be more helpful to the reader than amending the existing text. For example, legislation might be on a subject that is novel or which cuts across more than one code.²⁴ We also acknowledge that whether or not a particular subject area, and indeed, particular sets of rules within that subject area, are suitable for inclusion within a code rather than as free standing legislation is a determination that needs to be made on its merits.
- 2.69 We believe, however, that in the majority of cases amending the code will be more helpful to the reader than producing separate free standing legislation. A major advantage of codification to the reader is being able to locate all of the legislation governing a particular subject area in one place. This, we consider, will usually, if not invariably, militate in favour of amending the code. We recognise that some flexibility to legislate in a particular area outside the relevant code is necessary, and we consider below how this can be accommodated.
- 2.70 Secondly, Mr Greenberg argued that disciplines and rules aimed at preserving codes are unlikely to be obeyed because “a Minister is only concerned with what will get his or her legislation through the [National] Assembly with as little scope for interference and distraction as possible, and not with the long-term holistic integrity of the statute book.”
- 2.71 In our view it is because politicians in general are primarily concerned with achieving their particular policy goals through legislation as quickly as possible, that the long-term holistic integrity of the statute book must be explicitly protected. Whilst Mr Greenberg strongly supported consolidation, he astutely related its limitations:

The Education Act 1996 was a masterpiece of rational reorganisation through traditional consolidation of an area of the law that much needed it: but within a few years it lay in tatters as a result of successive Ministers' inability to resist thoroughly reorganising the education system. Whether that has benefited children seems doubtful; that it ruined the statute book is certain.

- 2.72 We see the establishment of codes as a means of preventing consolidations from disintegrating. In chapter 4, we discuss how the imposition of disciplines on policy makers, the legislature and the drafters of legislation can help to ensure that changes to the law within the subject area of a code are made by amendments of or addition to that code. We accept that compliance with these disciplines cannot be guaranteed and also discuss a process of subsequently integrating into the code any separate legislation that has been passed in its subject area.

²³ Wildlife Law (2015) Law Com No 362.

²⁴ The Well-Being of Future Generations (Wales) Act 2015 is an example of legislation in a novel area and which crosses a large number of subjects.

- 2.73 A further reason why the entire codification project cannot be planned in advance is that it is impossible to foresee what legislation the Welsh Government may wish to promote or the Assembly to enact in the future. Decisions about whether to locate new legislation in a code, and if so in which code, as well as decisions about whether to move provisions from one code to another, will need to be taken as the occasion arises. Advising on matters of that sort is one of the functions that we envisage for the code office whose creation we recommend in chapter 6.
- 2.74 We acknowledge that any system of limited devolved legislative competence, whatever the limits of that competence, is likely to place limits on the comprehensiveness of a possible codification. An example would be social care relating to children, which we discuss in chapter 7. We have suggested above that the limits of devolved competence will be a factor to be taken into account in planning a programme of codification.
- 2.75 A system of codification will, of course, also require support and commitment from both the executive and legislature in order to be successful. However, we perceive there is a willingness in Wales to seize this opportunity and to lead the United Kingdom in an innovative way of organising legislation.
- 2.76 We therefore make the following recommendations.

Recommendation 1: We recommend that the Welsh Government pursues a policy of codification, executed in accordance with the recommendations that follow.

Recommendation 2: We recommend that codification should involve

- (1) bringing together legislation whose subject matter is within the legislative competence of the National Assembly for Wales and which is currently scattered across various pieces of legislation of the United Kingdom Parliament and/or the Assembly in a piece of Assembly legislation;**
- (2) reform of the legislation as appropriate.**

Recommendation 3: We recommend that those areas in which the law is in most need of being brought together in Assembly legislation should be identified and the process of bringing the legislation together should be undertaken.

CHAPTER 3

DELIVERING CONSOLIDATION, CODIFICATION AND LAW REFORM: PROCEDURES IN THE NATIONAL ASSEMBLY

INTRODUCTION

- 3.1 For the reasons given in chapter 2, we have recommended that a process be undertaken of bringing fragmented existing legislation together in new National Assembly legislation, and that this be done principally with a view to the creation of codes to be kept intact as such. We have noted that some of the resulting legislation may not be suitable to stand as codes, so that bringing fragmented legislation together on the Assembly statute book can be either an end in itself or (preferably) the first step in a process of codification. There are three procedural innovations that need to be introduced in order for these processes to be successfully carried out.
- 3.2 First, there is a need for legislative procedures in the National Assembly to facilitate the passage of consolidation Bills and codification Bills, as we have described them in chapter 2. This will require the introduction of a streamlined legislative procedure to enable such Bills to pass efficiently through the Assembly. We also see merit in a procedure for non-controversial Law Commission law reform Bills, similar to that which exists in Westminster but adapted for a legislature with a single chamber. These are the subject of this chapter.
- 3.3 Secondly, the model of codification that we recommend seeks to introduce a discipline for policy makers, the legislature and the drafters of legislation. This is designed to protect the integrity of the statute book by ensuring that changes to the law in areas governed by a code are made by amendments or additions to that code rather than by freestanding legislation. It is considered in chapter 4.
- 3.4 Thirdly, we recommend that a programme of codification should be introduced in order to ensure that the statute book is rationalised into codes systematically and comprehensively. This is discussed in chapter 6.

LEGISLATIVE PROCEDURES

- 3.5 Legislative procedures that effectively facilitate the passage of consolidation and codification Bills will be key to successful consolidation and codification and to the maintenance of codes. If the law is merely being restated without substantive reform, the legislature's time should not be taken up by scrutinising it in detail. Where a Bill is restating the existing law, with at most technical reforms that are not politically controversial, it would be disproportionate to subject the Bill to the level of political scrutiny and amendment usually required for a Bill implementing a new policy. This is recognised in the existence of particular procedures in Westminster and in other legislatures in the common law world for Bills of this sort.
- 3.6 Providing efficient means of passing these Bills would help to ensure that consolidation and codification exercises, which may not be political priorities, are

carried into law without competing for Assembly time with other Bills. On the other hand, the legislature must not be prevented from scrutinising proposed reforms. A balance needs to be struck between democracy and accountability on the one hand and, on the other, providing suitable structures to make technical or non-controversial changes to ensure that the law is clear, comprehensible and operates well.

- 3.7 Here we review possible options for creating a legislative procedure that provides sufficient flexibility to facilitate the passage of Bills that implement technical reform without impermissibly restricting the National Assembly's powers to scrutinise legislation. We envisage that such a legislative procedure would be suitable to accommodate codification and consolidation Bills and non-controversial law reform Bills, including those prepared by the Law Commission.

Consolidation procedures in Westminster

- 3.8 We have mentioned in chapter 2 that, in theory, consolidation restates the law without making any substantive change to it. A consolidation Bill is accompanied by materials prepared by parliamentary counsel who has drafted the Bill. These consist of tables matching clauses of the Bill to provisions of the legislation being consolidated and notes drawing attention to any points of doubt as to whether the new wording reproduces the effect of the old wording without alteration.
- 3.9 As we have noted, "pure" consolidation is rarely satisfactory or even achievable in practice, since it is likely to preserve inconsistencies and even errors in the existing legislation. In recognition of this, procedures exist in the United Kingdom Parliament to enable consolidation Bills containing a measure of alteration of the effect of the legislation to benefit from an expedited legislative procedure.
- 3.10 In the consultation paper we first described the procedure under the Consolidation of Enactments (Procedure) Act 1949, which allows "corrections and minor improvements" to be made as part of a consolidation Bill.¹ "Corrections and minor improvements" are defined as amendments whose effect is confined to: resolving ambiguities; removing doubts; bringing obsolete provisions into conformity with modern practice; removing unnecessary provisions or anomalies which are not of substantial importance; or amendments designed to facilitate improvement in the form or manner in which the law is stated.
- 3.11 This procedure is not used in practice as it has been superseded by the use of consolidation with Law Commission recommendations,² which we described in the consultation paper as "Law Commission consolidation".³ Where this

¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.19 to 7.21.

² A rare example of a consolidation enacted using the procedure under the Consolidation of Enactments (Procedure) Act 1949 was the Radioactive Substances Act 1993. This is the most recent occasion when the 1949 Act was used.

³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.22 to 7.28. The Joint Committee on Consolidation etc Bills is provided for in Standing Orders of the House of Commons (2013) Standing Order 140 and Standing Orders of the House of Lords (2010) Standing Order 51. The expedited procedure is provided for in Standing Orders of the House of Commons (2013) Standing Order 58.

procedure is followed, the tables and notes produced by parliamentary counsel are accompanied by a report of the Law Commission, usually drafted by parliamentary counsel but also approved and signed by the Chairman of the Law Commission on the Commission's behalf, making recommendations for minor alterations in the effect of the legislation.

- 3.12 The degree of substantive change to the existing law permitted in "Law Commission consolidation" is not defined in the standing orders that govern the passage of such Bills through Parliament. It has been suggested that they may be a little wider than the amendments that could be made under the 1949 Act, but must "fall short of significant change of policy or substance".⁴ Reports of the Law Commission on consolidation Bills usually describe the recommended alterations as being necessary in order to produce a satisfactory consolidation of the legislation in question. This, it is important to note, is a narrower question than whether the alterations are necessary in order to produce a satisfactory piece of legislation.
- 3.13 The recommendations are thus based purely on a review of the legislation that is being consolidated, rather than on any fresh ideas about how that legislation might be improved. Examples of the sort of changes that the Law Commission has recommended under this procedure are: correcting mistakes where it is apparent from the text that one provision does not produce the effect which another provision makes it clear was intended; resolving doubts and ambiguities where, for example, the intended effect of an unclear or ambiguous provision can be detected from the terms of other provisions; removing inconsistencies between provisions introduced by different Acts; or restating archaic provisions in contemporary language.
- 3.14 Like Bills governed by the 1949 Act, Law Commission consolidation Bills are scrutinised by a joint Committee of both Houses of Parliament, the Joint Committee on Consolidation etc. Bills, rather than on the floor of either House. The Committee does not invariably accept the Law Commission's recommendations, occasionally removing a recommended amendment or referring it for debate on the floor of the House. But consolidation Bills often proceed through all stages without debate.⁵
- 3.15 Finally the consultation paper described the technique of facilitating consolidation by making pre-consolidation amendments by way of primary or secondary legislation.⁶ The effect is that the amendments are made separately from (and come into effect immediately before) the passage of the consolidation Bill. Any

⁴ D Greenberg, *Craies on Legislation* (9th ed 2008) p 73.

⁵ Erskine May, *Parliamentary Practice* (24th ed 2011) p 551.

⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.29 to 7.32, giving an example of a power to make pre-consolidation amendments to legislation on charities by way of secondary legislation. Another example of such pre-consolidation amendments may be found in the National Health Service (Pre-Consolidation Amendments) Order 2006, made using the Secretary of State's power under section 6 of the National Health Service Reform and Health Care Professions Act 2002 to make by order "such amendments of the legislation relating to the health service in England and Wales as in his opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or greater part of that legislation". The order was subject to the affirmative resolution procedure pursuant to section 38 of the Act.

debate on the amendments is conducted separately from the passage of that Bill. We do not recommend that technique for the Assembly because it is more cumbersome than the type of legislative procedure that we discuss in this chapter.

The special procedure for non-controversial Law Commission Law Reform Bills

- 3.16 In addition to procedures for consolidation, Parliament has a special procedure for Law Commission Bills where a consensus that the provisions of the Bill are not controversial has been achieved through the “usual channels”.⁷ On introduction in the House of Lords, a Bill suitable for this procedure is identified as such in House of Lords Business.⁸ Following first reading, a motion is tabled to refer the Bill to a Second Reading Committee. The second reading motion is then normally taken without debate in the House. Following its second reading, a Law Commission Bill is then referred to a “special public Bill committee” convened for the purpose of scrutinising it. The committee debates the Bill and reports to the House that it has considered the Bill. The Bill then proceeds as with any other public Bill but in practice is not debated on the floor of either House.⁹

Procedures in New Zealand

- 3.17 In New Zealand, Bills may be certified as appropriate to pass through a streamlined “revision Bill” procedure by the President of the Law Commission, the Solicitor-General, a retired Judge of the High Court nominated by the Attorney-General and the Chief Parliamentary Counsel.¹⁰ A revision Bill may include “changes in language, format and punctuation to achieve a clear, consistent, gender-neutral and modern style” and “minor amendments to clarify Parliament’s intent or reconcile inconsistencies between provisions” but, apart from a power to replace forms and schedules in an Act with a provision for prescribing them by regulations, the revision powers do not extend to making changes of substance.¹¹
- 3.18 In New Zealand, there is provision for a truncated form of the legislative procedure for revision Bills. The normal legislative procedure consists of the following stages:

- (1) first reading;
- (2) select committee consideration;
- (3) second reading;
- (4) committee stage; and finally,

⁷ That is to say, by agreement amongst the party whips.

⁸ House of Lords Business is a document containing the future business and the minutes of proceedings of the House of Lords and recording the daily business transacted: House of Lords, *Companion to Standing Orders and Guide to the Proceedings of the House of Lords* (2015) at paras 3.25 to 3.27.

⁹ House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2015) paras 8.44 and 8.111.

¹⁰ Legislation Act 2012 (NZ), s 33.

¹¹ Legislation Act 2012 (NZ), s 31.

(5) third reading.¹²

3.19 The procedure for revision Bills is truncated in three ways. First, there is no debate or amendment at the first reading stage. Secondly, a revision Bill moves straight from the second reading to third reading and skips the committee stage (except in certain limited circumstances). Thirdly, there is no debate or amendment at the third reading stage.¹³ This enables revision Bills to move much more quickly through the legislative process. This process is aided by the detail required to be contained in the explanatory note that must be provided alongside the Bill.

Lessons from consultation

3.20 In the consultation paper we asked the following questions:

Do consultees think there should be procedures in the National Assembly for technical legislative reform, such as consolidation Bills?

Do consultees think that a special procedure for non-controversial Law Commission Bills should exist in the National Assembly?¹⁴

3.21 The overwhelming majority of consultees thought that there should be such procedures. They included the Law Society Wales, the Care Council for Wales, David Michael (Neath Port Talbot County Borough Council), Marie Navarro (Your Legal Eyes) and Keith Bush QC.

3.22 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) agreed that such procedures should exist in the Assembly. The Welsh Government stated that:

correct procedures are a fundamental element of this both because of the lack of time available within the National Assembly and because governments need to strike a balance between reform and consolidation.

3.23 The Welsh Government also noted that the lack of adequate procedures in the Assembly could risk “exposing existing laws to substantive reconsideration”. The Welsh Government added that:

¹² New Zealand Parliament Standing Orders, p 81 SO 271 available at: <http://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders4/eb7c8b9e4a6c7aa88a47d14dc4100513b2557e60> (last visited on 15 June 2016).

¹³ New Zealand Parliament Standing orders, pp 82 to 92 available at <http://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders4/eb7c8b9e4a6c7aa88a47d14dc4100513b2557e60> (last visited 15 June 2016).

¹⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 3-1 and 3-2.

for the process to succeed it is essential to differentiate between restating the law, perhaps with minor amendments necessary in order to improve access to the law, and changing the law in a more substantive way that may merit more extensive political scrutiny. The process will not succeed if the law consolidated is routinely open to political debate.

3.24 Professor Thomas Watkin agreed that consolidation Bills would require an appropriate procedure, observing that consolidation Bills would not be changing the law, therefore not requiring the level of scrutiny that Bills are usually subjected to. Professor Watkin suggested a “special committee, which could co-opt appropriate outside experts on the law and practice of the areas involved”. He also warned of situations where some consequential or incidental changes would need to be made to the law, and that these situations should be “accommodated by the opportunity for democratic scrutiny and decision-making”.

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

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

3.26 The Association questioned who would be responsible for determining whether a Bill contains substantive reform or purely technical redrafting.

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

3.28 The Residential Landlords Association disagreed with the need for a procedure for technical legislative reform Bills as it could be open to “abuse and detrimental to the principle of open government”. The Association based their comments on their experience of the Renting Homes (Wales) Bill which they considered should have been a consolidation Bill but included reform.¹⁵ They stated:

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

3.29 Finally we note that in its report, *Making Laws in Wales*, the Constitutional and Legislative Affairs Committee of the National Assembly made two

¹⁵ The Renting Homes (Wales) Bill implemented recommendations made by the Law Commission in Renting Homes in Wales (2013) Law Com No 337.

recommendations. It recommended that:

The Business Committee commit to preparing a Standing Order on consolidation Bills, ideally in time for the Fifth Assembly. The aim of the Standing Order should be to provide expedited passage for Bills which are certified by legislative counsel as not involving any substantive change of law.

We recommend that the Business Committee explores the scope for a simplified procedure for law reform Bills implementing Law Commission reports.¹⁶

- 3.30 The Business Committee has accepted these recommendations in principle and is awaiting our report.

Conclusions

- 3.31 In common with the majority of consultees and the Constitutional and Legislative Affairs Committee, we conclude that special procedures are desirable in the National Assembly for Bills that do not effect substantive change to the law, as well as for non-controversial Law Commission law reform Bills. We take the view that special procedures could usefully also apply to Bills that are accompanied by the degree of alteration of the effect of the law that is encompassed in “Law Commission consolidation” or even by a measure of law reform going beyond that. We further recommend that such procedures should apply equally to consolidation Bills and to what we have termed codification Bills (that is to say, Bills that consolidate existing legislation together with law reform and are intended to stand as a code). The appropriate procedure should depend in our view upon the degree of change being made to the law, not upon whether the resulting text is intended to stand as a code.
- 3.32 In formulating our recommendations we have drawn from the procedures that exist in Westminster and in New Zealand, but do not consider the degree of reform they permit to be adequate to facilitate a comprehensive codification programme. As we observed in the consultation paper and in chapter 2 above, consolidation even on the Law Commission model can preserve features of the law that are not in truth worth preserving.¹⁷ In our view, the scope for substantive reform afforded by the existing Westminster procedures for consolidation is not wide enough to cover reforms of the sort that we are considering in our planning law project, such as merging the procedures for various forms of consent, the removal of redundant machinery from the planning system or the codification of principles of judge-made law.¹⁸
- 3.33 Moreover, the Welsh Government might wish to implement policy changes at the same time as codifying the law. Without a procedure flexible enough to accommodate Bills that include technical or policy-driven law reform, sections in

¹⁶ Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) recommendations 12 and 13.

¹⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 8.130.

them which did not change the law substantially would have to go through the full legislative procedure. This could be a deterrent to including desirable codification along with policy-driven reform.

- 3.34 We therefore recommend an innovative procedure for Wales that is more flexible than the procedures that exist in Westminster. We consider that the procedure should be able to accommodate varying degrees of reform, calibrating the degree of legislative scrutiny to the extent of reform.

A NATIONAL ASSEMBLY PROCEDURE FOR CONSOLIDATION AND CODIFICATION

- 3.35 We consider that it would be desirable for consolidation or codification Bills to be subject to different degrees of scrutiny depending on the significance of the substantive changes to the law contained within them. We consider that this could be provided by a single but flexible, multi-faceted procedure. We now turn to consider how such a procedure could work.
- 3.36 There are two main lessons that can be drawn from the Westminster experience as to how a streamlined legislative procedure might work in the National Assembly. First, the scrutiny of consolidation Bills under the procedures in Westminster is undertaken in committee, so that appropriate scrutiny takes place but without taking up time in the chambers.
- 3.37 The second notable feature common to these procedures is that they aim to ensure that legislators can trust that Bills subject to a special procedure are suitable for this more streamlined form of scrutiny. The Consolidation of Enactments (Procedure) Act 1949 requires a memorandum from the Lord Chancellor as well as providing for scrutiny by the Joint Committee. Law Commission consolidation Bills are accompanied by a report from the Chairman of the Commission, a politically neutral party external to the Government. In both cases parliamentary counsel, the expert legislative drafters who have a degree of independence from the government, give evidence to the committee.
- 3.38 This is not unique to Westminster special procedures. In New Zealand, as we have mentioned, Bills must be certified as appropriate to pass through a streamlined “revision Bill” procedure by the President of the Law Commission, the Solicitor-General, a retired Judge of the High Court nominated by the Attorney-General and the Chief Parliamentary Counsel.¹⁹

Trust in the procedure

- 3.39 The role played by the Law Commission and parliamentary counsel in the Westminster procedures described above, like the certification process in New Zealand, promotes trust on the part of legislators that the legislation being put forward does not contain alteration of the effect of the legislation of a sort that should be subject to scrutiny by the full legislature. Our first recommendation is that a similar means of promoting trust in a legislative procedure in the National

¹⁸ We shall consult in that project on the individual merits of these suggestions. See further chapter 6 and Planning Law in Wales, Law Commission Scoping Paper (2016) No 228.

¹⁹ Legislation Act 2012 (NZ), s 31.

Assembly should be established.

- 3.40 As we noted above, the Constitutional and Legislative Affairs Committee of the National Assembly has recommended a procedure involving certification by legislative counsel. We see a role for legislative counsel in our proposed procedure, but have also considered further ways of promoting trust in the procedure. We have considered the possibility of creating some new form of committee, but have rejected this for the reasons given in chapter 8. Instead, we envisage an enhanced role for the Counsel General.

The role of the Counsel General and legislative counsel

- 3.41 The Counsel General is the law officer of the Welsh Government. Many of the office's functions are performed on behalf of the Welsh Government, but others are exercised independently. The Counsel General is accountable to the National Assembly and answers questions in the National Assembly once every four weeks. The Counsel General's constitutional functions include making judgments on whether to refer a provision of an Assembly Bill (including a Welsh Government Bill) to the Supreme Court for a ruling on whether it is within the National Assembly's legislative competence.²⁰ The Counsel General has a duty to uphold the rule of law and shoulders the responsibility that the Welsh Government bears, along with the Assembly, for the health of the Welsh statute book. As the Counsel General for the Fourth Assembly, Theodore Huckle QC, explained to the Assembly in 2011:

Part of my role in providing legal advice to the Welsh Government is to ensure that the Government's responsibility for the integrity of the statute book is properly taken into account in the Bills it proposes and the subordinate legislation it makes. My priority is to seek to ensure that Welsh legislation is consistent with the rule of law and is effective. In order to do so, it is imperative that our laws are accessible and are intelligible, clear and predictable in their effect.²¹

- 3.42 At Westminster, parliamentary counsel have, in the course of drafting Bills, traditionally performed a wider advisory role in setting and maintaining a consistent approach to legislative standards. In the rare event that this advice is not accepted by an instructing government Department, parliamentary counsel may refer the matter to the Attorney General. We regard this advisory role as valuable and consider that Wales would benefit from according a similar role to legislative counsel and the Counsel General, backed up in Wales's case by the formal legislative standards that we recommend in chapter 8.²² As Lady Justice Arden explained:

²⁰ Government of Wales Act 2006, s 112.

²¹ National Assembly for Wales Record of Proceedings, 4 October 2011, Counsel General at p 37.

²² For a discussion of the role of parliamentary counsel, see E C Page, *Their Word is Law: Parliamentary Counsel and Creative Policy Analysis* [2009] *Public Law* 790.

Legislative counsel seem to me to be the gatekeeper in many situations. They have, of course, to act on the instructions of the promoters of the legislation and to draft the legislation as they are instructed but they are also able to advise and should do so where it seems that legislative proposals would offend against general principles of law, including the rule of law itself. It is one of the advantages of having an independent profession of legislative drafters that they should exercise independent judgement on a matter as important as the rule of law. It is an important constitutional safeguard for the citizen. Unlike the courts, drafters will see all or nearly all of the legislation placed before Parliament.²³

- 3.43 That view underpins a number of the recommendations in this report, such as that the Code Office whose creation we recommend in chapter 6 should report, through the First Legislative Counsel, to the Counsel General and that the Counsel General should be accountable to the Assembly in respect of the programme of codification that we recommend in that chapter.
- 3.44 We similarly suggest that the Counsel General should be responsible for recommending that a codification or consolidation Bill is suitable for the National Assembly's streamlined procedure. We suggest that the Counsel General should take the advice of the First Legislative Counsel and/or, in the case of a Bill accompanied by a Law Commission report, make the recommendation on the basis of that report.
- 3.45 In practice, we expect that legislative drafters will advise on which procedure is suitable for different parts of legislation and the Assembly must be confident in their advice. Trust in the advice of the officials performing consolidation and codification, and in particular, in the legislative drafters, will be central to the success of this work. The role of the Counsel General will be important in providing accountability for codification procedures as well as in promoting the programme of codification.
- 3.46 We recognise that some may regard the Counsel General, as a member of the Welsh Government, as insufficiently independent to take on this role. We accept that it will be important that the Counsel General's recommendations are transparently reasoned and objectively presented, stating accurately the effect of particular amendments. We explain the mechanics of the proposed procedure below. To the extent that the Law Commission is involved in consolidation or codification exercises, the Counsel General's recommendations can be based upon our report to the Welsh Government.

The mechanics of the procedure

- 3.47 Bills introduced into the National Assembly are accompanied by an Explanatory Memorandum. We discuss Explanatory Memoranda in chapter 8. We envisage that, in the case of a consolidation or codification Bill, a major role in the preparation of the Explanatory Memorandum will be played by legislative counsel who has drafted the Bill. Legislative counsel could usefully provide tables

²³ Rt Hon Lady Justice Arden DBE, *The Impact of Judicial Interpretation on Legislative Drafting*, Keynote address presented at the Commonwealth Association of Legislative Counsel conference, Nairobi, Kenya (September 2007).

correlating sections of the Bill to sections of the existing legislation and raise any points of doubt as to whether the former reproduce the effect of the latter, as at Westminster.

- 3.48 Beyond that, the Westminster procedure for Law Commission consolidation relies on a report of the Law Commission, signed by its Chairman. We consider that that arrangement could usefully be replicated for the Assembly, but that the Assembly procedure should accommodate Bills effecting a greater degree of alteration of the effect of the legislation than is permitted in a Law Commission consolidation and need not be dependent on the participation of the Law Commission.
- 3.49 To that end, we propose that the Explanatory Memorandum should explain both the effect of sections that go beyond restatement of the law without alteration and the justification for introducing them. Where the alterations are recommended by the Chairman of the Law Commission on the basis that they are necessary to produce a satisfactory consolidation, the Explanatory Memorandum can refer to and be backed up by that recommendation. Where, as we envisage doing in our project on planning law in Wales, the Law Commission recommends alterations that are more far-reaching but of a technical nature, the Explanatory Memorandum can again be based on the description of the alterations contained in our report. Where the alterations originate within the Office of the Legislative Counsel or our proposed Code Office, the treatment of them in the Explanatory Memorandum may need to be the work of legislative counsel alone. Again, we suggest, it should essentially consist of an explanation of their effect and of the reason why they are being proposed.
- 3.50 We further recommend that the accuracy of the Explanatory Memorandum in these respects should be endorsed by the Counsel General, who should be accountable to the Assembly in respect of this. We envisage the Counsel General giving some form of certificate of his or her satisfaction with the memorandum. We regard this as particularly important where the contents of the Explanatory Memorandum do not have the backing of a report from a body external to the Welsh Government, such as the Law Commission.
- 3.51 The Explanatory Memorandum could, we suggest, include or be accompanied by reasoned recommendations as to whether particular sections or parts of a Bill are suitable for scrutiny in committee or should be debated by the full Assembly. It would, of course be for the Assembly (acting in the first instance by the committee that we propose next) to accept or reject such recommendations.

Procedure in the Assembly

- 3.52 We envisage that a Bill accompanied by an Explanatory Memorandum certified by the Counsel General and, where applicable, a report of the Law Commission should then be submitted to a committee of the National Assembly. This could be the Business Committee, the Constitutional and Legislative Affairs Committee, the relevant subject committee of the Assembly or a new committee.²⁴ We regard the identity of the committee as a matter for the Assembly.

²⁴ For a list of the current committees, see the Welsh Government website: www.gov.wales. The committees of the Fourth Assembly are listed in Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 3.17.

- 3.53 We envisage that the committee would consider the Explanatory Memorandum together with the Counsel General's recommendations and would report to the Assembly on which sections of the Bill should be scrutinised by it or another committee and which should be scrutinised by the full Assembly.
- 3.54 The approach that the committee should follow is, in our view, a combination of the approach taken in Westminster to consolidation Bills and the approach taken to non-controversial Law Commission law reform Bills. Where the justification for an alteration is that it is necessary in order to produce a satisfactory consolidation, we envisage that the committee would both review that claim and at the same time ask itself whether the alteration is nevertheless of such significance that it ought to be debated in the Assembly. In other cases it should ask itself whether the proposed reform is controversial.
- 3.55 It seems to us that that aspect of the procedure will only work satisfactorily – and probably only work at all – if the committee proceeds on a basis of consensus, as is the case with non-controversial law reform Bills in Westminster. How best to incorporate that feature into the process is a matter for the Assembly to consider when drafting the relevant standing order, but it seems to us that it could be done by a combination of cross-party representation on the committee (and possibly representation of independent Assembly Members should the case arise) together with provision for committee decisions to be taken either unanimously or, in order to avoid giving possibly disproportionate leverage to minorities, by a stipulated majority.
- 3.56 As a further safeguard, we suggest that it ought to be possible for Assembly Members to call for a debate on the committee's report. This could be achieved by enabling an Assembly Member to put forward a motion disagreeing with a specific aspect of the committee's recommendations. If this motion were to be agreed by the Assembly the relevant section or part of the Bill would then be put before the full Assembly. Again, consideration could be given to whether a special majority should be needed to defeat such a motion.
- 3.57 In the case of our planning law project, for example, we would expect that the envisaged initial piece of planning codification could undergo the streamlined legislative procedure without referral for scrutiny by the full National Assembly. The committee would be able to scrutinise sufficiently the technical reforms we expect to make without debate in the full Assembly.
- 3.58 This procedure could afford three substantial benefits.
- 3.59 First, the National Assembly would retain control of whether a particular consolidation or codification Bill that also makes substantive changes to the law benefits from a streamlined procedure. Assembly Members' trust in the process would be bolstered by the dual safeguards deriving from the Counsel General's and the Assembly committee's involvement.
- 3.60 Secondly, it would enable technical aspects of a Bill to be insulated from politically driven amendments, helping to preserve the coherent restatement of the law carefully worked out by legislative counsel during its passage through the legislative procedure but also providing an opportunity for controversial or significant reform aspects of a Bill to be specifically scrutinised if necessary.

- 3.61 Thirdly, the explanations given in the Explanatory Memorandum will direct the committee to aspects of Bills that go beyond restatement and at the same time indicate both the extent and the rationale of the alterations. This should help the committee both to avoid spending excessive time on parts of Bills that are merely restatement of existing law and to identify more readily those parts that are suitable for scrutiny in committee or for scrutiny on the floor of the Assembly. The scrutiny a Bill receives should remain effective, but with the extent of the scrutiny confined to what is necessary and proportionate.

Amending Code Bills during their passage through the legislative process

- 3.62 In the consultation paper we asked

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?²⁵

- 3.63 We put this idea forward tentatively and acknowledged that it would be necessary to give further consideration to whether it would be possible to draft and to enforce such a rule.

- 3.64 Keith Bush QC commented that:

There would be practical difficulties attached to any effort to hamper the right of the legislature to amend the law and a rule that would seek to do so would be impossible to implement without creating tensions that would undermine the confidence of Members in the principle of codification.

- 3.65 We share Mr Bush QC's reservations about a rule directly hampering the freedom of Assembly Members to propose amendments to Bills, although precedents have developed in the Assembly limiting amendments, for example at further stage 3.²⁶ We think that, as has been the case in Westminster, the smooth passage of a Bill through the Assembly is best facilitated by Assembly Members' knowledge that provisions not scrutinised by the Assembly as a whole have been scrutinised in committee pursuant to a trusted procedure.

“NON-CONTROVERSIAL” LAW COMMISSION LAW REFORM BILLS

- 3.66 As we have indicated in our discussion above, we regard it as a matter for the Assembly whether sections of a Bill are or are not “controversial”. That applies equally to a Bill that effects substantive law reform independently of consolidation or codification. We consider that the Explanatory Memorandum accompanying such a Bill could properly describe the scope of any substantive changes being made and contain or be accompanied by a recommendations to the suitability of sections for committee or Assembly scrutiny. The description of the scope of the reforms effected by the Bill will in practice be based on the Law Commission's report accompanying the Bill.

²⁵ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 8-14.

²⁶ The Standing Order provisions on further stage 3 are set out in SO26.39 to 26.44.

3.67 We consider that it would be perfectly proper for an Assembly committee considering such a Bill to form the view that its sections were not controversial and should be scrutinised by an appropriate committee rather than by the full Assembly. In our view standing orders could usefully so provide, subject to the right of the Assembly to reverse the committee's decision. We discuss below whether the Assembly currently has the power to introduce such a rule.

INTRODUCING THE PROCEDURES

3.68 The National Assembly does not currently have legislative competence over its legislative procedures but can make provision for its legislative procedures in standing orders, subject to limitations set by the Government of Wales Act 2006. Section 111 of the 2006 Act requires the National Assembly's standing orders to make provision:

- (1) for general debate on a Bill with an opportunity for Assembly members to vote on its general principles,
- (2) for the consideration of, and an opportunity for Assembly members to vote on, the details of a Bill, and
- (3) for a final stage at which a Bill can be passed or rejected.

3.69 By section 111(2) of the 2006 Act, different provision may be made for Bills which "restate the law". The scope of the exception is open to argument: it is not clear whether it applies only to Bills limited to "pure" restatement, or to Bills insofar as they contain pure restatement, or extends to consolidation Bills accompanied by the degree of reform traditional in Westminster. We tend to the view that Parliament must be taken to have been aware of its own procedures and not to have intended to deny the Assembly a power to make equivalent provision by standing orders.

3.70 On the other hand, section 111(2) makes no reference to non-controversial law reform. We do not think that under section 111 the National Assembly could introduce a streamlined legislative procedure that omitted general debate on, or consideration of the details by the full Assembly of, a Bill that introduced law reform. If this view is correct, the flexible procedure that we recommend is not entirely within the current legislative competence of the National Assembly.

3.71 We suggest that the scope of the Assembly's powers to make standing orders be reviewed in the context of the developing devolution settlement.²⁷ We note that the Scottish Parliament has competence over its own legislative procedures under the Scotland Act 1998.²⁸

Recommendation 4: A flexible streamlined legislative procedure should be introduced into the Standing Orders of the National Assembly for:

- (1) codification or consolidation Bills that include alteration or reform of the law; and**

²⁷ The Wales Bill was introduced into Parliament and had its first reading without debate on 7 June 2016.

²⁸ Scotland Act 1998, ss 22 and 29, sch 3 and 5.

(2) other law reform Bills prepared by the Law Commission,

where the alterations or reforms are judged by the Assembly not to be controversial.

Recommendation 5: Such a Bill should be accompanied by an Explanatory Memorandum endorsed by the Counsel General which should explain the effect of each of the Bill's sections and include or be accompanied by recommendations as to the suitability of sections for committee or Assembly scrutiny.

Recommendation 6: A committee of the Assembly should consider the Bill and Explanatory Memorandum and recommendations as to the suitability of sections for committee or Assembly scrutiny. The committee should determine whether particular sections of a Bill are controversial, or make significant changes to the existing law such as to require scrutiny by the full Assembly, while others are suitable for scrutiny by an appropriate committee.

Recommendation 7: Assembly Members should be able to call for a debate on the committee's report.

CHAPTER 4

MAINTAINING CODES

INTRODUCTION

- 4.1 We now turn to consider in more detail how to secure a major advantage of codification over traditional consolidation, namely preserving the integrity of a code despite legislative amendment affecting its subject matter.
- 4.2 Our consultation paper asked a series of questions in relation to the preservation and maintenance of codes. Here we review the responses and set out our recommendations. We first consider how codes should be distinguished from other legislation, and then turn to the procedural discipline which will be needed to protect and preserve codes once they have been recognised as such.

DISTINGUISHING CODES FROM ACTS

- 4.3 In the consultation paper we explained our provisional view that there would be advantages in identifying a piece of legislation as a code rather than an Act. The primary advantage that we saw is that this would enable the introduction of procedural innovations applying to codes to facilitate their adoption and subsequent maintenance. We therefore asked the following question:

Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly?¹

Lessons from consultation

- 4.4 Some consultees specifically addressed the need to create a distinction between Acts and codes. The Wales Governance Centre argued that establishing a distinction between codes and Acts is “fundamental”. They also argued that this distinction should be presented in primary legislation emanating from the National Assembly because

it would underline the nature of the endeavour as a constitutional and legal departure for Wales, rather than it being merely a Government policy initiative.

- 4.5 However, the Wales Governance Centre recognised that, if the forthcoming Wales Bill did not provide the National Assembly with the competence necessary to do so, the National Assembly could instead implement the distinction by way of standing orders. This view was shared by Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly):

¹ We address the second part of this consultation question below at paras 4.28 to 4.44. Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 8-4.

The Assembly could amend Standing Orders to create and amend Codes using existing powers. However, primary legislation, outside the Assembly's current competence, would be required for certain formal but important matters, such as including Codes as enactments within the Interpretation Act. I am expecting that the forthcoming Wales Bill, if enacted, will give the Assembly control over its own arrangements for legislation and therefore bring the creation of a Codes system within the Assembly's competence. This would avoid the need to confer a specific power on the Assembly through an Act of the UK Parliament, which would be inconsistent with the constitutional trajectory of the Assembly.

- 4.6 On the other hand, Professor Thomas Watkin doubted that introducing a formal distinction would be beneficial, and stated that

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

- 4.7 Moreover, one key concern, expressed by Daniel Greenberg (Berwin Leighton Paisner LLP), is that the creation of yet another new kind of legislation will serve to confuse citizens, rather than assist them. Mr Greenberg cautioned against “[i]ntroducing a new layer of complexity into the statute book by differentiating between codes and other legislation”.

Distinguishing codes from Acts: conclusions

- 4.8 We see merit in distinguishing codes from other Acts of the Assembly. Labelling a piece of legislation as, for example, “the Planning Code”, rather than “the Planning Act”, signals more strongly that its text comprehensively contains the legislation on planning. The use of the term “code” has a role in telling citizens that this is the place to look for the primary legislation on planning. It also signals clearly to legislators the need to avoid compromising the legislation’s compliance with its description; in other words the need to observe what we refer to as a “discipline” when subsequently legislating within the subject area of a code.

- 4.9 On the other hand we see the force of the objections voiced by consultees to the formal creation of a new species of legislation and have concluded that to do so is unnecessary. Instead we suggest that a code should be in formal terms an Act of the Assembly that describes itself as a code. For example, section 1 of a statute intended to operate as a code could provide “this Act may be cited as the Education Code”. This is how codes are distinguished from other Acts in some Commonwealth countries. For example, section 1 of the Canadian Criminal Code states that “this Act may be cited as the Criminal Code”.² Similarly, section 1 of the Australian Criminal Code states “This Act may be cited as the Criminal Code Act 1995.” We prefer “Code” to “Code Act”, but that is a matter for the Welsh Government and the Assembly. The chosen designation could then be reflected in

² This is common to other Canadian codes. See for example, section 1 of the Canadian Labour Code that states “this Act may be cited as the Labour Code”, available online here: <http://laws-lois.justice.gc.ca/eng/acts/L-2/page-1.html> (last accessed 15 June 2016).

the short title of the Act as printed.

- 4.10 Where, as with our Welsh planning law project, comprehensive codification is not being achieved with a single Act, but advanced over a series of Acts, each could state that it represented a step towards the creation of a comprehensive code. Such a provision would have affinities with purpose clauses that we discuss in chapter 8. The procedural rules that we go on to discuss below could apply to Acts that contained such provisions. Our provisional view is that the piece of legislation intended to emanate from our Welsh planning law project could appropriately be entitled the “Planning Code”, signalling its role in the codification project, albeit that the codification that it initially achieves will not be comprehensive.

Recommendation 8: Codes should not be formally distinct from Acts of the Assembly. An Act of the Assembly should be identified as a code by a section of that Act and its short title.

Recognising Bills as codes

- 4.11 In our consultation paper we suggested that it would be possible for the Assembly to enact a code as such; standing orders would simply need to specify that the characteristics of a code applied when an instrument bearing that name was passed. However, our preliminary view was that it would be preferable for enactment to take place first, and then for a separate recognition process to occur.
- 4.12 We held this view for two reasons. First, even if an instrument is intended to be a code at the outset, it may be amended in such a way during its passage through the Assembly that it would no longer be appropriate for it to stand as the code. The second reason is that it may be that provisions already enacted are capable of standing as codes. In such a case, recognition is necessarily distinct from enactment.
- 4.13 We also considered that standing orders could make provision for a formal motion to be put that a Bill that has passed all its stages should stand as a code or a formal motion removing code status from an enactment. We considered that a motion that an enactment stand as a code could be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer.
- 4.14 We therefore asked the following questions:

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?

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?³

Lessons from consultation

- 4.15 Some consultees argued that standing orders should make provision for a formal

³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 8-6 and 8-7.

motion to be put to recognise or remove a Bill's status as a code. The Welsh Government stated:

Subject to consideration of the discussion in the Report this seems likely to be a sensible mechanism to have included in a codification process. A mechanism of some sort that could convert a Bill that for example covers more than one subject area (according to the political will of the day) into legislation that fits within a consolidated structure or code could also be considered.

4.16 Huw Williams (Geldards LLP) commented:

I would support a solution that was based on the Standing Orders of the National Assembly. I envisage the Assembly by resolution declaring an enactment to be a "Code". The consequence of this could be that if a future Bill was presented and it was declared by the Presiding Officer to fall within the ambit of the "Code" then the Bill could only proceed by way of amendment to the Code unless the Assembly resolves to the contrary – possibly by way of a super majority, say 60%. The principle should surely be that once a subject is codified changes to the law should only be by means of amendments to the Code and that this principle is protected through the Standing Orders of the Assembly.

4.17 The Association of London Welsh Lawyers also considered that such provision would be "sensible".

4.18 However, not all consultees agreed. Keith Bush QC argued that

It appears strange that a piece of legislation could receive code status ex post facto. If there is a will and the resources to draw up a series of codes, the Assembly's procedures should acknowledge them thus from the outset, so that they can undergo the appropriate kind of scrutiny.

4.19 Dr Sarah Nason (Bangor University) observed that

this would seem appropriate, but codes should have the same general legal status as other Acts. The identification as having code status should be there primarily to ensure proper development and maintenance in accordance with any procedure developed (as per question 8-5) and to ensure the presumption that new legislation on the same subject matter is achieved by amending the code (question 8-4).

4.20 The majority of consultees, which included the Care Council for Wales, Dr Nason and the Association of London Welsh Lawyers, considered that both the member in charge of the Bill and the Presiding Officer together should be required to put forward a motion that an enactment stand as a code. Marie Navarro (Your Legal Eyes) considered that the motion need only be in the name of the Presiding Officer.

4.21 Mr Williams suggested that

The motion to declare an Act to be a Code initially should be in the name of the member in charge of the Bill. Likewise I suggest that the removal of Code status should have to be by Bill (to enable scrutiny of the reasons why codification is no longer appropriate or is considered to have failed) and not by simple motion. In practice the member in charge of a Code Bill will almost invariably have to be a Minister given the resources required for developing a Code. As already indicated we suggest the Presiding Officer should then have the power to rule if a Bill is “Code amending” Bill or a free standing Bill in relation to a non-codified subject.

4.22 This also accords with the view of the Welsh Government on this matter:

Publication and organisation of the statute book is a matter for the Crown and therefore the executive. Consequently such a motion should be in the name of a member of the Welsh Government. This would be subject to scrutiny and approval by the National Assembly in the normal way.

Conclusions

4.23 As explained above, we do not consider it necessary to create a formal distinction between Acts and codes. Instead, we have concluded that an Act of the Assembly should be identified as a code by way of a provision on the face of the Act and by its short title. If this technique is used, it would be possible to insert or delete the relevant clause and amend the title at any amending stage of the legislative process. We agree with Mr Bush QC that it is more likely that the suitability or otherwise of a Bill for presentation as a code will be apparent from the outset and will not change during the Bill’s passage through the Assembly. Our proposed technique offers enough flexibility to cater for the exceptional occasion.

4.24 We suggested in our consultation paper that some Acts of the Assembly already in force may qualify for recognition as codes.⁴ In accordance with our recommendation the technique for achieving this would be the insertion of an appropriate opening provision and amendment of the Act’s title. We do not suggest that it will be necessary to amend an Act in this sole respect. We suggest that if existing legislation is recognised as deserving code status, the code disciplines that we suggest below should be observed when fresh legislation in the relevant subject area is made. The appropriate “code” section would be introduced by amendment along with any other amendments being made at that time.

4.25 The consultation paper envisaged code status being conferred or removed as a result of a motion in the Assembly, and our consultation question was framed accordingly. The consequence of our recommendation that code status be attached to the presence of code provision in the legislation is that conferral or removal of it will be a matter of amendment of the legislation. Whether a Bill includes a code clause when presented will be a matter for the member presenting the Bill. The moving of an amendment to the Bill to insert or remove such a clause

can, we think, be covered by the standing orders in the same way as other amendments.

A DISCIPLINE TO PRESERVE CODES

4.26 The key feature of our model of codification is the introduction of a discipline to preserve codes. In order for the advantages of codification to be realised, a code must remain the comprehensive and exclusive source of legislation on a particular subject matter. It will therefore be necessary to ensure that policy changes in the subject area of a code are enacted as amendments or additions to the code rather than as free-standing legislation.

4.27 In our consultation paper we suggested that this could be achieved if there were a rule that, where a relevant code is in place, new legislation could only take effect by way of amending the code. Our preliminary view was that this rule would be most appropriately contained in primary legislation.⁵ We refer to this rule as the “code discipline”. We therefore asked:

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?⁶

Lessons from consultation

4.28 Consultees were broadly in favour of preserving codes by prescribing that, where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code.

4.29 The Legal Wales Foundation was unequivocal in its support for the introduction of a discipline to preserve codes:

There should be a clear distinction between Acts and codes, and further legislation relating to the latter should take effect only by way of amending the code, in the interests of clarity and accessibility.

4.30 The Welsh Government did not have a firm view on this consultation question but acknowledged that

A mechanism or process of some sort is required in order to maintain newly consolidated legislation in an ordered and accessible form.

4.31 Consultees who were in favour of a code discipline included David Gardner (Administrative Court Office Cardiff), Dr Nason, the Association of London Welsh Lawyers and the Wales Governance Centre.

4.32 Not all consultees considered a code discipline desirable. The Residential

⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.95 to 8.100.

⁵ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.88 to 8.89.

Landlords Association stated:

we would highlight that some of the proposals in the consultation paper regarding codification risk introducing unforeseen consequences. Such as limiting further legislation on areas where a code already exists to only take effect by way of amendments to the code, or that it is possible to combine all the intricacies of common law and statute in one comprehensive code, whilst maintaining simplicity. We would say that although codification may be a noble aim, we do not agree with the level of alteration it would impose on the process of the National Assembly and that many technical issues still need to be resolved to provide adequate assurances.

- 4.33 Moreover, there was some disagreement amongst consultees who did support a code discipline about two key issues: how strictly should this discipline be applied, and where should it be prescribed?

How strictly should the discipline be applied?

- 4.34 Some consultees considered that it would not be desirable for the discipline to be applied too strictly. Consultees generally concluded that an inflexible rule was undesirable.

- 4.35 Dr Nason suggested that

There should be an initial presumption at least that further legislation within the subject area of the code can only take effect by way of amending the code, this lessens the potential for fragmentation. However, it might be possible to conceive of examples where amending the code is not the ideal route to achieving a legislative aim.

- 4.36 Professor Inge Backer (University of Oslo) also considered that there should be scope to enable freestanding legislation to be passed that falls within the subject area of a code:

As I understand it, your proposal for adopting codes in the Welsh legal system will preclude amendments in the form of supplementary and separate statutes. Surely, this will help retain the oversight of statute law once accomplished by codification. Still, I wonder whether a strict prohibition against separate legislation can be maintained in practice.

Where should the discipline be prescribed?

- 4.37 Some consultees were in favour of setting the discipline in primary legislation of the National Assembly because of its importance. However, it is outside the Assembly's competence to legislate on methods of legislating, as Dame Rosemary Butler AM observed.

⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 8-4.

- 4.38 Even if the Wales Bill was to provide the National Assembly with the necessary competence, Mr Bush QC considered that

It does not appear that legislation is needed in order to protect the character of a code by prohibiting legislation that would alter its effect unless that legislation amends the code. This could be achieved by means of the Assembly's Standing Orders.

Conclusions

- 4.39 In order for a system of codification to be successful, we consider that it is necessary for a code discipline to be introduced to preserve codes by prescribing that, where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code.
- 4.40 We recognise that it is necessary for there to be flexibility in the codification system. The discipline cannot be absolute. It should be possible for legislation within the subject area of a code to be enacted outside that code if the Assembly so chooses. However, in order for the discipline to be effective to preserve codes, this should only be done where it is justifiable in the circumstances. If it is too easy to legislate contrary to the code discipline, the codification process will be put in jeopardy.
- 4.41 We therefore recommend that where a member of the Welsh Government or any other Assembly Member decides to promote legislation contrary to the code discipline, there should be a requirement to justify doing so. This justification should be provided to the legislature in the Explanatory Memorandum accompanying a Bill within the subject area of a code.⁷ It would be subject to scrutiny by the National Assembly as part of the legislative process in respect of the Bill. We envisage that the Business Committee or another committee scrutinising the Bill at stage 1 of the legislative process would report to the Presiding Officer if it was not persuaded by the justification for departing from the code discipline. The role that we envisage for the Presiding Officer is further discussed below.
- 4.42 Since procedures in standing orders cannot be guaranteed to succeed in upholding the code discipline, it should also be possible for freestanding legislation to be integrated into a code, where appropriate, at a later date. We consider this sort of technical, remedial “tidying up” of codes later in this chapter.
- 4.43 We recognise that the introduction of a code discipline is necessary but not sufficient for codification to be successful. There needs to be a commitment from the Welsh Government and the National Assembly to the project of codification. Different actors within the Welsh Government and National Assembly bear responsibility. Legislative counsel have a frontline duty to ensure that the delivery of policy within the subject matter of a code is implemented through an amendment to the code. The importance of this role could be enshrined in the Office of the Legislative Counsel’s drafting guidelines. We consider below how adherence to the code disciplines could also be monitored through responsibilities

⁷ We discuss Explanatory Memoranda in chapter 7.

placed on the Counsel General, and the introduction of legislative standards.⁸

- 4.44 Ministers, policy officials and Assembly Members must also appreciate the importance of ensuring that codes are preserved. This will require a shift in legislative culture, but we consider that, as the Lord Chief Justice has observed, there is

an appetite for reform from judges, politicians, academics, the voluntary and advice sector and many more.⁹

- 4.45 We make the following recommendations and leave it to the Welsh Government and Assembly to determine the best means of imposing these requirements:

Recommendation 9: Codes should be preserved by a rule that, where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code.

Recommendation 10: A procedure should be established by the Assembly for considering whether to allow any piece of legislation to pass through the Assembly which does not comply with the requirement to legislate within the code.

Determining that the provisions of a Bill fall within the subject area of an existing code

- 4.46 In our consultation paper we suggested that the Presiding Officer of the National Assembly should take on the role of determining whether provisions of a Bill fall within the subject area of a code. The Presiding Officer is already charged with making a statement when a Bill is introduced about whether the Bill would be within the competence of the Assembly.¹⁰

- 4.47 We therefore asked consultees:

Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?¹¹

- 4.48 The Welsh Government were not convinced that this task was best placed with the Presiding Officer:

We consider this to be primarily a matter for the executive (and again this would be subject to scrutiny). Though a role for the Presiding Officer may also be possible to the extent (once again) that it does not compromise the executive's role in maintaining the statute book.

⁸ See chapter 7.

⁹ The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *The Law of Wales: Looking Forwards* (Speech at the Legal Wales Conference, 9 October 2015). The full speech is available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/speech-lcj-legal-wales-speech.pdf> (last accessed 15 June 2016).

¹⁰ Government of Wales Act 2006, s 110(3).

¹¹ *Form and Accessibility of the Law Applicable in Wales* (2015) Law Commission Consultation Paper No 223, consultation question 8-8.

4.49 Dr Nason suggested that

there must be an adequate consultation with appropriate subject matter departments and legal departments allowing a properly informed opinion to be reached. There must then also be a suitable procedure for allowing this determination to be challenged.

4.50 Mr Greenberg, who objected to codification, argued that the need to provide for such a determination

[i]llustrate[s] the unnecessary complexity, and new scope for confusion and challenge, to which this new creation would give rise.

4.51 We agree with the Welsh Government that determining whether or not a particular provision falls within the subject matter of a code is initially the executive's role, though we consider that it also forms part of the responsibilities of the Assembly in its capacity as the legislator that will translate the Bill into law. What we are considering here is what should happen when the executive has *not* identified a Bill or part of a Bill as falling within the subject matter of a code when it should have done. We trust that this will be a relatively unusual occurrence, but there needs to be a mechanism within the legislative process that assists the Assembly in ensuring that Bills or parts of Bills that are within the subject area of a code are identified and treated as such.

4.52 We see merit in the National Assembly's standing orders enabling the Presiding Officer to put forward a motion that a Bill (in whole or part) falls within the subject area of a code and should either be rejected or re-presented as a Bill amending the relevant code. We have suggested above that a committee should report to the Presiding Officer on this matter; the Presiding Officer's decision whether to propose such a motion will be informed by that report. The Assembly could resolve that the Bill (or relevant parts of the Bill) should be redrafted as amendments to the relevant code.

4.53 We acknowledge that this process for determining that a Bill falls within the subject matter of a code will lengthen the legislative process. However, we consider that the existence of the procedure will be valuable in underlining the importance of the code discipline and signalling the Assembly's commitment to it. Those advantages outweigh any detriment caused by the addition of this stage in the legislative process. The procedural and legislative vehicles for implementing these policies are matters for the Assembly to decide and it may be that there is a better way of achieving the same ends. We make our procedural recommendations with this in mind.

Recommendation 11: The standing orders of the National Assembly should enable the Presiding Officer to put forward a motion that a Bill (in whole or part) falls within the subject area of a code and should be treated as such.

Maintenance of codes

4.54 In our consultation paper we suggested that additional procedures for codes could

be created in order to facilitate the effective maintenance of codes.¹² Some modification of a code will likely be necessary either to accommodate amendments made to it, or over time to ensure that it remains in good shape.

Should editorial changes be able to be made to codes without approval by the Assembly?

4.55 The consultation paper envisaged that tasks such as renumbering and making formal editorial changes (principally to cross-referencing), so as to incorporate the amendments made by an Act of the Assembly into the code, could be done without formal approval by the National Assembly. We envisaged that in some cases, this could include re-ordering existing code material so as better to accommodate the amendments.

4.56 We therefore asked the following question:

Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?¹³

4.57 The Welsh Government stated that

In principle yes. If there is any change in the law then approval is likely to be required. It depends therefore on the nature of the 'technical' change.

4.58 However, the majority of consultees considered that the National Assembly should not be prevented from approving even technical amendments. Mr Bush QC stressed that

The Assembly's unique position as a legislature should not be undermined in any way. It is Assembly Members that have the democratic mandate to change the law and this should be respected even in relation to technical changes. Naturally, simple and quick procedures should be devised to facilitate their consent in such cases. But they should retain the ultimate authority.

4.59 Professor Watkin observed that

The possibility, however, of some consequential and incidental changes being necessary at that stage should not be ruled out, but should be accommodated by the opportunity for democratic scrutiny and decision-making when the need arose. The process could still, however, be fairly streamlined.

¹² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 8.104 to 8.121.

¹³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 8-11.

4.60 The Association of London Welsh Lawyers commented:

To provide that changes, even of a “technical editorial” nature, should not be subject to approval by the Assembly could lead to lack of confidence in the Assembly’s oversight process, especially if the perception of what is “technical editorial” became stretched.

Providing a streamlined procedure for amendments to codes

4.61 We observed in our consultation paper that amendments may need to be made to codes that are technical, but more than merely editorial. We considered that there may be merit in enabling such changes to be made by a simple motion rather than a Bill. This would provide an even more efficient form of making technical changes to legislation.

4.62 We envisaged that any proposed technical amendments would be submitted, in the first instance, to the relevant subject committee of the National Assembly. It would be for the committee to decide whether an amendment should be presented to the full National Assembly on a motion for approval or by way of a Bill subject to a special legislative procedure.

4.63 We therefore asked the following questions:

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?

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?

Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?¹⁴

4.64 Consultees were broadly in favour of enabling a National Assembly committee to determine the degree of scrutiny technical amendments should receive. The relevant subject committee would be able to determine whether a technical amendment should be approved by a simple motion, or whether it should pass through one or more stages of the normal legislative process. If the committee decided to opt for the latter, this process would operate in the same manner as the special streamlined procedure for consolidations we recommended above.

4.65 As Mr Bush QC observed, this would keep the authority to change the law in the hands of the legislature. Moreover, the Wales Governance Centre stated:

We strongly agree that procedural mechanisms are necessary to ensure that codifying bills do not have to compete for legislative time in the Assembly with “ordinary” political Government bills.

4.66 However, Dr Nason expressed concern about what kinds of amendments will be

¹⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 8-11, 8-12 and 8-13.

subject to lesser scrutiny. Dr Nason noted that

the phrase 'substantial defects' is not sufficiently clear. It implies that the defect is one that needs urgent redressing, but the normal legislative process should generally not be bypassed unless this phrase can be given sufficient clarity and provided there is an opportunity for members to object to the shortened version being applied.

- 4.67 Consideration of consultees' responses to our consultation paper has led us to move away from the proliferation of distinct procedures. In line with our recommendation that codes need not be formally distinct from Acts, we recommend that the sort of amendments envisaged by these consultation questions should be effected by amending legislation to which the legislative procedures discussed in chapter 3 will apply.

Publication of codes

- 4.68 Our consultation paper envisaged the promulgation of codes, as updated from time to time, being a function of the Assembly. We now see the promulgation of legislation as a function of government as a whole. We explain in chapter 11 that Welsh primary and secondary legislation is made available to the public, along with other legislation, on the legislation.gov.uk website maintained by the National Archives. We do not see a need for this function to be duplicated in Cardiff; such duplication would be inefficient. The function of promulgating legislation would be adequately performed if (which is unfortunately not yet the case) that website were fully up to date with the incorporation of amendments into the text of the legislation, a matter we also discuss in chapter 13.

CHAPTER 5

CONSOLIDATING, CODIFYING AND AMENDING SECONDARY LEGISLATION

INTRODUCTION

- 5.1 Consultees stressed that secondary legislation is especially difficult to access in a useful form. There are several factors that contribute to the poor accessibility of secondary legislation. One of the main problems is that secondary legislation is particularly voluminous. In 2015, there were 2,059 pieces of secondary legislation made in the United Kingdom. There were only 37 United Kingdom public general Acts.¹ In the same year there were 314 pieces of secondary legislation made by the Welsh Ministers and six Acts of the National Assembly. The sheer quantity of secondary legislation makes navigating secondary legislation an onerous task.
- 5.2 Moreover, secondary legislation usually contains more detailed, and often more complex, rules than primary legislation. It often forms part of a legislative framework, and may need to be read alongside primary legislation and/or other secondary legislation.
- 5.3 Currently, secondary legislation is amended in the same way as primary legislation: by making amending Regulations that effect amendments to the original Regulations. For example, the Education (Pupil Referral Units) (Application of Enactments) (Wales) (Amendment) Regulations 2015 is a very short statutory instrument making a single amendment to the Education (Pupil Referral Units) (Application of Enactments) (Wales) Regulations 2007 as follows:
- For paragraph 16 and its heading in Part 2 of Schedule 1 to the Education (Pupil Referral Units) (Application of Enactments) (Wales) Regulations 2007(2) substitute—
- “Education (School Development Plans) (Wales) Regulations 2014
16. The Education (School Development Plans) (Wales) Regulations 2014(1) apply in relation to units as they apply in relation to maintained schools.”
- 5.4 Without access to an updated text readers of the 2007 Regulations have to locate both sets of Regulations and make the amendment themselves.
- 5.5 As we explain in chapter 13, the National Archives is behind with the task of updating legislation on the [legislation.gov.uk](http://www.legislation.gov.uk) website so as to incorporate subsequent amendments. It is making progress with updating primary legislation; however, secondary legislation is not being updated at the same rate. The proportion of secondary legislation that is out of date is higher than that of

¹ Data from the National Archives, <http://www.legislation.gov.uk/ukpga> and <http://www.legislation.gov.uk/uksi> (last visited 15 June 2016).

primary legislation.² Updating the secondary legislation is a vast task.

- 5.6 Consultees informed us that the legislation to which they most need access is secondary legislation. For example, Citizens Advice Cymru explained that when advising a client on a problem in relation to social security benefits, the law they need to consider is principally contained in subordinate legislation setting out the detail of entitlement to particular benefits and the amount of the benefit entitlement.³ The Wales Council for Voluntary Action made similar points.

IMPROVING THE PRESENTATION OF SECONDARY LEGISLATION

- 5.7 Where primary legislation is codified, the benefits of codification will be enhanced if secondary legislation made under or in relation to it is also made more accessible. There are a number of steps that can be taken to achieve this. The first is to draw the attention of readers of the code to the secondary legislation. This, we suggest, could be appropriately done by reference being made and hyperlinks to the legislation.gov.uk website being provided in respect of relevant secondary legislation as well as primary legislation on the *Cyfraith Cymru/Law Wales* website that we discuss in chapter 14. We suggest that this should be done for secondary legislation in both codified and uncodified areas. In chapter 14 we also make recommendations in respect of access to tertiary materials such as official guidance.
- 5.8 Secondly, the mechanical process of inputting amendments in order to produce and publish up to date versions of secondary legislation online is urgently in need of completion. The need is as urgent in the case of secondary legislation applying in England as in Wales. This is a task for the National Archives, and requires adequate resources being made available to the National Archives to achieve it.
- 5.9 Thirdly, codification of primary legislation could usefully be accompanied by a review of the associated secondary legislation. We do not take a view on whether the secondary legislation should also be reduced to a single instrument in the same way as the primary legislation, though consideration could be given to that as the occasion arises. But that review could provide an occasion for deploying the legislative technique that we suggest next.
- 5.10 Fourthly, we consider that a new approach could usefully be taken to amending secondary legislation so as to maintain secondary legislation in an up to date and accessible form.
- 5.11 Significant inefficiency results from making a new statutory instrument which amends another statutory instrument, requiring the National Archives to piece the two together manually in order to publish up to date secondary legislation. We see merit in the Welsh Government re-making the earlier statutory instrument wherever possible. Making secondary legislation is simpler than making primary

² The National Archives has informed us that as of May 2016, approximately 80 per cent of primary legislation on legislation.gov.uk has been brought up to date and is being further updated as subsequent amendments are made.

³ Third sector consultees also told us that guidance published by government departments and agencies was important in understanding how the relevant law would be applied to their clients. Social security law is not devolved to the National Assembly for Wales and, as a result, would not be included in any consolidation or codification exercise.

legislation, because the process of producing the text of the legislation is wholly internal to the Welsh Government; the process of comparing the new text with the old so as to be satisfied that the effect of the changes is as desired could be done within the relevant directorate.

- 5.12 The updated text of the statutory instrument could then be laid before the National Assembly, rather than an amending statutory instrument. The proposed amendments could be highlighted by, for example, showing deleted text struck through and inserted text in italics or in another colour. The Assembly would consider the text as amended, but the resolution would be limited to the changes made. The updated statutory instrument would then be able to be published immediately by the National Archives. The previous version would need to remain available to view, with an indication of the dates of effectiveness of the different texts, as it is currently done on legislation.gov.uk for updated primary legislation.⁴
- 5.13 Taking the example above, rather than making the Education (Pupil Referral Units) (Application of Enactments) (Wales) (Amendment) Regulations 2015 as the means of amending the secondary legislation, the Welsh Ministers would instead have laid before the National Assembly the Education (Pupil Referral Units) (Application of Enactments) (Wales) Regulations 2007 with the desired amendments incorporated and highlighted. These would become law (with the highlighting of the changes removed) either as the Education (Pupil Referral Units) (Application of Enactments) (Wales) Regulations 2015 or – which we consider preferable – as the version of the 2007 Regulations effective from the relevant stated date. The updated Regulations could be published without further editorial work by the National Archives.
- 5.14 We consider that this method of amending statutory instruments would be particularly valuable where secondary legislation has already been consolidated, but could be of use more generally. We accept that use of this method will not always be possible – for example, where some of the content of the existing statutory instrument is outside Welsh legislative competence – or convenient, for example, where an amendment needs to be made to multiple statutory instruments. But we suggest that it be the method used unless there is a good reason not to do so in a particular case.

Recommendation 12: When secondary legislation is amended, the updated text of the statutory instrument should be laid before the National Assembly, rather than an amending statutory instrument.

Recommendation 13: The resolution of the National Assembly should be limited by standing order to the changed text only.

⁴ See, for example, the timeline in relation to the Transport Act 1985, s 6: <http://www.legislation.gov.uk/ukpga/1985/67/section/6?view=extent&timeline=true> (last visited 15 June 2016).

CHAPTER 6

A CODIFICATION PROGRAMME AND A CODE OFFICE

A CODIFICATION PROGRAMME

- 6.1 Despite the overwhelming support for consolidation in Wales, little consolidation has taken place. The disincentives are twofold. First, there is a lack of time on the part of government policy and legal teams and of legislative counsel. Secondly, there has been a lack of time in the National Assembly (coupled with the lack of an appropriate procedure, as the Constitutional and Legislative Affairs Committee has noted).¹ Delivering policy changes through legislation is usually a government's priority, and will take up much of a legislature's time. Bills that seek to rationalise and simplify legislation, without making substantial policy reform, take second place.
- 6.2 The need for consolidation has been recognised by the National Assembly. In its report on *Making Laws in Wales*, the Assembly's Constitutional and Legislative Affairs Committee explained that:

We believe that the Welsh Government needs to do more to overcome the problems and barriers to the consolidation of Welsh law and focus on developing and delivering a positive solution.

We believe that the Welsh Government should collaborate with the Law Commission to establish a long-term plan for the consolidation of law in Wales.²

- 6.3 The Welsh Government intends to consider this recommendation in conjunction with our report. For the reasons given in this report, we consider that such a plan should be for the codification of the law in Wales in the manner described in chapter 2.

New Zealand's Revision Bill Programme

- 6.4 Other Commonwealth countries have already taken steps to ensure that legislation is revised on a regular basis. In New Zealand, the Legislation Act 2012 obliges the Attorney General³ to prepare a draft three yearly revision programme for each new Parliament.⁴ The draft revision programme must include the revisions that are proposed to be started and enacted during the three year period.⁵ The draft programme must also set out the revisions on which work is

¹ See chapter 3.

² National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).

³ The Attorney General in New Zealand simultaneously holds a ministerial position and is chief law officer of the Crown.

⁴ Legislation Act 2012 (NZ), s 30(1).

⁵ Legislation Act 2012 (NZ), s 30(2)(a) and (b).

expected to continue during that period.⁶ This draft revision programme must be published and subject to a public consultation.⁷ The Attorney General must present a revision programme to the House of Representatives as soon as practicable after it is approved by the Government.⁸

- 6.5 The 2012 Act also provides the Parliamentary Counsel Office with a power to make recommendations in its annual report for the repeal of obsolete or redundant enactments or provisions of enactments, if their repeal is not suitable for inclusion in a revision. The Parliamentary Counsel Office may also make recommendations for changing certain provisions of the 2012 Act, including the revision powers which are outlined below.⁹ It is the Chief Parliamentary Counsel who is obliged to produce a draft revision Bill in accordance with those powers.¹⁰
- 6.6 We consider that such a programme is an effective means of improving the accessibility of the law. It provides an explicit statutory, and therefore binding, obligation on the Government's law officer (the Attorney General) to ensure that consolidation is taking place regularly. The obligation is not merely aspirational, but requires discrete tasks to be completed within a particular timeframe. This ensures that the importance of implementing technical law revision Bills is not forgotten by the Government, in its desire to prioritise public policy change.

The need for a rolling programme of codification in Wales

- 6.7 In our consultation paper we observed that we could see the benefit of the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, drawing up a programme of codification. This programme would be with a view to developing Welsh codes on the model we describe for those areas of the law where they are needed.
- 6.8 We asked:
- 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?¹¹
- 6.9 The majority of consultees, including the Care Council for Wales and Dr Catrin Fflur Huws (Aberystwyth University), supported the creation of a programme of codification.
- 6.10 The Welsh Government considered that

⁶ Legislation Act 2012 (NZ), s 30(2)(c).

⁷ Legislation Act 2012 (NZ), s 30(3).

⁸ Legislation Act 2012 (NZ), s 30(4).

⁹ Legislation Act 2012 (NZ), s 30(5).

¹⁰ Legislation Act 2012 (NZ), s 31(1).

¹¹ Form and Accessibility of the Law Applicable in Wales (2014) Law Commission Consultation Paper No 223, consultation question 8-15.

... a programme of some sort, be that of consolidation or codification, would be sensible. The content of the programme should, however, be a matter for the government of the day, subject to appropriate consultation.

6.11 Keith Bush QC stated:

That would be very desirable, on the understanding that codification would be on the basis of devolved law in the relevant areas similar in substance to a programme of consolidation – but with the intention of restricting future legislation that did not take the form of an amendment to the code.

6.12 The Wales Governance Centre were more emphatic:

Our view is that the first step required by statute should be the drawing up of a broad strategic codification programme. This would set out the broad structure of codes, answering the questions posed above, and provide a timetable for their achievement.

6.13 We conclude that a programme of codification should be developed in the form that we recommend in this report. It would respond to the Constitutional and Legislative Affairs Committee's call for a programme of consolidation, with the added benefits of associated technical reform and a discipline to preserve the integrity of the resulting product. We consider that the New Zealand model of establishing a statutory duty to undertake such a programme should be followed in Wales. This would help to ensure that a codification programme is sustained throughout changes of Government, and in spite of changing public policy demands.

6.14 As we have noted in chapter 3, the Counsel General is the Welsh Government's chief legal adviser, and shoulders the Welsh Government's responsibility for improving the accessibility of devolved legislation in Wales. We also observed that the Counsel General enjoys a measure of independence from the government.

6.15 We therefore consider that the Counsel General should be under a statutory obligation to present a codification programme at prescribed intervals (perhaps every three or four years). The programme could be carried out on a rolling basis, so that each programme commences where the last finished. The programme should be prepared after public consultation and should have the explicit aim of producing codes. The First Legislative Counsel should then supervise the production of draft codification Bills following the Counsel General's programme. The Welsh Ministers would also be able to refer reform work associated with the production of a codification Bill to the Law Commission.¹²

6.16 The Counsel General should be accountable to the National Assembly for the exercise of these obligations and responsibilities. The Constitutional and Legislative Affairs Committee of the National Assembly could usefully produce a

¹² Law Commissions Act 1965, s 3(1)(ea). Our acceptance of such a referral would be subject to resource constraints. See also the Protocol between the Welsh Ministers and the Law Commission (July 2015).

report on the codification programme at prescribed intervals. This would underscore the legislature's joint "ownership" of the codification process and enable the Committee to point to lessons learned from experience, in a similar way to its report on *Making Laws in Wales*.

- 6.17 A balance will need to be maintained between on the one hand ensuring the momentum of the codification programme and providing sufficient resources for the complex work involved without on the other hand hampering the rest of the legislative programme. We consider the economic impact of our recommendations in further detail in our impact assessment.¹³

How many codes?

- 6.18 In our consultation paper we suggested that the list of areas of competence constituted by schedule 7 to the Government of Wales Act 2006 could provide a useful starting point in determining how many codes ought to be introduced in Wales. However, we emphasised that the purpose of the codes is to improve the statement of the law for the benefit of the citizen. The boundaries of each code, therefore, should be those that best serve citizens, not those that fit pre-existing legal categories, or some other notion of tidiness.

- 6.19 We therefore asked the following consultation question:

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?¹⁴

- 6.20 Consultees who responded to this question broadly agreed that the coverage of each code should be subject to consultation on a case by case basis, but acknowledged that the list of legislative competences of the National Assembly for Wales was a helpful starting point.

- 6.21 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) suggested that

This should proceed field by devolved field, starting with the fields of most impact on the citizen and on businesses in Wales. [...] I accept that different solutions may be appropriate for different fields. As mentioned above, in my view, the fields of law which most affect the citizen and businesses should be the priority for consolidation or codification. Legislation concerned with the organisation of public services could be a lower priority, although consolidation/codification of these might produce resource efficiencies for the public purse.

- 6.22 The Welsh Government considered this to be

¹³ Form and Accessibility of the Law Applicable in Wales (Impact Assessment) (2016). Available at <http://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-to-wales/> (last visited 15 June 2016).

¹⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 8-3.

... a practical issue that we would need to consider fully if we are to proceed. But flexibility would be essential.

6.23 Dr Sarah Nason (Bangor University) said that:

The appropriate subject matter for any proposed code should be a key aspect of consultation for each project. Many of the downsides to codes stem from their being either under or over inclusive in terms of their subject matter from the outset. The interaction of specific subject matter codes must also be examined.

6.24 In chapter 7 we discuss the case studies that we presented in the consultation paper. We also refer to suggestions from consultees, including the Welsh Government, on how the formulation of a programme might be approached. We conclude that the first codification programme to be drawn up by the Welsh Government might include any combination of: education law, local government law, social care law, law on waste and the environment, or other topics identified by the Welsh Government as suitable. We envisage that the codification of planning law, on which we have already started work, would be included.

6.25 We have referred to the Constitutional and Legislative Affairs Committee's recommendation that a plan for consolidating the law within Wales should be drawn up in collaboration with the Law Commission. This is a matter for the Welsh Government. It will be for the Welsh Government to consider the recommendations in this report and determine the extent to which they wish to implement them. It will also be a matter for the Welsh Government, in agreement with ourselves, to decide upon our future involvement both in the establishment of a codification programme and in projects for the codification of particular areas of Welsh law. This would be in accordance with the terms of the Law Commissions Act 1965 and the Protocol between the Welsh Ministers and the Law Commission.

Recommendation 14: The Welsh Government should institute regular programmes of codification.

Recommendation 15: The Counsel General should be obliged to present a codification programme, and report to the National Assembly on the progress of the programme at regular intervals.

A CODE OFFICE

6.26 In the consultation paper we identified the following functions which need to be undertaken as part of a system of codification and for the effective maintenance of codes once created:

- (1) the recognition of an enactment as a code;
- (2) determination that the provisions of a Bill fall within the subject area of an existing code;
- (3) approval or oversight of the exercise of technical maintenance of the codes;

- (4) managing the technicalities of incorporating amending text into a code;
- (5) periodic technical reviews;
- (6) managing the process of identifying more substantive defects, and promoting amendments to correct them; and
- (7) publication of the code.¹⁵

6.27 Our preliminary view was that an office should be established within the National Assembly with responsibility for these functions, explicitly tasked with supporting the development and maintenance of Welsh codes. We did not envisage that such a “code office” would necessarily be involved in, or responsible for, carrying out the codification programme discussed above.

Lessons from consultation

6.28 We asked consultees:

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?

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?¹⁶

Should a Code Office be established?

6.29 The majority of consultees agreed that it would be necessary to establish new infrastructure to support consolidation and codification. For example, Huw Williams (Geldards LLP) observed that if it is to be successful, a programme of consolidation and codification will require a great deal of work. In Mr Williams’ view, this work would be best managed by a separate body with specific responsibility for it. The Wales Governance Centre also noted that a separate body would have a key co-ordinating role.

6.30 Keith Bush QC went further, arguing that an office with a much broader remit should be established. He argued that a Legislation Office should be set up and provided with responsibility not only for the creation and maintenance of codes, but for legislation in general. Mr Bush QC suggested that this office would, for example, advise the National Assembly on the quality of proposed legislation. Mr Bush QC also considered that the supervision, or the organisation, of a programme of codification could be part of the functions of such an office.

6.31 Other consultees were not persuaded that a new body would be necessary. The

¹⁵ Form and Accessibility of the Law Applicable in Wales (2014) Law Commission Consultation Paper No 223, para 8.92.

¹⁶ Form and Accessibility of the Law Applicable in Wales (2014) Law Commission Consultation Paper No 223, consultation questions 8-5 and 8-6.

Association of Judges of Wales considered that the departments of the civil service, arranged in accordance with code subject matters, and supporting the National Assembly would be more effective than establishing a distinct office or department simply to support the development and maintenance of the Welsh codes. Dr Nason suggested the establishment of cross-departmental teams of experts to ensure the expertise necessary for the development and maintenance of a system of codification. She suggested that these teams ought to be accountable to a specific officer or director to ensure that the work was being carried out.

- 6.32 The Welsh Government considered that, as a matter of principle, the functions we identified in our consultation paper should be undertaken by the Welsh Government, rather than a newly established body. The Welsh Government set out two reasons in favour of the Code Office functions being performed by the Welsh Government. First, as a matter of principle, the creation of the legislative programme and management of legislation is a matter for Government. Secondly, in practical terms, the Welsh Government, especially the Office of the Legislative Counsel, already has the necessary expertise to perform these functions.

Where should the office be located?

- 6.33 Consultees who supported the creation of a new office expressed mixed views on where this office should be located. Some consultees, including the Association of London Welsh Lawyers and the Wales Governance Centre, thought that the office should be within, or responsible to, the National Assembly for Wales. If this were the case, codes would be drafted by legislative counsel in the Welsh Government and not by this new office. The Code Office would co-ordinate codification and would maintain, edit and look after codes under the standing orders, liaising with the Business Committee to decide how they could be accommodated within the Assembly's legislative programme.
- 6.34 Other consultees, such as Mr Williams, thought this office ought to be a part of, or answerable to, the Welsh Government, or, more specifically the Office of the Legislative Counsel. The arguments for this model echoed those of the Welsh Government for keeping the function we describe within the executive: that it was already a matter of executive responsibility, and that the expertise to perform the functions only really existed in the Office of Legislative Counsel.
- 6.35 The Lord Chief Justice of England and Wales suggested that the office be a hybrid with a mandate to produce better law, and should occupy a position between the Welsh Government and the National Assembly, with independence from both. Keith Bush QC made a similar suggestion.

A Code Office for Wales: Conclusions

- 6.36 There was some disagreement amongst consultees as to the nature and quantity of functions that ought to be undertaken by a new office. Whilst we had envisaged that a new office would exclusively undertake the post-codification maintenance functions that we identified in our consultation paper, the majority of consultees considered that the new office should be made responsible for supporting the codification programme. This would be a broader remit, meaning that the Code Office would help to create, as well as maintain, codes.

Alternatively, it could undertake functions to monitor the statute book more generally, such as advising the National Assembly on proposed legislation.

- 6.37 Many of the functions that would be undertaken by a broadly constituted Legislation Office are already discharged by other bodies or persons. For example, the National Assembly's Legal Services provide expert and impartial advice to support Assembly Members and committees in scrutinising legislation.
- 6.38 Equally, the Office of the Legislative Counsel is tasked with ensuring that legislation is an effective means of delivering policy in each particular case. The Counsel General is also responsible for promoting the accessibility of devolved law in Wales. Both the Counsel General and Office of the Legislative Counsel have a role in ensuring that the statute book is generally kept in a good state of health.
- 6.39 We do not consider that merging the various responsibilities identified by consultees in a single body is justified. We have not found evidence that the current allocation of responsibilities in relation to legislation is problematic. The tasks of scrutinising the substantive policy of legislation, on the one hand, and the development of that policy and drafting of legislation on the other, are constitutionally and conceptually distinct. We consider that creating a hybrid body would blur the separation of powers between the executive and legislature, without providing a clear improvement to the current arrangement.
- 6.40 In the preceding chapters we have explained how the first two functions we described above (recognising an enactment as a code, and determining that the provisions of a Bill fall within the subject area of an existing code) can be carried out within the usual functioning of the National Assembly for Wales. We therefore no longer consider that a separate body needs to undertake these functions.
- 6.41 The publication of legislation is currently carried out by the Queen's Printer on behalf of the Crown. The function is performed by the National Archives, which is also responsible for publishing legislation online on the legislation.gov.uk website.¹⁷ We now do not consider that the function of publishing codes need be carried out by a body other than the National Archives. In our model of codification, codes are formally Acts of the Assembly. Amendments made to codes will be enacted by the National Assembly in amending legislation and editorially input by the National Archives and published on the legislation.gov.uk website in the usual way. This we consider makes adequate provision for performance of the fourth and seventh functions that we identified. The National Archives is responsible for the publication of legislation generally and has the editorial expertise and experience necessary to undertake this task.
- 6.42 The third, fifth and sixth functions that we identified in our consultation paper will, however, need to be undertaken. These functions exclusively concern the upkeep and maintenance of codes and are ones that call upon the skills of legislative drafters.
- 6.43 We are persuaded by the majority of consultees that the Code Office should be responsible for assisting with the delivery of the codification programme, as well

¹⁷ We describe the arrangements for publishing legislation in chapter 13.

as post-codification maintenance. Both sets of functions require similar expertise in legislative drafting.

- 6.44 If our recommendations are followed, the Counsel General will be under a statutory obligation to present the codification programme. This will be a substantial task. Determining the areas of the law ripe for codification will require some input from policy officials, but the success of the delivery of the programme of codification will depend on legislative drafters. It will need to be legislative counsel who will draft code Bills, with instructions from government policy officials where, for example, a substantial technical reform is required to be made to the code.
- 6.45 For these reasons we consider that the Code Office will need to be staffed principally by legislative counsel and that accountability for it should rest with the Counsel General. We envisage that it would be led by the First Legislative Counsel and would contain legislative counsel specifically dedicated to the codification programme. In order to carry out a programme of codification, it will be necessary for Welsh Government directorates to second policy or legal staff to the Code Office while a code within their area of responsibility is being drafted, and to assist the Code Office to make recommendations as to areas of law suitable for codification.
- 6.46 The Code Office should be led day-to-day by First Legislative Counsel. The Office of the Legislative Counsel, like the Office of the Parliamentary Counsel, is not formally independent of government, but has an obligation to give independent legal advice to the government. In Westminster a disagreement between parliamentary counsel and the instructing Government Department may be referred to the Attorney General for adjudication. We anticipate that any similar disagreement in Wales would be referred to the Counsel General. This independence is important to maintaining the confidence of government and a legislature in their legislative drafters.¹⁸
- 6.47 Legislative counsel in the Code Office would also undertake the post-codification maintenance functions we have identified. These would include managing the technicalities of incorporating amending text into a code, advising the Counsel General on whether new legislation is appropriate for incorporation into an existing code (and if so, which code), undertaking periodic technical reviews of codes, identifying defects in codes and drafting amendments to correct them. The creation of a separate office should, we anticipate, encourage the development of focussed expertise in codification and code maintenance as a specialised role; it could also assist in ensuring that human resources allocated to codification and code maintenance remain dedicated to those tasks.
- 6.48 We concluded above that the Counsel General should be responsible for codification, with a statutory responsibility to report periodically to the National Assembly on the codification programme. The activities of the Code Office should fall within the scope of this reporting obligation. In this way, the work of the Code Office can be held to account before the National Assembly, via the Counsel General. This would help to ensure that the National Assembly is able to

¹⁸ For a discussion of the role of legislative drafting offices, see D Greenberg, "Dangerous trends in modern legislation" (2015) 1 *Public Law* 96.

scrutinise carefully the progress of the codification programme and the ongoing maintenance of codes.

Recommendation 16: We recommend that a Code Office should be set up to manage the process of codification and consolidation and maintain codes. The Code Office should be distinct from the existing Office of the Legislative Counsel.

Recommendation 17: We recommend that the Code Office functions should include the following:

- (1) approval or oversight of the exercise of technical maintenance of the codes;**
- (2) periodic technical reviews; and**
- (3) managing the process of identifying more substantive defects in codes and drafting amendments to correct them.**

Recommendation 18: We recommend that the Code Office should be accountable to the Counsel General and led by First Legislative Counsel.

CHAPTER 7

CASE STUDIES

INTRODUCTION

- 7.1 In the consultation paper we discussed five areas of devolved law: education, social care, waste and the environment, town and country planning and local government. We considered the extent to which fragmentation of the law in these areas was hindering access to it and ease of understanding of it and the need for consolidation. We asked consultees:

... 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.

Do consultees consider that the law as it applies in any of the areas described above would benefit from consolidation? What would the benefits be? Are there any problems or disadvantages in consolidating the relevant law, including costs?¹

CASE STUDY 1: EDUCATION

- 7.2 In the consultation paper we observed that the National Assembly for Wales has enacted 13 pieces of primary legislation in the field of education since receiving primary lawmaking powers under Parts 3 and 4 of the Government of Wales Act 2006.² In addition, the United Kingdom Parliament has continued to pass legislation relating to education which has occasionally applied to Wales on the basis of a legislative consent motion. We noted that, depending on how widely "education law" is defined, education law in Wales is contained in between 17 and 40 Acts of Parliament, seven Measures and six Acts of the National Assembly and hundreds of statutory instruments.
- 7.3 We observed that the law on education needs to be understood by non-lawyers, such as parents and teachers, as well as by lawyers. We noted the increasing divergence of education legislation in England and Wales and the intermingling in Acts of Parliament of sections and subsections applicable only in England or only in Wales. We concluded that a rationalisation of the existing law seemed desirable, but acknowledged that a heavy legislative reform programme can make consolidation difficult.
- 7.4 Consultees were overwhelmingly in favour of consolidating the law on education. Throughout the consultation period, on numerous occasions, we heard that the law on education in Wales is particularly fragmented. This confirmed our analysis in the consultation paper.
- 7.5 Huw Williams (Geldards LLP) gave the example of the law in relation to the

¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 5 consultation questions 5-1 and 5-2.

² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 5.8.

inspection of education and training in Wales and the functions of HM Chief Inspector of Education and Training in Wales. He listed provisions in eight different Acts of Parliament dealing with the inspection of different forms of education and training. Mr Williams also noted that the legislation often makes different provision for England and for Wales, which complicates matters further.

7.6 Universities Wales gave a similar example in the field of higher education, where the law is dispersed across numerous statutes, parts of which apply to England and parts of which apply to Wales. They raised issues concerning the condition of education law in Wales, including:

- (1) difficulty in identifying non-textual amendments to the legislation;
- (2) problems of identifying the parts of the legislation applicable in Wales;
- (3) much of the legislation being in statutory instruments, which in their experience made it particularly difficult to trace amendments;
- (4) the prevalent use of “Henry VIII clauses”³; and,
- (5) a lack of clarity surrounding the boundaries of Welsh Assembly competence.

7.7 Keith Bush QC acknowledged that consolidation of education law in Wales would be resource intensive. He observed, however, that the Welsh Government’s annual expenditure on education in Wales is of the order of £2 billion and that “the cost of simplifying the law on that subject would be very low in comparison”. Mr Bush QC emphasised that currently, the law is dispersed across (by his count) 31 pieces of legislation.

7.8 Consultees overwhelmingly supported the consolidation of education legislation in Wales. We consider that the consolidated legislation could be accompanied by technical reform and could stand as a code. However, we acknowledge that this will be a substantial task.

CASE STUDY 2: SOCIAL CARE

7.9 In the consultation paper we highlighted that in recent years there has been increasing divergence in social care law between England and Wales. In 2014, the National Assembly passed the Social Services and Well-being (Wales) Act which consolidated the legal framework for children’s services as well as those provided to adults. In some areas the Act radically reforms social care law. We commented that the new Act presents a fresh start from which policy and practice may develop.

7.10 We also noted that the Act has been criticised for being opaque and for not being comprehensive in its coverage of the law relating to children.

7.11 Consultees were critical of the Social Services and Well-being (Wales) Act 2014. The Association of Judges of Wales commented adversely on its inter-

³ A “Henry VIII clause” is a provision giving a Minister the power to make regulations which amend, repeal or revoke a provision of primary legislation.

relationship with the Children Act 1989 (formerly the main piece of legislation in England and Wales dealing with children, parts of which remain in force in Wales). The Association described the situation as one of “utmost concern”.

- 7.12 One fundamental difference in the legislation on social care between England and Wales is the use of the term “well-being” in Wales – a departure from “welfare”, the term used in England. The Association of Judges of Wales described “welfare” as a key definition in the Children Act 1989. The Association stated:

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

- 7.13 Their view was that

Ideally, those provisions of the Children Act 1989 relating to public law proceedings which currently remain applicable to Wales supplemented by those parts of the [Social Services and Well-being (Wales) Act 2014] which apply to children in Wales would be re-enacted in one statutory code with explanatory footnotes referring to the relevant subordinate legislation in force in Wales.

- 7.14 Third sector organisations voiced similar concerns. For example, the Care Council for Wales stated that

The overall impression left by the Act, as a piece of consolidating legislation, is that it did not achieve coherence as a single unified piece of legislation but rather a disjointed series of areas of legislation that did not amount to a coherent whole.

- 7.15 The Social Services and Well-being (Wales) Act 2014 only came into force on 6 April 2016. Consequently, there is little experience of how the Act will work in practice. We were struck by the strength of the judges’ concerns about the legislation on children and their plea for codification. The Welsh Government in turn described these as an example of the problems that the Assembly’s competence creates for consolidation or codification exercises. It observed that the subject matter of the Children Act 1989 is largely outside the competence of the National Assembly (a point acknowledged by the judges, who pointed out that a full codification exercise would require legislation of the United Kingdom Parliament).

CASE STUDY 3: WASTE AND THE ENVIRONMENT

- 7.16 In the consultation paper we noted that much of the law relating to waste emanates from the European Union. Consequently, the relevant legislation frequently does no more than transpose EU Directives. In practice the Welsh Government works closely with, and benefits from work carried out by, the United Kingdom-wide Department for Food and Rural Affairs (Defra).
- 7.17 We noted the possible advantages of maintaining similarity between the law in England and in Wales, given that the waste industry works across both countries. We also noted that the legislation is fragmented, being spread between three Acts of Parliament and numerous statutory instruments made under those Acts or

under the European Communities Act 1972, and that the European Union legislation can be difficult to understand. However, stakeholders had reported that much of the legislation relating to waste had been in place for years and was well understood by the industry and regulators.

- 7.18 On the other hand we suggested that there might be benefit in consolidating and simplifying the whole of the environmental legislation applicable in Wales. We acknowledged that the benefits of consolidation should be offset against the possibility of losing the benefits of the familiarity with the current legislation. We referred to the Welsh Government's earlier request that we undertake a project on environmental law as part of our Twelfth Programme.
- 7.19 We received a limited number of consultation responses referring to the condition of the legislation on waste and the environment. One consultee, a lay magistrate and a farmer, noted that the law on waste and the environment is well understood because of the information and guidance promulgated by the Welsh Government and organisations such as the National Farmers' Union Wales and Farmers' Union of Wales.
- 7.20 Another consultee commented that legislation about water is difficult to understand and that this was highlighted by Dwr Cymru in evidence to the Silk Commission. In addition, the United Kingdom Environmental Law Association's report on "The State of UK Environmental Law" highlighted stakeholders' dissatisfaction with the quality of environmental legislation, particularly noting the increasing fragmentation of environmental laws across the devolved administrations.⁴
- 7.21 The case for codification of legislation on waste is not clear, for the reasons we advanced in the consultation paper. There are arguments that it would be unsatisfactory for the legislation in England and Wales to diverge. As regards environmental law more generally, there is evidence to support a codification exercise. We would consider again a project of codification and reform of the law in this area at the invitation of the Welsh Government, but do not make any recommendation in that regard.

CASE STUDY 4: TOWN AND COUNTRY PLANNING

- 7.22 In the consultation paper we emphasised that the Planning Directorate in the Welsh Government has promoted a distinct planning system for Wales, evidenced by a recent significant piece of legislation, the Planning (Wales) Act 2015.
- 7.23 We found two sources of confusion about planning law in Wales. First, difficulties in discerning the law applicable in Wales and that in England. Secondly, difficulties of accessibility arising from the fact that a fresh consolidation of the law relating to town and country planning is overdue both in England and in Wales. We referred to the law reform project that we were undertaking for the Welsh Government on planning law in Wales and to the First Minister's statement of intention to pursue a planning consolidation Bill that would bring together all the existing legislation and further streamline the planning process.

- 7.24 Consultees agreed that town and country planning legislation is complicated and difficult to access; they highlighted the difficulties resulting from a lack of textbook coverage of planning law in Wales.
- 7.25 Mr Williams discussed the potential further divergence of town and country planning law in England and in Wales. He saw “strong arguments for a common system” for compulsory purchase orders, given the “close connection between the [compulsory purchase] system and the law of property generally”.
- 7.26 Consultees in both the present project and our Welsh planning law project supported the consolidation of planning law in Wales. Our planning law project has expanded to provide for this. Further information about the project is contained in our scoping paper in that project, published contemporaneously with this report.
- 7.27 In summary, planning law in Wales suffers, first of all, from the problem of fragmentation that it shares with the law in England. The planning law of England and Wales was last consolidated in 1990, in the Town and Country Planning Act 1990 and two other statutes dealing with listed buildings and conservation areas⁵ and with hazardous substances.⁶ The 1990 legislation has been described as a “remarkable achievement”,⁷ but the clarity of presentation achieved by it did not last long. Further legislation devoted in whole or in part to planning was passed in each year from 1991 to 1995. Since 2000 there have been a further six Acts of Parliament and four Acts of the Assembly. Much of the subsequent legislation, including the Planning (Wales) Act 2015, takes effect by amending the Town and Country Planning Act 1990, but in some cases it makes separate new provision – in particular in the Planning Act 2008, which introduced a national system of approval for “nationally significant infrastructure projects”. It is impossible to navigate the law without an updated text. It is often not clearly stated whether provisions in Acts of Parliament apply to Wales.⁸
- 7.28 The intention behind the project is for the planning law applying in Wales to be contained in Assembly legislation. The technique that we provisionally propose to employ is that described in this report as “codification”: consolidation accompanied by law reform with a view to creating a code to be kept intact. In this instance, in particular given the extent of the policy-driven reforms already effected by the Planning (Wales) Act 2015, reform will be limited to what we have labelled “technical reform” or “simplification”. We envisage:

⁴ UK Environmental Law Association, *The State of UK Environmental Law in 2011-2012: Is there a case for legislative reform?* (2012)

⁵ Planning (Listed Buildings and Conservation Areas) Act 1990

⁶ Planning (Hazardous Substances) Act 1990

⁷ *Hansard (HC)*, 14 May 1990, vol 172, col 714 (Mr John Fraser MP).

⁸ For example, Pt 2 of the Planning and Compulsory Purchase Act 2004 does not apply in Wales; this is not stated expressly, but is achieved by s 37 of the Act (the interpretation section applying to Pt 2) employing a definition of “local planning authority” that does not include any local authorities in Wales.

- (1) the restatement of the existing law so that as far as reasonably practicable it is contained within a consolidated piece of legislation in a modern, consistent and well-ordered manner so as to be easily accessible to, and ascertainable by, its readers;
- (2) adjustments to produce a satisfactory consolidated text – correcting errors, removing ambiguities and obsolete material, modernising language and resolving a variety of minor inconsistencies;
- (3) the simplification of the law by way of streamlining and rationalising unnecessary process and procedure, but not introducing any substantial change of policy; and
- (4) the writing into statute of propositions of law developed in case law where they might contribute towards more accessible and coherent legislation.

7.29 The sort of technical reforms that we envisage in the scoping paper (and on whose merits we shall in due course consult) involve possible procedural improvements such as merging the procedures for obtaining listed building and conservation area consent with those for planning consent, and the repeal of provisions that are not used. For example, the Town and Country Planning Act 1990 provides for the constitution of a planning inquiry commission to act in place of the Secretary of State or the Welsh Ministers in more difficult or important planning inquiries. The inquiry procedure has never been used and has been the subject of extensive criticism.⁹ We shall investigate the scope for repealing this part of the legislation. Similarly, we shall investigate the need to retain provisions providing for the creation of simplified planning zones (never used in Wales) given their overlap with local development orders.

7.30 The project will not attempt to codify the whole of the legislation governing planning at once. In the scoping paper we provisionally propose an initial piece of codification focussing on the most frequently used (and also most often amended) provisions governing the making of development plans, the determination of planning applications and enforcement. We see the project as the first stage in the eventual production of a comprehensive planning code for Wales.

CASE STUDY 5: LOCAL GOVERNMENT

7.31 Finally, the consultation paper looked at the condition of the law governing local government. We referred to the Welsh Government's 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.

7.32 We explained that the most significant piece of legislation in this field, the Local Government Act 1972, has been heavily amended and that as a result, it is difficult to understand the intention of some of its provisions. Further, the language of the 1972 Act is archaic.

7.33 Since we published the consultation paper the Local Government (Wales) Act

2015 has received Royal Assent. The Act makes provision for the voluntary merger of two or more local authorities.¹⁰ On 24 November 2015 the Welsh Government launched a consultation on a draft of a second local government Bill whose “objective [...] is to complete the programme of Local Authority mergers and reform the legislative framework for Local Authority democracy, accountability, performance and elements of finance”. The Draft Bill would also set up a statutory Public Services Staff Commission. The consultation closed on 15 February 2016.

- 7.34 The consultation response of David Michael (Neath Port Talbot County Borough Council) pointed to the two most important pieces of local government legislation – the Local Government Act 1972 and the Local Government Act 2000 – and questioned “the extent to which these provisions were ever properly integrated”. He added that “the fact that they are contained in different Acts parts of which apply to England and parts of which apply to Wales certainly does not help interpretation.” He saw the problem as “compounded by National Assembly legislation which is sometimes not as well set within the existing structures as it might be.”
- 7.35 Mr Michael’s view that the fragmented nature of local government law makes it difficult to understand the legal position was reflected by other consultees. Consultees emphasised difficulties of interpreting the law both because legislation has been heavily amended and because the law respectively applying in England and in Wales is not clear.
- 7.36 Consultees generally supported consolidation of local government law in Wales. The organisation of local government is currently undergoing a process of policy-driven reform as described above. The legislation on local government strikes us as a candidate for codification, which could either be introduced alongside further reforms proposed in the current draft Bill or be undertaken once the further reform legislation has been enacted.

OTHER AREAS OF LAW SUGGESTED FOR CONSOLIDATION OR CODIFICATION

- 7.37 In the consultation paper we also asked:

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?¹¹

- 7.38 In addition to identifying other areas of devolved law where there are problems related to the form and accessibility of the law, some consultees made introductory remarks about the state of legislation applying in Wales. The Presiding Officer of the National Assembly, Dame Rosemary Butler AM, pointed

⁹ *Encyclopaedia of Planning Law and Practice* (vol 2) p 2-3405.

¹⁰ Local Government (Wales) Act 2015.

¹¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 5-3.

out that it is “difficult and expensive for the public in Wales [...] to obtain up to date versions of all the laws applying to Wales” but that this is “not a problem created by the Assembly or the Welsh Government”. The Presiding Officer explained that even when citizens have obtained the law it is difficult to understand their application due to the “mixture of UK laws that apply to both Wales and England”. The Presiding Officer also noted that the Welsh Government’s increasing tendency to make use of secondary legislation can make it even more difficult for citizens to access the law; secondary legislation is only updated on commercial websites.

7.39 LexisNexis gave the perspective of a commercial publisher approaching legislation that applies in Wales. They commented that “it is not always obvious which legislation can be said to apply to Wales”, pointing out that the Government of Wales Act 2006 does not indicate which Westminster Acts apply to Wales. They also highlighted how part of some Acts have “not been consistently amended so as to account for a transfer of functions”. For example, section 61 of the Housing Act 1988 was amended by the Deregulation Act 2015¹² so as to insert the words “in relation to Wales”, but its reference to the Secretary of State was left unaltered despite the fact that the function in question has been transferred to the Welsh Ministers. They asked rhetorically whether “this roundabout way of finding information could have been avoided?”

7.40 The Welsh Government suggested an approach to considering areas for consolidation: one should look at the areas of law in which there is most legislation, and assume that the more legislation created, the more likely the law is to benefit from consolidation. It stated that “older legislation can also be problematic as it is often more difficult to understand”. The Welsh Government suggested approaching consolidation systematically rather than area by area approach, “since priorities as to those areas, and the complexity of the law developing in them, may change rapidly over time in ways not immediately predictable”. There is also a need to consider the consolidation of secondary legislation and better publishing of “soft law”. Soft law includes statutory and non-statutory guidance.

7.41 Housing was an area of law suggested as suitable for consolidation. The Association of Judges of Wales explained that, similarly to social care, the law on housing in Wales is going through a time of change. It emphasised that it is important that these changes are made known to those in England as well as Wales:

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

7.42 Citizens Advice Wales also identified housing law as an area in which it experiences difficulties. It referred to its experience with the Housing (Wales) Act 2014 and the then Renting Homes Bill, now the Renting Homes (Wales) Act

¹² Deregulation Act 2015, s 103(3) and sch 22, Pt 1, para 9

2016.

- 7.43 Similarly, David Gardner (Administrative Court Office Wales) identified housing and homelessness as areas of law where there have been some problems in practice. He stated that there are occasions where representatives quote the regulations that apply in England but not Wales. He considered that consolidation of the law in these areas would be beneficial.
- 7.44 Dr Catrin Fflur Huws (Aberystwyth University) identified the Welsh Language (Wales) Measure 2011 as an area of devolved law where there is a problem with the form and accessibility of the law. Dr Huws commented that the Measure “is not arranged in the most convenient way for the reader – for example, the grounds for appeal to the Welsh Language Tribunal are dispersed across four sections that are not chronological, and so it is not possible to easily evaluate what the grounds for appeal are”.
- 7.45 Finally, during consultation meetings, consultees argued that the constitutional legislation relating to Wales should be consolidated. The piecemeal development of devolution means that the law governing the devolution settlement in Wales is dispersed across various pieces of legislation. Consultees suggested that the fundamental nature of this area of law meant that citizens should be capable of finding it in one coherent statute.

CONCLUSION

- 7.46 These examples illustrate some of the issues discussed elsewhere in this report, showing the difficulties of the current state of fragmented legislation and some of the benefits and possible risks to be weighed up in deciding whether to carry out consolidation or codification exercises. We have not investigated the merits of consolidation or codification in these fields in depth, but our provisional view is that the products of any exercise of bringing together legislation on these topics could profitably stand as codes, which can then be protected from fragmentation by subsequent amendment.

CHAPTER 8

LEGISLATIVE STANDARDS

INTRODUCTION

- 8.1 In the consultation paper we explored options for improving the supervision, scrutiny and quality of legislation. These included introducing new structures to consider draft legislation before its passage through the Assembly and to review the quality of legislation and the overall state of the statute book in Wales. We described the committees that had functioned in New Zealand, a common law jurisdiction with population roughly comparable to that of Wales and a unicameral legislature, which has tried three forms of legislation committee. This chapter reviews suggestions made for the United Kingdom and New Zealand Parliaments and considers, in the light of consultation responses, their suitability to Wales.
- 8.2 We begin by summarising and updating the history of what we describe for convenience as “legislation committees” in New Zealand.¹ We then turn to the related topic of legislative standards, following which we consider consultees’ views and explain our conclusion that the needs identified by stakeholders are not best met by a new advisory committee but rather by the introduction of formal legislative standards.
- 8.3 We then go on to consider other materials to accompany legislation that legislative standards might prescribe; we consider and reject the introduction of a new species of impact assessment assessing the impact of a proposed piece of legislation upon the remainder of the statute book but instead make recommendations about informal Keeling schedules and about Explanatory Memoranda and explanatory notes.

LEGISLATION COMMITTEES IN NEW ZEALAND

- 8.4 A Legislation Advisory Committee was established in New Zealand in February 1986 at the same time as the New Zealand Law Commission. It was chaired by the Law Commission’s President, and worked closely with that body.² The committee consisted of lawyers in private practice and academia, senior government officials and Parliamentary drafters. It was accountable to the Attorney General. It had two main functions. First, it set standards for legislation by way of guidelines on the legislative process and the content of legislation, approved by the Cabinet. Secondly, it assessed Government legislation against its guidelines. The New Zealand Law Commission prepared reports on Bills for the committee. Where a Bill contravened the guidelines, the committee could make a submission to the Parliamentary Select Committee considering the Bill.
- 8.5 Sir Geoffrey Palmer QC, former President of the New Zealand Law Commission

¹ The subject is dealt with in our consultation paper, *Form and Accessibility of the Law Applicable in Wales* (2015) Law Commission Consultation Paper No 223, paras 9.32 to 9.59.

² The New Zealand Law Commission has a much broader remit than the Law Commission of England and Wales in considering legislation before and during its passage through Parliament. See New Zealand Law Commission Act 1985, s 5. See also the powers of the Law Commission in s 6 and responsibilities in s 7.

and Chairman of the Legislation Advisory Committee, described the impact of the committee over the last 20 years as “benign, but peripheral”. His view was that problems with legislation were rooted in its early design and were difficult to resolve by the time the Bill reached the Advisory Committee. In order to influence legislative design at an earlier stage, Sir Geoffrey Palmer QC was instrumental in the establishment of a Legislation Design Committee in 2006. He anticipated that, had the committee been a success, it would have replaced the Legislation Advisory Committee.³

- 8.6 The Legislation Design Committee was a ministerial committee, again chaired by the President of the Law Commission, which operated as a standing advisory body to Government departments and agencies. The Prime Minister and Cabinet’s legal advisor would identify Bills in the year’s legislative programme for the committee’s attention. Sir Geoffrey Palmer QC described its role as “guide, philosopher and friend to departmental officials generating difficult legislation”.
- 8.7 The Committee operated on an advisory basis rather than having a screening role as part of the structures for producing draft legislation. It ceased meeting regularly after the general election and a change of administration in 2008.⁴
- 8.8 Following criticism of the quality of New Zealand legislation in a report by the New Zealand Productivity Commission, a new Legislation Design and Advisory Committee was set up in June 2015.⁵ This new committee combines the functions of its two predecessors. It has taken over responsibility for the legislative standards drafted, maintained and enforced by the Legislation Advisory Committee.⁶ The Attorney General described the new committee’s other role as follows:

The committee will work with agencies when proposals for bills and drafting instructions are first being developed to address problems in the basic architecture of legislation and identify potential legal and constitutional issues before bills are introduced.⁷

- 8.9 As at March 2016 (after nine months of operation), the committee had met with government departments and agencies on 15 Bills. It has provided advice to departments and agencies on a range of legislative design issues, including

³ Sir G Palmer QC, “Improving the Quality of Legislation – the Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 *Waikato Law Review*. See also the alternative view of the Legislation Advisory Committee’s work expressed by Professor Dawn Oliver, “Improving the Scrutiny of Bills: the Case for Standards and Checklists” (2006) 2 *Public Law* 219.

⁴ For a summary of the structure and role of the Legislation Design Committee, see the New Zealand Law Commission’s *Briefing for the Minister Responsible for the Law Commission* (2011) p 14, where the committee is described as “only operating on a partial basis”.

⁵ New Zealand Productivity Commission, *Regulatory institutions and practices* (16 July 2014) available at <http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf> (last visited 15 June 2016).

⁶ Legislation Advisory Committee Guidelines on Process and Content of Legislation (2014 edition) available at <http://ldac.org.nz/guidelines/lac-revised-guidelines/> (last visited 15 June 2016).

access to law, the use of high level principles in legislation and the allocation of provisions between primary, secondary, and tertiary legislation. Feedback from departments and agencies to date has been positive, the majority of departments surveyed considering that the quality of their Bill was improved through engagement with the committee and that they would be likely to engage with the committee in the future when developing policy/legislation.

- 8.10 The committee also retains a post-introduction vetting function, through a subcommittee of external advisers. The subcommittee has been operating since February 2016 and reviews, after their introduction, Bills that have not been reviewed by the main committee. By the end of May 2016 it had made two submissions to Parliamentary select committees where Bills were inconsistent with the Legislation Advisory Committee Guidelines of 2014.⁸
- 8.11 The committee also provides education and training work in relation to its role and the Guidelines. A large focus of its initial education strategy has been educating department and agency officials with the relevant knowledge to work with the Committee, as well as providing workshops and discussion forums on common legislative design issues and practical best practice.⁹

LEGISLATIVE STANDARDS

- 8.12 One of the functions of the Legislation Advisory Committee in New Zealand was to develop legislative standards (the Guidelines referred to above). Broadly speaking, legislative standards are directed to governments and set standards as to what a piece of legislation should seek to achieve and how it should be presented to the legislature. They are different from drafting guidelines, such as those produced by the Office of the Legislative Counsel, which are directed to drafters and are concerned with how best to express in words what a piece of legislation seeks to achieve.¹⁰
- 8.13 The key benefit of legislative standards is that they provide an objective yardstick to measure the quality of legislation. The House of Commons Political and Constitutional Reform Committee has noted that without such a list of standards, determining whether or not a piece of legislation is of poor quality is a highly subjective exercise.¹¹ Standards can be of great assistance to members of the legislature who are tasked with the job of scrutinising legislation. Moreover, these guidelines help to enable policy officials to understand and address issues with

⁷ New Zealand Attorney General's press release (29 June 2015) available at <http://beehive.govt.nz/release/establishment-legislation-design-and-advisory-committee> (last visited 15 June 2016).

⁸ The submissions are available at <http://ldac.org.nz/submissions/2016> (last visited 15 June 2016)

⁹ Information supplied by the New Zealand Legislation Design and Advisory Committee chairman, Paul Rishworth QC, who describes the committee as successfully contributing to better quality legislation in New Zealand. We are grateful to Mr Rishworth QC for the information.

¹⁰ In the next chapter we discuss the Office of the Parliamentary Counsel's *Drafting Guidance* (March 2014).

¹¹ House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation (2013-14) HC 85, para 55.

the quality of legislation in the process of developing a Bill.

- 8.14 Proposals have been put forward on a number of occasions for the introduction of legislative standards in the United Kingdom Parliament and of a committee to ensure these standards are met.
- 8.15 In 2014, the House of Commons Select Committee on Political and Constitutional Reform recommended a code of legislative standards to be agreed between Parliament and the United Kingdom Government. The Select Committee also recommended that a Joint Legislative Standards Committee should be created “with an oversight role”. The Government took the view that a code of legislative standards was not necessary and would not “be effective in ensuring quality legislation”.¹²
- 8.16 Similarly, University College London’s Constitution Unit recommended that a code for constitutional standards should be adopted. The code would set standards for the content of legislation and the practice of the legislative process. It would provide a resource for government in the preparation of Bills, for parliamentarians engaged in legislative scrutiny, and for the House of Lords Constitution Committee in reviewing and developing standards. It could also work together with any general code of legislative standards along the lines of that recommended by the House of Commons Select Committee on Political and Constitutional Reform.¹³
- 8.17 Views have differed, however, as to what exactly the standards should be, and as to the scope of their coverage. The legislative standards employed by the new Legislation Design and Advisory Committee in New Zealand are different, in a number of notable ways, from the draft legislative standards code drawn up by the House of Commons Political and Constitutional Reform Committee.
- 8.18 Perhaps the most notable difference between the two sets of standards is their length, and the degree of prescription of standards. The draft United Kingdom legislative standards are succinct at 3 pages, whereas the New Zealand standards are 123 pages long and address a greater number of concerns about the quality of legislation. We now turn to discuss the content of the standards and how they are enforced.

What the standards require

- 8.19 To the extent that they overlap, the draft code of the House of Commons Political and Constitutional Reform Committee (the draft United Kingdom standards) and

¹² House of Commons Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation*, (2013-14) HC 85. The Government Response is appended to the report and may be found at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/611/61104.htm> (last visited 15 June 2016).

¹³ J Simson Caird, R Hazell and D Oliver, *The constitutional standards of the House of Lords Select Committee on the constitution*, The Constitution Unit (January 2014). See also earlier articles by the authors on the issues of scrutiny: D Oliver, “Improving the scrutiny of Bills: the case for standards and checklists” [2006] *Public Law* 219; R Hazell, “Who is the guardian of legal values in the legislative process: Parliament or the executive?” [2004] *Public Law* and R Hazell “Time for a new convention: Parliamentary scrutiny of constitutional Bills” [2006] *Public Law*.

the New Zealand Legislation Advisory Committee Guidelines (the New Zealand standards) contain broadly similar standards, with specific nuanced differences.¹⁴

- 8.20 Both sets of standards prescribe requirements, or raise questions, concerning the substance of a piece of legislation. For example, both contain standards requiring officials to explain the policy background of a piece of legislation. However, there is a notable difference in approach to standards concerning the substance of legislation. On one hand, the New Zealand standards are demanding. For example, they ask whether legislation is the most appropriate means of implementing the policy, and whether the common law already satisfactorily addresses those matters that the new legislation is proposing to address.
- 8.21 On the other hand, the United Kingdom draft standards use a lighter touch. This is because the House of Commons Political and Constitutional Reform Committee concluded that its draft standards should be “as objective and politically neutral as possible in order to avoid straying into the realms of debating policy”. Nonetheless, the draft United Kingdom standards do ask whether, for example, the relevant legislation is introducing new definitions of existing legal concepts.
- 8.22 Both sets of standards also aim to ensure that legislation conforms to constitutional principles. The draft United Kingdom standards ask policy officials to consider:
- Does the bill in whole or in part affect a principal part of the constitution, and does it raise an important issue of constitutional principle?
- 8.23 Similarly, the New Zealand standards require that new legislation should respect the basic constitutional principles of New Zealand law. Like the United Kingdom, New Zealand does not have a codified constitution. The New Zealand standards go into much greater detail than the draft United Kingdom standards. The New Zealand standards specifically set out and briefly explain constitutional principles, such as the rule of law, separation of powers and respect for the dignity of the individual.
- 8.24 Both sets of standards also prescribe certain procedural requirements. The standards ask whether a piece of legislation has been subject to consultation. The standards also emphasise the importance of ensuring that officials and scrutinisers consider how a new Bill will fit into the statute book.
- 8.25 The New Zealand standards are significantly wider in scope. For example, the New Zealand standards contain questions or principles concerning discrimination, privacy, the New Zealand Bill of Rights Act 1990, and the effects of legislation on the Maori population.

¹⁴ New Zealand Legislation Design and Advisory Committee Guidelines (2014), <http://www.ldac.org.nz/guidelines/> (last visited 15 June 2016); House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation (2013-14) HC 85 annex A.

How the standards are enforced

- 8.26 Common to both sets of standards is the requirement for the Government to endorse and adopt them.
- 8.27 In New Zealand, Ministers and officials are required to state in cabinet papers seeking approval of Bills for introduction whether any aspects of a Bill depart from the New Zealand standards. They are required to justify any departures. Scrutiny of a Bill's conformity with the standards is undertaken by the legislature, as part of its scrutiny of the Bill as a whole. To assist with this, the Legislation Design and Advisory Committee may, through a subcommittee of external advisors, make a submission to the relevant select committee during a Bill's progress through Parliament.
- 8.28 In submissions to the House of Commons Select Committee's inquiry, consultees discussed the case for a legislative standards committee based in the legislature. Lord Norton of Louth supported the creation of such a committee, together with the introduction of post-legislative scrutiny as recommended by the Law Commission.¹⁵ But such changes would not be sufficient. A wider "culture shift" was needed among Parliamentarians, away from a "constricted and rushed" process where large volumes of legislation result from Ministers "wanting to make their mark through legislation", so that the Government can show that "it has done *something*". He regarded it as important that Parliament have "ownership of its own standards criteria and processes for scrutinising legislation". Their criteria might be the same as or overlap substantially with those of government; they would provide the essential framework within which the two Houses could then test the merits of government proposals.¹⁶
- 8.29 The Public Bills Office expressed concerns about potential delays to legislative timetables that might result from the operation of a legislative standards committee. The Clerk of Legislation suggested instead that standing orders could require every Public Bill Committee to take evidence on whether the Bill before them complied with legislative standards. Explanatory notes could also include an assurance that legislative standards had been met.¹⁷
- 8.30 The House of Commons Select Committee recommended that the Cabinet Committee responsible for approving proposals for new legislation (currently the Parliamentary Business and Legislation Committee) check the information provided by the relevant Department and certify (by an internal process) that the standards are met. The Minister in charge of the Bill would be responsible for the quality of the Bill at all stages of the legislative process, and for post-legislative review. The Select Committee considered that the Leader of the House should be responsible to Parliament for the decision to certify the Bill as having met the

¹⁵ Post-Legislative Scrutiny (2006) Law Com No 302, Cm 6945.

¹⁶ House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation (2013-14) HC 85 Vol II Additional written evidence, Ev w4, Lord Norton of Louth. See also contributions from National Assembly for Wales, Scottish Parliament, Northern Ireland Assembly, Law Commission, Professor Dawn Oliver and others.

¹⁷ House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation (2013-14) HC 85 Vol II Additional written evidence, Public Bill Office, House of Commons, Ev w7.

agreed standards, and should expect to answer questions about the Government's approach to legislative standards.

- 8.31 The Select Committee considered that there could be a separate role for a Legislative Standards Committee. It recommended that the Committee would analyse a selection of Acts that recently received Royal Assent to ascertain whether the standards, as certified by the Cabinet's Parliamentary Business and Legislation Committee, are generally being met. The Select Committee considered that the Legislative Standards Committee's findings could then be used by Parliamentarians to ask questions of the Leader of the House or Minister in charge of the Bill.
- 8.32 In addition, the House of Commons Select Committee envisaged that a Legislative Standards Committee could, in exceptional circumstances, analyse compliance of individual Bills and report before second reading, time permitting. The Committee could also, in rare cases, analyse compliance of individual Bills and report later in the legislative process when public and Parliamentary scrutiny may have revealed quality issues.
- 8.33 The Select Committee's recommendation for a Legislative Standards Committee was not taken forward. In the Government's response to the recommendations, it concluded:

[We do] not believe that a Legislative Standards Committee, as proposed by the Committee, is either necessary or would be effective in improving legislation.¹⁸

A LEGISLATION COMMITTEE FOR WALES?

- 8.34 In the consultation paper we expressed concern that a new committee might lack any real power and be subject to the political whims of different administrations, as appears at times to have been the case in New Zealand. We also doubted whether such a committee would add anything meaningful to the existing legislative and scrutiny arrangements in Wales.
- 8.35 We posed two questions in the consultation paper:

We ask consultees whether a Welsh Legislation Design and Advisory Committee should be created?

We would also welcome consultees' views on alternative models.¹⁹

- 8.36 Consultees' views were mixed both on whether any form of advisory committee would assist in improving the quality of law made and on what sort of body should be created.

¹⁸ House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation (2013-14) HC 85. The Government Response is appended to the report and may be found at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/611/61104.htm> (last visited 15 June 2016). See paras 17 to 22.

¹⁹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 9.

- 8.37 The Welsh Government stressed that the structure of legislation is closely linked to the policy content and should, therefore, remain a matter for the Government. Although the Welsh Government did not see the need for “a permanent committee of experts”, it did see the benefit of Assembly committees being able to take advice from those with relevant expertise and the Welsh Government itself taking advice from counsel where necessary. It reminded us that the Assembly and Government are able to take such advice already. The Presiding Officer of the Fourth Assembly was in favour of initiatives that facilitated discussion of legislative design. The Presiding Officer thought that any legislation advisory committee or similar mechanism should involve and be owned by politicians and technical experts.
- 8.38 Some consultees were sceptical about the creation of additional organs of government. Additional committees could be costly and might struggle to have any real influence on the Welsh Government. Professor Dawn Oliver and Professor Richard Rawlings (University College London) and the Welsh Government all noted the vulnerability of the New Zealand committees to political change as a difficulty of having such a committee at the heart of government.
- 8.39 As we suggested in the consultation paper, such a committee might involve the same people as are already involved in the governance of Wales. Dr Catrin Fflur Huws (Aberystwyth University) thought that what was needed was expertise in the existing committees, not additional committees. The Welsh Local Government Association expressed a similar concern about the effectiveness of any new committee as it would very likely include largely the same stakeholders as are currently involved in the legislative process, but under a slightly different guise. If any new committee is to be created, it is, as Dr Sarah Nason (Bangor University) pointed out, important that it is complementary to existing roles and responsibilities rather than duplicating them.
- 8.40 The Wales Governance Centre thought that such committees might assist the Welsh Government, but would not be likely to make a substantial contribution to improving the law. Ultimately, it was a matter for the Welsh Government to “put its house in order in machinery of government terms”. Others, including Professor Rawlings supported this view.
- 8.41 On the other hand, consultees expressed concerns about the variable quality of legislation, the quality of scrutiny, the sheer amount of legislation going through the Assembly and the lack of oversight of the development of the statute book as a whole. We discuss some of these issues in relation to drafting legislation below. Those who supported the idea of a committee to oversee or advise on the quality of legislation thought that such a committee could be constituted in a number of different ways.
- 8.42 They variously suggested that an advisory committee could:
- (1) be made up of, or at least be led by, politicians as well as technical experts;
 - (2) be made up of, or at least led by the Welsh Government;
 - (3) be independent of Government and the Assembly, a committee of independent experts, and/or;

- (4) represent civil society.
- 8.43 Some thought that the function we had identified was already part of the responsibilities of the Constitutional and Legislative Affairs Committee and that the best solution was to enhance or support that committee's role. This could be achieved by the Committee establishing a group of experts to consider and report to it on the legislative programme at the start of an Assembly and on the quality of legislation and state of the statute book, including consolidation and codification programmes at intervals during each Assembly.
- 8.44 Keith Bush QC suggested going further, advocating the creation of an independent Legislative Commission:

At Westminster level, the independence of the House of Lords means that powerful committees such as the Committee on Delegated Powers can create practical problems for the Government if the legislation does not reach their standard.

A more effective way of raising the quality of legislation in the Welsh context would be to establish an independent body – a Legislative Commission – that would have statutory functions in relation to the quality of legislation (amongst other things) and could intervene in the legislative process – not to prevent it (something that would be contrary to Assembly Members' control over the law) but to delay it – if there was a large enough flaw in a Bill.

- 8.45 The Welsh Language Commissioner welcomed any new model, including a Legislative Design and Advisory Committee which would “ensure that legislation is well planned and both consistent and accessible from the outset”. In particular, she wanted to ensure that the process of planning legislation be amended to ensure “consistency in the consideration given to the Welsh language in legislating”.²⁰

Conclusion on a legislation committee

- 8.46 The National Assembly is a young legislature without the benefit of an independent second legislative chamber bringing experience and, crucially, time to the scrutiny and oversight of legislation. The pace at which it legislates is accelerating and we can see the force of the concerns raised by consultees about the variable quality of legislation, the quality of scrutiny, and, in particular, the lack of oversight of the development of the statute book as a whole. Those in Wales with existing responsibilities for legislative quality and good practice, the Constitutional and Legislative Affairs Committee, the Counsel General, the Office of the Legislative Counsel or indeed the Welsh Government's Legal Services Department, are already under pressure, and rarely have the luxury to step back and consider the impact of proposed legislation on the quality and accessibility of the law overall. It seems to us that there is a case to be answered. Whether a legislation design and advisory committee is the best solution is less clear.
- 8.47 We think it important to identify the functions which could usefully and practically

²⁰ We discuss these issues further in chapters 10 and 11 below.

improve the quality and accessibility of legislation in Wales. Once they have been identified it will be possible to say which are already being adequately fulfilled, which could be improved and which are altogether absent. This should provide a robust basis on which to say whether a new body ought to be set up, and may also indicate what its constitution and location should be.

8.48 We consider that the following functions could be useful:

- (1) setting standards against which legislation can be measured;
- (2) pre-legislative scrutiny of the impact of items in the legislative programme on the accessibility of the statute book as a whole; and
- (3) post-legislative scrutiny of the impact on accessibility and on the statute book as a whole.

Legislative standards

8.49 The first function – setting legislative standards – is not currently being performed. Wales does not have a set of legislative standards; we consider that it should. Properly thought out, these standards could be a valuable resource for government officials when considering whether and how to legislate. Moreover, they could give real bite to legislative assessment either by the Constitutional and Legislative Affairs Committee and other Assembly committees generally or, if the standards were published, by third parties outside government who could then give evidence to the Assembly. A clear and accessible set of standards, agreed between government and the Assembly, against which good or bad law could sensibly be judged could be a powerful tool for achieving better quality legislation.

8.50 Moreover, a great deal of work has already gone into creating legislative standards. There would be value in reviewing this work, perhaps in combination with interested academics and other experts, and adapting it as appropriate to the needs of Wales.

8.51 In our evidence to the Constitutional and Legislative Affairs Committee's Inquiry into Making Laws in Wales we made a number of suggestions based on our own experience of preparing legislation. These were endorsed by the Committee in their Report.²¹ First we suggested that better legislation could be promoted by:

- (1) identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;
- (2) formulating well thought-through policy objectives, with transparent impact assessment;
- (3) carefully assessing whether a legislative or non-legislative solution would be more appropriate; and
- (4) setting aside adequate time and resources for pre-introduction public consultation and solution-testing.

²¹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).

8.52 The Committee recommended that the Welsh Government should adopt more robust policy development criteria based around those highlighted by the Law Commission.²² In response, the Welsh Government said its approach to policy development was already consistent with these principles.²³

8.53 We also suggested that the quality of legislation could be improved by

- (1) ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;
- (2) having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;
- (3) minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;
- (4) making greater use of Keeling Schedules (as part of the explanatory notes) to clarify changes that a Bill makes to previous enactments; and
- (5) providing for the clear repeal of any existing enactments that are superseded by the Bill.

8.54 The Committee recommended that the Welsh Government commits to improving the quality of legislation it introduces by adopting these principles.²⁴ In its response the Welsh Government recognised the importance of our first three suggestions and said it would consider the others further in light of our present report. We discuss Keeling schedules and explanatory notes below. Our present recommendation is that legislative standards should contain guidance on policy development and the preparation of better legislation.

8.55 These standards could usefully cover the matters we referred to in our evidence to the Commission, together with standards for consolidation, codification and the preservation of the integrity of codes. Further matters that we consider could usefully be addressed by legislative standards are Explanatory Memoranda (discussed below) and questions of balance in legislation – both as between primary and secondary legislation and, within primary legislation, as between the sections of an Act and the contents of schedules.²⁵

8.56 We agree with Lord Norton of Louth that legislative standards are the responsibility both of government as the promoter of legislation and of the

²² National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 64 and Recommendation 2.

²³ Welsh Government, *Written Response to the report of the Constitutional and Legislative Affairs Committee entitled Making Laws in Wales* (December 2015), p 2.

²⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 113 and Recommendation 9.

²⁵ Dame Rosemary Butler AM, Presiding Officer of the Fourth Assembly, commented on this in her evidence to the Constitutional and Legislative Affairs Committee's inquiry into *Making Laws in Wales*. We refer to this in chapter 8.

legislators who enact it.²⁶ We suggest that the development of legislative standards for government should be a responsibility of the Counsel General. Insofar as the standards relate to the design and content of legislation, as distinct from procedures for the formulation of government policy, the standards should be reviewed by an Assembly committee and, if accepted, could be formally adopted by the Assembly by resolution in Plenary

- 8.57 Ideally, the Welsh Government and the Assembly should be of one mind as to the appropriate standards, but each should turn their minds to the issue. This could be productive of a useful dialogue. It might lead to the Assembly putting forward different standards; compliance with these could be a matter for comment by the Assembly but not, we suggest, a ground for rejecting a Bill. Ideally it would result in the creation of an agreed set of legislative standards.

Pre-legislative scrutiny

- 8.58 In agreement with the Presiding Officer of the Assembly, the Constitutional and Legislative Affairs Committee considered pre-legislative scrutiny a vital part of the legislative process, especially in a unicameral legislature.²⁷ The Committee recommended that there should be a presumption in favour of publishing draft Bills.²⁸ This is in accordance with our own suggestion of public consultation before legislation is introduced into the Assembly and solution-testing.
- 8.59 The Welsh Government rejected this recommendation, saying that other ways of consulting could sometimes be more appropriate. We accept that, but nevertheless recommend that there should be a presumption in favour of publishing draft Bills. We support the Committee's further recommendation that the reasons for not publishing a Bill in draft should be given in the Explanatory Memorandum accompanying a Bill upon its introduction.²⁹

Post-legislative scrutiny

- 8.60 We referred the Constitutional and Legislative Affairs Committee to our 2006 report on post-legislative scrutiny.³⁰ In that report we saw no need to create a body independent of Parliament to carry out post-legislative scrutiny, but suggested that consideration be given to setting up a new Parliamentary joint committee to undertake the work of commissioning others to do so – a recommendation which the United Kingdom Government rejected on the grounds that the new joint committee would cut across the work of Select Committees.
- 8.61 The Constitutional and Legislative Affairs Committee recommended that Assembly committees consider the suitability of a Bill for later post-legislative scrutiny as part of their scrutiny during its passage, observing that Assembly

²⁶ See above.

²⁷ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) para 67.

²⁸ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) Recommendation 4.

²⁹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), Recommendation 4. We discuss Explanatory Memoranda later in this chapter.

Committees' recommendations on this could aid the development of the work programmes of future committees. We agree.

A new body

- 8.62 Whilst we recommend, in agreement with the Constitutional and Legislative Affairs Committee, that the various additional functions that we have discussed should be performed, we have concluded that their performance does not necessitate the creation in Wales of a new form of legislation committee along the lines of the successive committees in New Zealand. We are persuaded by those consultees who argued against the further proliferation of functions amongst bodies that would be likely to have an overlapping composition. We have suggested above that setting the aims and options for delivering policy and legislative design are properly functions of the executive.
- 8.63 The evidence from New Zealand suggests that the capacity of any such committee, however constituted, to effect meaningful change is uncertain, though the report we have received on the work of the current New Zealand committee is promising. Any new body would also come at a cost to set up and maintain. At a time of limited resources, we suggest that available resources would be better dedicated to funding the Code Office and the programme of codification that we recommend. The success of the newly constituted Legislation Design and Advisory Committee in New Zealand could nevertheless usefully be kept under review.

Recommendation 19: We recommend that the Counsel General be responsible for publishing a set of legislative standards.

Recommendation 20: We recommend that, insofar as the standards relate to the design and content of legislation, they be reviewed by the National Assembly and, if accepted, adopted by resolution.

Recommendation 21: We recommend that the National Assembly establish a regular structure for:

- (1) pre-legislative scrutiny of Bills, including their impact on the accessibility of the statute book; and**
- (2) post-legislative scrutiny of Bills, including their impact on the accessibility of the statute book.**

LEGISLATIVE IMPACT ASSESSMENTS

- 8.64 Impact assessments are intended to require governments to think about whether legislation is really necessary and what the effects of that legislation might be on the economy, on equality, on the burdens of regulation, on the environment and a range of other issues, as required by the rules and guidance governing impact

³⁰ Post-legislative Scrutiny (2006) Law Commission No 302.

assessments from time to time.³¹

- 8.65 In the consultation paper, we reviewed the system of impact assessments developed by the Welsh Government and considered the introduction of a further form of impact assessment gauging the impact of proposed legislation on the existing statute book.³² We were sceptical about the practical value of such a form of impact assessment, suggesting that legislative design did not lend itself well to the usual model of impact assessment, and that to impose such a requirement risked mixing up the respective functions of policy officials and lawyers. We sought the views of consultees:

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?³³

Lessons from consultation

- 8.66 Several consultees supported the idea of some sort of assessment at the commencement of the legislative process as to whether the proposed legislation met any need for change. As Marie Navarro (Your Legal Eyes) put it, there should be “a justification of why the Bill is needed, and an assessment of what the current law is”. The Presiding Officer of the Fourth Assembly, Dame Rosemary Butler AM, was also in favour of a legislative impact assessment being undertaken during the course of policy development for Bills.

- 8.67 Citizens Advice Cymru thought that a legislative impact assessment could help the Government to prioritise areas for consolidation.

- 8.68 The Law Society Wales thought that a new legislation advisory committee could perform this function, but suggested that a more immediate response would be for the Constitutional and Legislative Affairs Committee to include

an additional scrutiny function regarding the form of new law applicable in Wales with a protocol to introduce draft Bills for pre-legislative scrutiny and engage expert advisers (voluntarily, by committee or otherwise).

- 8.69 Several consultees, including Universities Wales, reported that the existing system of impact assessments was not always effective and could benefit from review. In this context, they found it difficult to see how additional impact assessments would be any more effective. The Assembly’s Finance Committee

³¹ The Government of Wales Act 2006 s 76 requires Welsh Ministers to make a code of practice setting out how and in what circumstances they intend to carry out a regulatory impact assessment when making Welsh subordinate legislation. The code currently in force was laid before the Assembly on 20 October 2009.

³² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223 paras 9.70 to 99.23 to 9.31 and 9.71 to 9.77.

³³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 9-1.

has issued strong criticisms of some regulatory impact assessments.³⁴

Conclusion

- 8.70 The views of consultees tend to confirm our preliminary view. We think that, rather than introducing a further impact assessment process as a procedural requirement, appropriate legislative standards should be set.

KEELING SCHEDULES

- 8.71 We described the origin of Keeling schedules in the consultation paper.³⁵ They take their name from a proposal made in 1938 by Mr Edward Keeling MP that a Bill amending existing legislation should contain a schedule setting out the legislation as it would read when amended by the Bill and “showing by typographical devices the amendments proposed”.³⁶ We mentioned that Keeling schedules were not universally popular with legislators and parliamentary counsel. This is because of the work involved in amending them where a Bill is amended during its passage and of the risk of inadvertent inconsistency between the Bill’s clauses and the schedule. In 2004 the House of Lords Select Committee on the Constitution recommended that rather than Bills having a Keeling schedule in the strict sense – a schedule to a Bill that becomes part of the Act when the Bill is passed – an “informal Keeling-type schedule” should be included in the explanatory notes to a Bill.³⁷
- 8.72 In the consultation paper we suggested that a Keeling schedule, showing amended text by striking through text to be repealed and showing new text underlined, would help readers of a Bill to understand how the proposed amendments would change the legislation. We noted the significant amount of work required to produce and amend such schedules but also the possible savings in time later on, when legislation has to be prepared in its amended form for online publication.³⁸

Lessons from consultation

- 8.73 In the consultation paper we asked:

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?

³⁴ See, for example the recommendations made by the National Assembly’s Finance Committee in their Report on the Public Health (Wales) Bill (September 2015), where the presentation of costs and benefits is described as “confusing and unintentionally misleading” (Recommendation 2) and the Committee recommends that the “Welsh Government undertake work to develop a more consistent approach across Bills to providing costs association with subordinate legislation to enable better scrutiny of the full costs and benefits of Bills”. (Recommendation 7).

³⁵ See Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 4.48 to 4.57.

³⁶ Hansard (HC), 26 July 1938, vol 338, cols 2912 to 2920W.

³⁷ House of Lords Select Committee on the Constitution, Parliament and the Legislative Process, 14th Report of Session (2003-04) Vol 1, pp 27 to 29.

³⁸ We discuss online publication and updating amended legislation in chapter 11 below.

Should Keeling schedules be formal schedules to an amending Bill that become law when the Bill is enacted?

What features would consultees like to see in Keeling schedules, or other documents showing amendments, to make the changes as clear as possible?³⁹

8.74 Several consultees liked the idea of a schedule that showed the legislation as amended, but did not see a need for a formal Keeling schedule forming part of a Bill.

8.75 Many consultees were concerned about the cost of preparing Keeling schedules and some questioned whether doing so would be the best use of legislative counsel or Assembly time. Consultees thought that similar benefits could be achieved by publishing updated versions of legislation online, highlighting amendments.

8.76 There was, however, some support for formal Keeling schedules. Keith Bush QC suggested that

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

8.77 The National Trust also supported the schedule becoming a formal part of the legislation as enacted. David Michael (Neath Port Talbot County Borough Council) asked whether it would be possible to enact the legislation in a consolidated form instead of providing a Keeling schedule.⁴⁰

8.78 The Welsh Government explained that, where practicable, it seeks to re-enact legislation rather than heavily amending it. It saw merit in producing a Keeling schedule where that could not be done and numerous amendments to an existing Act were being made. The Welsh Government reported that it had recently prepared a Keeling schedule for the Planning (Wales) Bill and that the Welsh Government and the National Archives have also been trialling a service through which amendments to existing law can be seen on the legislation.gov.uk website.⁴¹ It did not see the benefit of enacting a Keeling schedule as part of legislation passed by the Assembly:

³⁹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 4-4, 4-5 and 4-6.

⁴⁰ In chapter 11 below, we discuss methods of publication and how to show the application of a piece of legislation, so that the reader knows which laws apply in Wales.

⁴¹ Now the Planning (Wales) Act 2015.

There appears to be little merit in producing such a Schedule formally as the function served by the Schedule should be to show the effect of proposed amendments during the passage of a Bill. Once the Bill is passed showing the law in its up to date form is a matter for publication, in other words by incorporating the amendments to the existing legislation on legislation.gov.uk.

8.79 The Legal Wales Foundation thought that preparing Keeling schedules would not be a good use of Assembly resources. LexisNexis considered that a Keeling schedule would act as a useful “checking tool” for an editor but pointed out that a Keeling schedule

loses its value over time as amendments to the original material increase unless the Keeling schedule is updated as well; and an editor would not update the Keeling schedule itself without statutory authority in the form of a specific amendment.

8.80 The overwhelming majority of consultees did not support a requirement for Keeling schedules to be enacted as formal schedules to legislation. However, Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) suggested that two versions of Keeling schedules should be published. She suggested:

(1) a "tracked change" version, illustrating changes to the original legislation; and

(2) a "clean" version, illustrating the amended legislation.

8.81 The Presiding Officer proposed that this should be carried out in such a way as to avoid the Assembly having to scrutinise the Keeling schedule in detail.

8.82 There was more support for the inclusion of Keeling schedules in explanatory notes, for example from Marie Navarro (Your Legal Eyes) and the Law Society Wales. Angela Williams (Member of the Law Commission’s Welsh Advisory Committee) suggested that a formal schedule was not needed but that it would be useful to see a “working document”, perhaps one created during the drafting process, to see what sections were changed and how.

8.83 Consultees suggested tracking changes with links to any documents referred to. Schedules would need to provide as much of the original legislation as is required for a reader to understand the precise effect from the amended extract alone and some form of introduction to contextualise an extract could be used where more pragmatic and helpful to do so.

8.84 The Welsh Government also thought that there would be some cases in which an explanation of the effect of the amendment may also be appropriate.

8.85 The National Assembly’s Constitutional and Legislative Affairs Committee favoured informal Keeling schedules. They endorsed the suggestion of the Learned Society of Wales that

With modern technology amendments [to Bills] could be presented in electronic form to allow AMs and the public to see the original text, the effect of the amendment upon it in a 'tracked-change' format, and what the final text would look like when amended, all at the press of a computer key, and much the same could be done with proposals amending earlier legislation.⁴²

8.86 The Committee concluded in *Making Laws in Wales*:

We recommend that the Business Committee prepares proposals to amend the Assembly's Standing Orders to require Keeling Schedules to accompany a Bill on introduction (where it proposes to amend existing primary legislation).⁴³

8.87 The Committee took the view that Explanatory Memoranda could become unwieldy if they included Keeling schedules, making it preferable to produce them as separate documents.⁴⁴ The response to the report of the Business Committee of the Assembly welcomed the recommendation. The requirements of Explanatory Memoranda to accompany Bills introduced into the Assembly were amended in March 2016. New Standing Order 26.6C requires:

Where the Bill proposes to significantly amend existing primary legislation, the Explanatory Memorandum must be accompanied by a schedule setting out the wording of existing legislation amended by the Bill, and setting out clearly how that wording is amended by the Bill.⁴⁵

8.88 We commend this new requirement although we are aware that producing a Keeling text will create additional work for legislative counsel. We agree with Keith Bush QC and the Learned Society for Wales that technological advancements ought to be able to facilitate producing amending legislation in a form that shows the amendments made. This is part of a wider need for the modernisation of the legislative drafting technology. Work is under way to design a drafting tool which will allow much more flexibility and communication between the drafters in devolved legislatures.⁴⁶

8.89 Where a Bill is amended during its passage through the Assembly, Standing Order 26.27 requires a revised Explanatory Memorandum to be prepared. Although there is no express requirement to produce an amended Keeling schedule, we take the view that this would be beneficial to Assembly Members.

⁴² National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 305.

⁴³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), Recommendation 20.

⁴⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 216.

⁴⁵ SO 26.6C was inserted by resolution in Plenary on 16 March 2016. The standing orders were reissued in May 2016.

⁴⁶ Progress on this project is reported at <http://www.legislation.gov.uk/projects/drafting-tool> (last visited 15 June 2016).

- 8.90 We do not recommend a requirement for a formal Keeling schedule, enacted as part of the legislation. There is an oddity in the resulting situation where not only the original legislation and the amending provisions in the amending legislation but also the resulting text all exist on the face of the statute book.⁴⁷

EXPLANATORY MEMORANDA

- 8.91 Standing orders require an Assembly Member introducing a Bill to lay an Explanatory Memorandum before the Assembly. Following the report of the Constitutional and Legislative Affairs Committee, Standing Order 26.6 was amended in March 2016.

- 8.92 The Explanatory Memorandum must:

- (1) state that in the Assembly Member's view the provisions of the Bill would be within the legislative competence of the Assembly;
- (2) set out the policy objectives of the Bill;
- (3) set out whether alternative ways of achieving the policy objectives were considered and, if so, why the approach taken in the Bill was adopted;
- (4) set out the consultation, if any, which was undertaken on (a) the policy objectives of the Bill and the ways of meeting them and (b) the detail of the Bill; (c) a draft Bill, either in full or in part (and if in part, which parts);
- (5) set out a summary of the outcome of that consultation, including how and why any draft Bill has been amended;
- (6) if the Bill, or part of the Bill, was not previously published as a draft, state the reasons for that decision;
- (7) summarise objectively what each of the provisions of the Bill is intended to do (to the extent that it requires explanation or comment) and give other information necessary to explain the effect of the Bill;
- (8) set out the best estimates of costs and benefits expected to result from the legislation and on whom costs would fall, including administrative costs and savings;
- (9) set out any environmental and social benefits and disbenefits arising from the Bill that cannot be quantified financially;
- (10) in relation to any provision conferring power to make subordinate legislation, set out why the power is being delegated, to whom and by what procedure the subordinate legislation will be made,;
- (11) where the Bill contains any provision charging expenditure on the Welsh Consolidated Fund, incorporate a report of the Auditor General setting

⁴⁷ There could also be difficulties where an already amended provision is amended again: the Keeling schedule to the earlier amending legislation would become out of date and misleading, though this could perhaps be remedied by the later amending legislation repealing it.

out his or her views on whether the charge is appropriate;⁴⁸

- (12) state precisely by an index or other means where each of the requirements of Standing Order 26.6 can be found within it;⁴⁹
- (13) where provisions of the Bill are derived from existing primary legislation, whether for the purposes of amendment or consolidation, be accompanied by a table of derivations that explain clearly how the Bill relates to the existing legal framework;⁵⁰ and
- (14) where the Bill proposes significant amendment of existing primary legislation, be accompanied by a schedule setting out the wording of existing legislation amended by the Bill, and setting out clearly how that wording is amended by the Bill.⁵¹

8.93 The Explanatory Memorandum is different from explanatory notes (considered next). It is designed to assist the legislators while a Bill is going through the Assembly. Explanatory notes, by contrast, relate to the Act once passed and are intended for the general reader. An Explanatory Memorandum does not become completely irrelevant once a Bill is enacted; it could, for example, potentially be read by a court in order to aid understanding of the Government's intended policy in a particular piece of legislation.

8.94 In *Making Laws in Wales*, the Constitutional and Legislative Affairs Committee emphasised the importance of Explanatory Memoranda in helping Assembly Members to scrutinise legislation and in assisting the Supreme Court in considering Assembly Bills and went so far as to say that

... a poor Explanatory Memorandum can have a detrimental effect on the Assembly's ability to scrutinise a Bill and the ability of all those affected by it to understand a Bill's purpose and effect.⁵²

8.95 The Committee concluded from submissions to its inquiry that the quality of Explanatory Memoranda had been "highly variable" and this was acknowledged by the Welsh Government,⁵³ though views differed as to whether they were better or worse than those prepared in Westminster.⁵⁴

8.96 The Committee recommended careful consideration of what should be included in an Explanatory Memorandum, starting with the information required by Standing Order 26.6 and ensuring that any additional information the Welsh Government wishes to include is

⁴⁸ Standing Orders of the National Assembly for Wales, Standing Order 26.6 (May 2016).

⁴⁹ Standing Orders of the National Assembly for Wales, Standing Order 26.6A (May 2016).

⁵⁰ Standing Orders of the National Assembly for Wales, Standing Order 26.6B (May 2016).

⁵¹ Standing Orders of the National Assembly for Wales, Standing Order 26.6C (May 2016).

⁵² National Assembly for Wales Constitutional and Legislative Affairs Committee, *Making Laws for Wales* (October 2015), paras 186 and 189.

⁵³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 186.

...robustly assessed, to ensure that it helps aid the reader's understanding of the legislation.⁵⁵

8.97 The Committee also recommended

that the Welsh Government should review its approach to Explanatory Memoranda and publish the outcome of that review in readiness for the Fifth Assembly.

8.98 The Welsh Government's response was that this was best done once the requirements of standing orders had been revised by the Business Committee, but that the Welsh Government would consider how its approach to Explanatory Memoranda could be improved ahead of the next Assembly term.

8.99 We commend the amendments made to the standing orders and further recommend that Explanatory Memoranda should disclose and justify any departure from the legislative standards that we recommend should be drawn up.

Recommendation 22: We recommend that standing orders should require that the Explanatory Memorandum to a Bill disclose and justify any departure from legislative standards.

EXPLANATORY NOTES

8.100 Explanatory notes are published alongside Acts in order to explain the purpose and effect of their provisions. In the consultation paper we described briefly how explanatory notes may be found on the legislation.gov.uk website and on commercial legal databases. We also summarised the findings of the Office of the Parliamentary Counsel's Good Law Project, following their consultation on explanatory notes.⁵⁶

8.101 Here we consider the views expressed in response to our consultation questions on explanatory notes, in addition to the findings and recommendations of the Constitutional and Legislative Affairs Committee in *Making Laws in Wales*.

The Good Law Project

8.102 In 2014 the Office of the Parliamentary Counsel's Good Law Project considered how to make explanatory notes more useful to readers. We endorse the findings the Good Law Project made as a result of their consultation process.

- (1) Explanatory notes should be more practical.
- (2) Explanatory notes should contain examples about how the law is to be applied in the real world.

⁵⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 189.

⁵⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), para 193.

⁵⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 6.78 to 6.85.

- (3) People want to understand *why* the legislation has been passed, not just *what* it does to the law.
- (4) People want practical information that explains any amendments to existing legislation, or new regulations that may be passed as a result.
- (5) People want more legal content about the intent or purpose of the legislation.
- (6) People use the explanatory notes to Acts on an ongoing basis, not only when the Act is first passed.
- (7) The vast majority of people who read explanatory notes do so online, rather than reading printed copies.
- (8) People use explanatory notes particularly when they are trying to understand a provision where the text of the legislation is not self-explanatory.
- (9) Explanatory notes are not useful when they merely restate the legislation in different words.
- (10) The main reason why consultees don't use explanatory notes is that they don't know they exist.⁵⁷

8.103 As a result of the review of explanatory notes by the Good Law Project, changes were piloted in the Armed Forces (Service Complaints and Financial Assistance) Bill. The new format was intended to be easier to navigate and to work better with online content and included

- (1) a table of contents,
- (2) a grid showing the application of each part of the Bill to each part of the United Kingdom,
- (3) a shoulder note to the explanation of each clause and schedule showing the application of the provision to each part of the United Kingdom,
- (4) an explanation of both the policy and legal backgrounds, along with a summary of the existing law ,
- (5) an explanation of the financial implications of the Bill and of the need for a money resolution,
- (6) links to relevant policy documents and
- (7) an explanation of how the measures in the Bill will be commenced.⁵⁸

⁵⁷ The Office of the Parliamentary Counsel, Cabinet Office, *Results and analysis of the explanatory notes survey July 2013* (June 2014), pp 1 to 2.

⁵⁸ The new format was announced by the Leader of the House of Commons, Mr William Hague. See *Hansard* (HC), 22 October 2014, col 73WS.

Consultation

8.104 We asked consultees:

Do consultees find explanatory notes helpful? Could they be improved?

How could explanatory notes best be presented?⁵⁹

8.105 Consultees found that explanatory notes, particularly available online, could be useful as pre-reading for the Act itself, to help readers to understand relevant provisions or to give context to areas of law that readers might be unfamiliar with.⁶⁰

8.106 The Residential Landlords Association thought that explanatory notes were more useful for those who were not legally trained. Citizens Advice Wales thought they were geared more towards “people working in policy, researchers, legislators and legal practitioners than for member of the public”. Dr Sarah Nason (Bangor University) added students. Citizens Advice Wales stated that explanatory notes can be “extremely useful” and that an easy-read document could be created to serve the public.

8.107 Keith Bush QC drew on his own experience of preparing explanatory notes and was “doubtful of their value”. Mr Bush QC explained that

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

8.108 In addition to calling for similar improvements to those suggested in the Good Law Project’s consultation, consultees asked for

- (1) greater consistency in the way that explanatory notes are produced
- (2) explanatory notes to be written in plain English, in “non-legalistic language” as the Care Council for Wales put it
- (3) the inclusion of hyperlinks to background papers and proceedings before the Assembly (The National Trust)
- (4) the inclusion of Keeling schedules with an explanation of all amendments.

8.109 LexisNexis provided a comparison to support their view that explanatory notes vary enormously in their quality and utility.

⁵⁹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 6-13 and 6-14.

⁶⁰ These examples came from the Residential Landlords Association, Citizens Advice Wales and Dr Sarah Nason (Bangor University).

Example from Lexis Nexis

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

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

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

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

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

s57: "The Housing Act 1996 referred to 'violence'; this has now been changed to 'abuse' to clarify that it should not be restricted to physical violence."

s60: "Sections 179(2) and (3), 180 and 181 of the Housing Act 1996 provided that local housing authorities might give financial and other assistance to homelessness advice providers. These provisions have not been replicated here, since general local authority powers are now available for this."

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

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

"The Mobile Homes (Wales) Act 2013 restates and consolidates the legislation on mobile homes sites in Wales"

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

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

- 8.110 The Welsh Government reported in its consultation response that it has been considering how to improve the presentation of explanatory notes, focusing on the following:

- (1) explanatory notes should provide an introductory summary of the content of the whole or part of the Bill/Act written as plainly as practicable
- (2) explanatory notes should be genuinely explanatory – this means providing useful supplementary information not paraphrasing provisions of the Act, and
- (3) conversely where no explanation is necessary specific section by section notes are not necessary.

8.111 It is also considering whether the political context to a Bill/Act and its policy aims should be set out in the explanatory notes. This information is currently found in the Explanatory Memorandum.

8.112 Our experience both of reading and of drafting explanatory notes leads us to consider that they can be valuable, but too often are not. Keith Bush QC has identified the reason for this. We applaud the Welsh Government's focus on improving the quality of explanatory notes. There is no shortage of learning on the drafting of worthwhile explanatory notes; we do not propose to try to add to it in this report. We recommend that standards as to the preparation of explanatory notes be included in legislative standards.

Recommendation 23: We recommend that standards for the content of explanatory notes be included in legislative standards.

CHAPTER 9

DRAFTING GOOD LEGISLATION

INTRODUCTION

- 9.1 The intended meaning of legislation should be clear to its readers, regardless of whether or not they are legally trained. Where relevant, the reader should also be able to understand how the legislation fits into the statute book as a whole. This is particularly important in Wales, where the statute book comprises legislation from an array of sources.
- 9.2 In the consultation paper we described drafting guidance and practices in Wales and asked consultees for their views on Welsh legislation. We also considered particular drafting practices: overviews as navigation tools to legislation and purpose (or aspirational) clauses.¹ We consider the views of consultees on these and take into account the report of the Constitutional and Legislative Affairs Committee of the Assembly, *Making Laws in Wales*.²

DRAFTING LEGISLATION

- 9.3 Drafting plays an important role in making legislation accessible.³ Complexity can be caused by imprecise policy objectives created by policy makers, a superficial assessment of the legal framework, rushed or inaccurate instructions to the drafter and also by the quality of the drafting.⁴
- 9.4 It remains the case, however, that legislative drafters carry a heavy responsibility for the health of the statute book overall. As we explained in chapter 3, the drafter has a role in advising government on approaches to legislative projects that better promote clear law, whether by improving drafting techniques, clarifying instructions or advising that legislative reform is not needed in order to carry out policy intentions. In the consultation paper we described how primary and subordinate legislation is drafted in Wales, the roles of legislative drafters at the Office of Legislative Counsel and the lawyers at the National Assembly. We described in some detail the guidance under which legislative drafters operate.⁵
- 9.5 The Office of the Legislative Counsel published Legislative Drafting Guidelines in 2012, setting out best practice for legislative drafters in Wales. The Guidelines provide that the overarching objective of legislative drafting is clarity. It states:

Legislation must be effective, but it cannot be effective unless it is

- ¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 4.
- ² National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).
- ³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 4.1.
- ⁴ Chapter 4 of the Consultation Paper looked at drafting and interpreting legislation.
- ⁵ The current guidelines for parliamentary counsel are: Office of the Parliamentary Counsel, *Drafting Guidance* (March 2014) and for Welsh Legislative Counsel, Office of the Legislative Counsel, *Legislative Drafting Guidelines* (January 2012).

sufficiently clear.

An effective draft is certain in its effect, accurate and achieves the policy objectives behind the legislation. Being clear is about making it as easy as possible for readers to understand what is being said. Even if a draft is clear enough to be effective, it may still be possible to make it easier to understand. The drafter's search for clarity should go beyond the minimum required to be effective.⁶

9.6 In the consultation paper we explored the guidance given in the Office of the Legislative Counsel Guidelines on the meaning of "clarity". This includes using plain language, meaning plain words and writing clear sentences. It also includes structuring and organising legislation so as to make it easily navigable and understandable.⁷ The Guidelines note the practical issues that can limit the scope for achieving clarity. In addition to time constraints, these include an unmet need for consolidation of the legislation. The Guidelines also note the role of legislative counsel as advocates for clear law:

- (1) Some things that affect the clarity of legislation are not within the ultimate control of the drafter. But in all cases the drafter has a role in being an advocate within government for approaches to legislative projects that better promote clear law.
- (2) If an Act or statutory instrument has been amended on a number of previous occasions, a new proposal for amendment should cause those involved to think seriously about updating the law into a consolidated text to improve its accessibility to the public. Or if the proposal is to amend an Act of Parliament or a statutory instrument made in English only this will mean that the substantive law will remain in the English language only – remaking the law would mean producing a text in Welsh too, improving access to the law through the Welsh language.
- (3) There may well be valid reasons why Ministers or departments do not wish to consolidate provisions at the same time as taking forward a legislative reform: for example, it may require resources that are not easily available, or in the case of a Bill, settled but potentially controversial provisions could be opened up to debate and amendment. The final decision on how to proceed in a case like this is for Ministers collectively, not the drafter; but it is the role of the drafter to ensure that these matters are brought to the attention of decision makers. If drafters are concerned that these issues are not being considered or if approaches are suggested which are liable to impair access to legislation, the issues should be raised through the management chain of the Legal Services Department and, if necessary, with the Counsel General. The drafter's client is the Welsh Government as a whole, rather than individual departments or Ministers, and the policy interest in clear

⁶ Office of the Legislative Counsel, *Legislative Drafting Guidelines* (January 2012) Part 2 para 5.

⁷ Office of the Legislative Counsel, *Legislative Drafting Guidelines* (January 2012) chapters 1 and 2.

law must be properly taken into account along with the other policy and handling considerations.⁸

- 9.7 We agree with the summary of the advantages of consolidation contained in these passages. Our recommendations on consolidation and codification are contained in chapter 2. The Guidelines also advise on clear drafting of textual and non-textual amendments and repeals.⁹

Lessons from consultation

- 9.8 In consultation we asked:

Do consultees think that the current practice strikes the right balance between simplicity and precision in legislation passed by the National Assembly?

Would there be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines?

Do consultees currently experience difficulty reading amended legislation?¹⁰

- 9.9 Consultees voiced opinions on the quality of legislation passed in Wales as well as the legislative process both in Cardiff and in Westminster. As with the pattern of evidence given to the Constitutional and Legislative Affairs Committee, most of our consultees thought that legislation made by the National Assembly was generally of good quality, while many also commented that its quality could be variable and that there was room for continuing improvement.
- 9.10 Some noted that lack of clarity may well be in part a result of unclear policy, rather than inadequate drafting. As Huw Williams (Geldards LLP) pointed out, "no amount of clear, modern drafting will compensate for a badly thought out policy". Keith Bush QC took the view that the Welsh Government had a tendency to favour precision over clarity, following the Westminster approach to drafting. Angela Williams (Law Commission's Welsh Advisory Committee) thought that Welsh legislation would benefit from more time being spent in editing.
- 9.11 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) set out her views on the quality of drafting and importance of clarity in her response to the Constitutional and Legislative Affairs Committee's inquiry; and the Committee endorsed her comments:

As a general principle, legislation should be clear for the target audience and, wherever possible, for all citizens, as it is an essential pillar of democracy that citizens can understand the laws to which they are subject. In our opinion, there is very rarely a

⁸ Office of the Legislative Counsel, *Legislative Drafting Guidelines* (January 2012) Part 2 para 9.

⁹ Office of the Legislative Counsel, *Legislative Drafting Guidelines* (January 2012) Part 7.

¹⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 4-1, 4-2 and 4-3.

justification for drafting legislation – especially primary legislation – in a way that is so complex and technical that it is, in practical terms, incomprehensible except to specialists in the field.¹¹

- 9.12 The Presiding Officer, amongst others, provided the Committee with examples of drafting which she thought were problematic.
- 9.13 Consultees agreed that the clarity of legislation in Wales was significantly and increasingly undermined by successive amendments to legislation being made both by the National Assembly and Parliament without consolidation, and by the divergence of law in both nations.
- 9.14 Other criticisms voiced to the Constitutional and Legislative Affairs Committee related to the use in legislation of indefinite expressions such as “among other things” and “in particular”.¹² Without giving examples, Mold Town Council saw the complexity of sections and subsections of Acts and the use of schedules as causes for concern.¹³
- 9.15 The Learned Society of Wales cautioned that new drafting techniques should not give rise to a practice of “uncritical conformity to new orthodoxies”. Instead the test should always be whether the chosen approach serves to elucidate the purpose and meaning of the legislation for legislators and the public.¹⁴
- 9.16 In similar vein, the Society praised the judicious use of the technique of breaking up a provision into several subsections rather than including conditions and provisos within a single section. However, on the other hand, it gave an example from Westminster of a lengthy succession of subsections that was “as bewildering as a long section with conditions and provisos in the old style”.
- 9.17 In their report, *Making Laws in Wales*, the Constitutional and Legislative Affairs Committee recommended that we take account of the views of stakeholders who contributed to their inquiry.¹⁵ We have done so. We also note the Committee’s overall assessment in the foreword to their report, in which David Melding AM (Deputy Presiding Officer of the Fourth Assembly) wrote:

¹¹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015). The written submissions made to the inquiry may be found at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054> (last visited 15 June 2016).

¹² Evidence given by Your Legal Eyes to the Constitutional and Legislative Affairs Committee.

¹³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015). The written submissions made to the inquiry may be found at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054> (last visited 15 June 2016).

¹⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015). The written submissions made to the inquiry may be found at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054> (last 15 June 2016). The Society was considering the practice of including overview clauses in legislation. We set out their comments below.

¹⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015), Recommendation 14.

- (1) At a technical level, there has been general admiration for the drafting of our legislation, and the few relatively modest recommendations that we have made in relation to aspects of the drafting process will hopefully be seen in that context.
- (2) We acknowledge and recognise that, as the Welsh Government indicates, “drafting legislation is [...] complex, and drafting it in two languages is even more challenging”, particularly in terms of recruitment, resources and training. Equally we recognise the huge effort and commitment of the drafters in the Office of the Legislative Counsel who are at the forefront of, as the First Minister told us, resurrecting Welsh as a legal language after 1,000 years and in quite a short space of time.

9.18 In our view, the current drafting guidelines under which legislative counsel draft in Wales provide a well thought through and useful set of drafting standards. Consultees in general supported the publication of the Office of the Legislative Counsel’s Guidelines. The guidelines are now available on the *Cyfraith Cymru/Law Wales* website.¹⁶ We understand the time pressures that drafters are often under and the relationship between clarity in the policy and clarity in the legislation. In chapter 6 we have made some recommendations about policy formation.

9.19 We also agree with the Welsh Government that it is on occasions inevitable that plain language will have to give way to expressing the intention of the legislation effectively:

Precision and effectiveness cannot be compromised in the interest of clarity; and over-simplification, therefore, can result in legislation failing to have its intended result.¹⁷

9.20 We also asked consultees to give us their views on two particular drafting techniques: overviews and aspirational or purpose clauses.

Overviews

9.21 A practice has developed in Welsh legislation of setting out an introductory overview of the structure and content of the legislation, sometimes at the beginning of the legislation and sometimes at the beginning of each part. This practice has occasionally been used by the United Kingdom Parliament, for example in the Tax Law Rewrite project, discussed in chapter 7 of the consultation paper, or in the Corporation Tax Act 2009.¹⁸

9.22 The Planning (Wales) Act 2015 starts with an overview. This states:

¹⁶ <http://law.gov.wales/> (last visited 15 June 2016).

¹⁷ Welsh Government submission to National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).

¹⁸ For an example of an overview of only one part of an Act, see the Finance Act 2004, Part 4. The Tax Law Rewrite project was discussed in the consultation paper at paras 7.46 to 7.52.

- (1) This Part provides an overview of this Act.
- (2) Part 2 of this Act makes provision about sustainable development in the exercise of functions relating to development planning and applications for planning permission.
- (3) Part 3 of this Act is about development planning in Wales. It makes provision —
 - (a) for the preparation and revision of a National Development Framework for Wales;
 - (b) for the designation of strategic planning areas, the establishment of strategic planning panels and the preparation of strategic development plans;
 - (c) about the status of the National Development Framework for Wales and strategic development plans;
 - (d) about local development plans (including provision about the duration of plans, withdrawal of plans and directions to prepare joint plans);
 - (e) for joint planning boards to exercise development planning functions.
- (4) Part 3 also makes provision about the constitution and financial arrangements of strategic planning panels.

9.23 Overviews can be lengthy. The Renting Homes (Wales) Act 2016 starts with six sections of overview, including key concepts in the Act. The overview at the beginning of the Social Services and Well-Being (Wales) Act 2014 is some five pages long.

9.24 The Office of the Legislative Counsel's Drafting Guidelines describe the purpose of an overview as helping "the reader to navigate round a larger piece of legislation where the table of contents is too long to give a clear picture", or in a shorter piece of legislation, where the provisions are on "an obscure topic or potentially difficult for all or part of the likely readership". An overview can also explain how this legislation fits into the existing legislative landscape.¹⁹

9.25 An overview will generally have no operative effect of its own. It may be contrasted with a purpose clause intended to affect the interpretation of other provisions.²⁰ An overview is not intended to prescribe rules or principles or to form part of the law, nor to be an aid to judicial statutory interpretation. It is a practical tool to help readers to understand and to find their way around the legislation.

9.26 However, as the *Drafting Guidelines* point out:

¹⁹ Office of the Legislative Counsel, *Drafting Guidelines* (2012), p 83.

²⁰ Office of the Legislative Counsel, *Drafting Guidelines* (2012), p 83.

The fact that an overview may not be intended by the drafter to have any operative effect does not mean to say that a court would take no account of it in construing the legislation to which the overview relates.²¹

9.27 The Guidelines go on to say that an overview that goes beyond merely outlining the contents of provisions to describe how those provisions operate carries a greater risk of the overview being used as an interpretative tool.²²

9.28 In the consultation paper we asked two questions about overviews:

(1) Do consultees find overviews helpful in navigating or understanding legislation?

(2) Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?²³

9.29 Consultees almost universally thought overviews were helpful signposts and a useful tool for navigating legislation. Some suggested improvements - Angela Williams (Law Commission's Welsh Advisory Committee) suggested that it would be helpful to include hyperlinks in the overviews. In evidence presented to the Constitutional and Legislative Affairs Committee, the Learned Society of Wales praised some uses of overview sections in recent legislation, while also pointing to other cases where the overview added little to the long title. The Society found the use of an overview section in the National Health Service (Wales) Act 2014 useful despite the Act having only two further sections, given that the provision summarised in the overview proceeded by way of amending earlier legislation. It also noted with favour the apparent recognition in the Further and Higher Education (Wales) Act 2014 that a short Act does not need an overview if the content is clear from the table of contents.²⁴

9.30 Several consultees agreed with the suggestion in the question that overviews would likely become admissible as aids to the construction of legislation. This risk has been recognised by the Office of the Legislative Counsel and their Drafting Guidelines warn drafters that an overview needs to be drafted with care to ensure that it is an accurate summary of those provisions and could not have an unintended consequence.²⁵

9.31 The wide support expressed by consultees suggests that the overviews do operate as a tool to help readers to navigate legislation. The risk of courts using overviews to interpret the purpose or meaning of the legislation will be borne in mind by drafters.

²¹ Office of the Legislative Counsel, *Drafting Guidelines* (2012), p 80, para 95.

²² Office of the Legislative Counsel, *Drafting Guidelines* (2012), p 80, para 95.

²³ *Form and Accessibility of the Law Applicable in Wales* (2015) Law Commission Consultation Paper No 223, consultation questions 4-7 and 4-8.

²⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015). The written submissions made to the inquiry may be found at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=9054> (last visited 15 June 2016).

9.32 We support the use of links to the relevant parts of the legislation. The National Archives website already uses hyperlinks from the contents pages of legislation through to the sections. It would be helpful if a similar approach could be applied to overviews and could include links to other relevant legislation online.

Purpose clauses

9.33 An “aspirational” or “purpose” clause may express the purpose or aim of legislation or may impose a statutory obligation to work towards a goal which is an aspiration, rather than a measurable target which the duty-holder is expected to reach within a certain reporting period. An example of the latter type of purpose clause is found in section 3 of the Well-Being of Future Generations (Wales) Act 2015, which states:

- (1) Each public body must carry out sustainable development.
- (2) The action a public body takes in carrying out sustainable development must include:
 - (a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals; and
 - (b) taking all reasonable steps (in exercising its functions) to meet those objectives.

9.34 In the consultation paper we cited section 1(1) of the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 as an example of a statement of the purpose of a piece of legislation. This states:

The purpose of this Act is to improve—

- (a) arrangements for the prevention of gender-based violence, domestic abuse and sexual violence;
- (b) arrangements for the protection of victims of gender-based violence, domestic abuse and sexual violence;
- (c) support for people affected by gender-based violence, domestic abuse and sexual violence.

9.35 We asked consultees:

Do consultees find aspirational clauses a helpful addition to legislation?²⁶

9.36 Many consultees supported the assistance provided by such clauses in setting

²⁵ Office of the Legislative Counsel, Drafting Guidelines (2012), para 95.

²⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 4.66 to 4.69, consultation question 4-9.

out clearly the policy goals of the legislation. The Legal Wales Foundation thought that they were likely to promote consistency and good practice. As Huw Williams (Geldards LLP) put it:

... sensibly drafted aspirational clauses can enshrine the policy aims of legislation and provide a “timeless” reminder for a future reader.

- 9.37 The Association of Judges of Wales suggested that purpose clauses could be used to express the legislature’s intention to meet international obligations, as exemplified by the Welsh Government’s adoption of the United Nations Convention on the Rights of the Child in the Rights of Children and Young Persons (Wales) Measure 2011.
- 9.38 The National Trust likened purpose clauses to recitals in deeds, which set out the reasons why the deed is being entered into so that the original purpose is clear on the face of the document.
- 9.39 However the Law Society Wales, the Association of London Welsh Lawyers and local authorities in North Wales all took the view that aspirational clauses made it difficult to be certain of the rights and obligations the legislation imposes. They thought it more helpful to include the policy goals and aspirations in the explanatory notes rather than create operative clauses in legislation which are difficult to enforce.

Conclusions

Overviews

- 9.40 We take the view that a properly drafted overview clause may well help the reader and the courts to understand the intentions of the Assembly. It has to be borne in mind however that, as the drafting guidelines recognise, there is a risk that courts will use them as aids to the interpretation of the legislation that contains them. This could create a tension between the broad statement of the purpose of the legislation and the detailed provision giving effect to the purpose. This is particularly so where the purpose of the legislation has to yield to other purposes or interests. Any ambiguity in the detailed provision balancing the achievement of the statute’s purpose against other interests may well be construed in favour of the achievement of that purpose.

Purpose clauses

- 9.41 We see a similar risk of tension in the case of clauses stating the purpose of a piece of legislation. For example, the statement in the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 that its purpose is to improve the arrangements for the prevention of such violence and abuse could lead to any ambiguity elsewhere in the legislation being construed expansively.
- 9.42 On the other hand we see no reason why legislation should not impose aspirational duties on, in particular, public bodies. It must be borne in mind that such duties may well not be legally enforceable.

CHAPTER 10

BILINGUAL LEGISLATION

INTRODUCTION

- 10.1 Welsh is an official language in Wales, although not spoken universally. The 2011 census recorded a Welsh population of 3.06 million and that 23.3% of those born in Wales were able to speak Welsh.¹
- 10.2 The Welsh language is used extensively in courts in Wales. In the year March 2015 to March 2016, there were 581 cases conducted wholly or partly in Welsh, of which 268 were in the magistrates' courts, 34 in the Crown Court, 270 in county courts and 9 before tribunals. In the year March 2014 to March 2015 there were 660 cases conducted wholly or partly in Welsh, of which 392 were in the magistrates' courts, 29 in the Crown Court, 214 in county courts and 25 before tribunals.²
- 10.3 Acts, Measures and subordinate legislation of the National Assembly are available on legislation.gov.uk in Welsh and in English. Welsh language versions of legislation are widely used, with 19 per cent of those accessing Acts and Measures of the Assembly on legislation.gov.uk accessing them in Welsh.³
- 10.4 In the consultation paper we discussed legal terminology, the form of bilingual legislation, bilingual drafting and the interpretation of bilingual legislation.⁴ In this chapter we draw together responses from consultees on bilingual lawmaking and consider how access to the law in the Welsh language can be improved.

Welsh as a legal language

- 10.5 The Welsh language's official status is given legal effect by enactments which:
- (1) require the Welsh and English languages to be treated on the basis of equality in the conduct of the proceedings of the National Assembly for Wales;
 - (2) give equal standing to the Welsh and English texts of measures and acts of the National Assembly for Wales, and subordinate legislation; and

¹ For a more detailed breakdown of Welsh speakers and those who read and write Welsh living in Wales and living in England, see H M Jones, *A statistical overview of the Welsh language* (Welsh Language Board, February 2012).

² Figures supplied by Welsh Language Unit of Her Majesty's Courts and Tribunals Service, which has suggested that these figures may understate the actual number of cases in which Welsh is used in court. There is considerable anecdotal evidence that many cases which have required an interpreter or have involved the use of some Welsh are not recorded as such in the system. In the last 3 years, cases using Welsh in the Crown and county courts have increased. In the last 3 years, cases using Welsh heard in the magistrates' court have decreased. This may reflect the fact that less cases are heard in the magistrates' court now.

³ The National Assembly for Wales, Constitutional and Legislative Affairs Committee's Inquiry into Making Laws in Wales, Evidence from the National Archives (January 2015).

⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapters 10 to 12.

- (3) confer a right to speak the Welsh language in legal proceedings in Wales.⁵
- 10.6 In addition to legal requirements, it is Welsh Government policy to promote the Welsh language.⁶ Legislation passed in Wales is generally made in both English and Welsh. Both versions of the text are authoritative as they are treated for all purposes as having equal standing.⁷ In the case of Acts of the Assembly, Acts that amend monolingual Westminster legislation are an exception. Secondary legislation made by the Welsh Ministers is usually made in both languages.⁸
- 10.7 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.⁹ We first consider the development of Welsh legal terminology. The next chapter discusses the challenges involved in bilingual drafting.

WELSH LEGAL TERMINOLOGY

- 10.8 In our consultation paper we observed that the suitability of Welsh as a medium for modern legal communication and debate has certainly been established.¹⁰ We also noted the importance of developing a modern, standardised legal terminology which equips Welsh for use as a legal language in the way that the English language has done over many centuries. However, as Dr Catrin Fflur Huws (Aberystwyth University) points out, Welsh legal terminology may be developed in directions that do not have connotations derived from existing concepts and therefore may represent current law more accurately:

For example, the term custody is still commonly, though incorrectly, used in relation to the residence of children. However, the

⁵ Welsh Language (Wales) Measure 2011, s 1.

⁶ The Welsh Government website contains pages on “Promoting the Welsh language”, where they say “We want to see an increase in the number of people able to speak Welsh and the number that use it.” See: <http://gov.wales/topics/welshlanguage/promoting/?lang=en> (last accessed on 15 June 2016).

⁷ Government of Wales Act 2006, s 156. Section 156(2)-(5) provides that the Welsh Ministers may by order provide in respect of any Welsh word or phrase that, when it appears in the Welsh text of any Assembly Measure or Act of the Assembly, or any subordinate legislation made under an Assembly Measure or Act of the Assembly or by the Welsh Ministers, it is to be taken as having the same meaning as the English word or phrase specified in relation to it in the order. The power has not been used to date. See Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 11.13 to 11.19.

⁸ See further D Hughes and H G Davies, “Accessible Bilingual Legislation for Wales / Deddfwriaeth Hygyrch a Dwyieithog i Gymru” (2012) 33(2) *Statute Law Review* 103 at 106.

⁹ See, for example the Practice Direction on Devolution Issues. Civil Procedure Rules, Practice Direction 3N, paras 12.1 to 12.3. Available here https://www.justice.gov.uk/courts/procedure-rules/civil/rules/devolution_issues (last visited 15 June 2016). 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.

¹⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, pp 195 to 196.

development of terminology in Welsh for this concept meant that different words could be used for “the imprisonment of a person suspected of or charged with a criminal offence” on the one hand, and “an order regarding who a child should reside with” on the other.¹¹

- 10.9 In 2001 a study group from Wales visited Canada and reported that in that country there is a national body for standardising legal terminology, namely a committee of the National Programme for the Administration of Justice which is based in Ottawa and funded by the Federal Government: Promoting Access to Justice in Both Official Languages (PAJLO). The Committee consists of representatives from the Department of Justice and the courts, and the Translation Centre also contributes. The Committee makes decisions on the terms to be used. Once terms are decided upon, they are used in legislation, judgments and legal textbooks.¹² Under this programme, four jurilinguist¹³ centres were established at different universities across Canada that work together to assist in the process of standardising legal terminology.¹⁴
- 10.10 In Wales, a group of practitioners and scholars recently completed a project, sponsored by the Welsh Language Board, to standardise Welsh legal terminology. It reached agreement on some 1,600 terms. This project was discontinued following the dissolution of the Welsh Language Board.¹⁵
- 10.11 We suggested in the consultation paper that, in addition to standardising legal terminology, it is also necessary to ensure that “legal Welsh” is accessible to and understandable by Welsh speakers. It appeared that the difficulty of “legal Welsh” may be an impediment to the accessibility of legislation and other legal documents in Welsh and to the use of the language in legal proceedings.¹⁶ We considered that many Welsh speakers would find it difficult to employ or understand formal “legal Welsh”. More specifically, there is evidence of a need for greater familiarity with Welsh legal terminology among Welsh-speaking court

¹¹ C F Huws, “The day the Supreme Court was unable to Interpret Statutes” (2013) 34(3) *Statute Law Review* 221.

¹² Office of the Counsel General, *Bilingual Lawmaking and Justice: A Report on the Lessons for Wales from the Canadian Experience of Bilingualism* (2001) 3.2.1. See also the National Program for the Integration of Both Official Languages in the Administration of Justice Jurilinguist Component website: <http://pajlo.org/en/resources/standardisation.htm> (last visited 15 June 2016).

¹³ “Jurilinguist” is a term borrowed from Canada to describe an expert in legal terminology in more than one language.

¹⁴ François Blais, *Language Update*, Volume 6, Number 4, 2009, p 14, available online here: http://www.btb.termiumplus.gc.ca/tpv2guides/guides/favart/index-eng.html?lang=eng&lettr=indx_autr8G8LU1W84qNM&page=9LdxzmQigKuk.html (last visited 15 June 2016).

¹⁵ Termau Gweinyddu Cyfiawnder. A part of the product of this exercise is available on the website of Justice Wales Network / Rhwydwaith Cyfiawnder Cymru, http://cyfiawndercymru.org.uk/?page_id=106&lang=en (last visited 15 June 2016).

¹⁶ See study by Robat Trefor on how Welsh speakers deal with written Welsh. R Trefor, “Problemau gyda Safoni a Chywair”. The full text is available at <https://llyfrgell.porth.ac.uk/media/ysgrifau-ar-ieithyddiaeth-a-geiriaduraeth-gymraeg-in-Welsh-only> (last visited 15 June 2016).

users and legal professionals alike.¹⁷ In this regard we drew attention to the practice of the National Assembly of publishing with draft Bills a glossary (English to Welsh) of technical and legislative terms employed in the Bill.

10.12 We therefore asked consultees the following questions

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?

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.¹⁸

Lessons from consultation

- 10.13 The majority of consultees considered that there should be a formal process of standardising and keeping up to date Welsh legal terminology. Consultees expressed a diverse range of views on how exactly the process of standardising should be continued and funded, and what sort of body should be responsible for performing this role.

Should the process of standardising Welsh legal terminology be formalised?

- 10.14 The overwhelming majority of consultees considered that there should be some process for the standardisation of Welsh language legal terminology. For example, the Association of Judges of Wales observed that the standardisation of Welsh language legal terminology is a “long standing problem”. The Association considered that if the Welsh language is to gain a foothold within the courts and tribunals, then access to appropriate terminology is essential. They urged that a national body be established, able to provide definitive and reliable legal terminology and an accepted glossary which remains current and enters into a common usage. Linenhall Chambers also stressed the importance of ensuring “uniformity of understanding, expression and approach”. The Welsh Government agreed that “there may be merit in a formal arrangement for standardisation either within one body or by bringing those who currently have a role together”.
- 10.15 However, not all consultees supported the establishment of a body to standardise Welsh language legal terminology. The Welsh Language Commissioner considered instead that:

It would be much better to establish a method of referring difficulties to terminologists so that the terms can be standardised in response to

¹⁷ I Madoc-Jones and O Parry, “‘It’s always English in the Cop Shop’: Accounts of Minority Language Use in the Criminal Justice System in Wales” (2013) 52(1) *The Howard Journal of Criminal Justice* 91 at 101. This view is also supported by the response to the Law Commission’s report Rhentu Cartrefi yng Nghymru / Renting Homes in Wales (2013) Law Com No 337.

¹⁸ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 11-1 and 11-2.

real situations and requirements.¹⁹

- 10.16 Moreover, the Welsh Language Commissioner also emphasised the importance of ensuring that Welsh language legal terminology is determined during the development of policy and legislative drafting:

The action of standardising terms should not take place in a vacuum outside the policy-making process. The process of standardising Welsh and English terms for a specific policy area should happen simultaneously as a basis for the work in hand [...]

The new legislation of Wales is in itself developing new concepts in both languages. Consider in that respect what is now meant by the terms "safonau" and "standards" in relation to the Welsh language or "llesiant" and "well-being". These terms have definite concepts relating to them which result from the definitions of Welsh legislation. One of the main international principles of standardising terms is the need for terms to reflect a concept. One of the purposes of legislation is to implement a policy aim and thus it is vital to establish that policy concept from the outset and to specify terms in Welsh and in English to reflect that concept.

- 10.17 Dr Huws considered that there is excessive concern regarding standardising terms in Welsh and not enough concern about the same problem in English. She observed that "the British system is well used to words that have several meanings, 'absolute' and 'possession' in land law for example, without any worries".
- 10.18 Keith Bush QC doubted whether the standardisation of Welsh language legal terminology is really a pressing need. He explained that the Welsh language vocabulary currently in use is already substantial and considered that any additional development and homogenisation of terminology would not need to be undertaken through a complex structure. He suggested that "relatively informal meetings and conferences between lawyers, translators and linguists to discuss recent developments and to amend term databases" were all that was necessary. He also suggested that universities and the Coleg Cymraeg Cenedlaethol could fund these kinds of activities from their ordinary budgets, which he did not think would be costly.

Who should be responsible and what should the formal standardisation be?

- 10.19 The majority of consultees who supported the introduction of a formal standardisation process, and a body to support that process, did not specifically propose what this process, and who this body, ought to be. However, a number of consultees did suggest some options for formal processes for terminology standardisation.
- 10.20 Huw Williams (Geldards LLP) considered that as the greatest impetus to develop and standardise Welsh legal terminology will come from the drafters of bilingual

¹⁹ The Welsh Language Commissioner's proposal for "terminologists" is described in paras 10.24 to 10.26.

legislation, the Office of the Legislative Counsel, it therefore would be sensible to have the responsibility for standardisation located within the Office of the Legislative Counsel. Mr Williams suggested that the Office of the Legislative Counsel should be funded to publish an online English Welsh Legal Glossary, or to collaborate with the National Academy for Wales, which is responsible for publishing the most authoritative dictionary of the Welsh language. Mr Williams added that an advisory committee of legal, linguistic and jurilingual experts should be constituted as a source of external advice and assistance to the Office of the Legislative Counsel.

- 10.21 Similarly, the Legal Wales Foundation suggested that standardisation of terminology should be the joint responsibility of the Office of the Legislative Counsel and the Welsh Language Unit of Her Majesty's Courts and Tribunals Service. The Legal Wales Foundation noted that extra funding will be needed from the United Kingdom and / or the Welsh Government. Law Society Wales suggested that a formal committee with representation from across the legal sector, government and the legislature could undertake the function of standardising and keeping up to date Welsh legal terminology.
- 10.22 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) observed that much of the responsibility for standardising and keeping up to date Welsh legal terminology currently falls upon the Welsh Government's legal translators, adding that they consult with and receive assistance from other relevant parties, such as National Assembly translators.
- 10.23 The Care Council for Wales, on the other hand, considered that the process should be driven by, and emanate from, the National Assembly because it is the source of legislation in Wales. It therefore considered that the responsibility should be taken on by the National Assembly's translation services.
- 10.24 The Welsh Language Commissioner emphasised the importance of ensuring that Welsh legal terminology is properly considered during policy development and legislative drafting. In addition, the Welsh Language Commissioner proposed a comprehensive alternative scheme for standardising Welsh language legal terminology that would address terminology issues as and when they arise. She explained that this scheme would require "judges, solicitors, translators and editors to refer problematic terms to one central location explaining the context, quoting the legislation and explaining their difficulties" and that "terminologists would need to be appointed who would be responsible for receiving the problematic terms of the above solicitors and judges". The Welsh Language Commissioner considered that these terminologists should work within Welsh Government, as "the Welsh Government is responsible for developing policy and legislation in Wales". The Welsh Language Commissioner added that:

These terminologists should advise the policy and legislation developers as they standardise terms at the beginning of the process of developing policy and legislation bilingually.

- 10.25 The Welsh Language Commissioner considered that the terminologists should consult with a panel of legal experts such as judges, solicitors and academics, as well as with linguistic experts. The Welsh Language Commissioner suggested that the Welsh Language Standardisation Panel, currently being established by

Coleg Cymraeg Cenedlaethol, would be able to provide the necessary linguistic advice.

- 10.26 The Welsh Language Commissioner suggested means of ensuring that the conclusions of the terminologists are implemented:

It would be necessary to specify legal terminology standardisation criteria recognised by the Lord Chancellor's Standing Committee²⁰ (or another official organization) and which are used by the terminologists as they consider specific terms and by policy and legislation developers. It is vitally important that there is agreement regarding the criteria and the standardisation process between the relevant organisations in order to ensure that institutions of the law recognise this terminology that is standardised in this way. Already, terms standardisation criteria have been developed as part of the project carried out by the Welsh Language Board.

- 10.27 In addition to these specific suggestions, a significant number of consultees emphasised the importance of securing support from universities in Wales in this endeavour. For example, Professor Noel Lloyd (Aberystwyth University) suggested that the "Law Schools of the universities in Wales could play a valuable role in conjunction with the Coleg Cymraeg Cenedlaethol".

Other ways of improving the accessibility of terminology

- 10.28 The Welsh Government drew attention to the BydTermCymru website that publishes Welsh / English terminology. This website is maintained by the Welsh Government's Translation Service, and is freely available online. Dame Rosemary Butler AM described the BydTermCymru website as a valuable resource.

- 10.29 The Welsh Language Commissioner observed that BydTermCymru could provide a single national search interface to enable people to find terms in one place, whilst currently such terms are spread out across a number of different sources. The Welsh Language Commissioner also suggested that it could be agreed with other organisations which publish sources of terms and a glossary online, such as Geiriadur Prifysgol Cymru, y Porth Termau Cenedlaethol and the Coleg Cymraeg Cenedlaethol, that terms that have been standardised by the Welsh Government are included in their databases too. This would attempt to ensure consistency in the use of particular terms across multiple databases. Keith Bush QC agreed that the multiplication of databases was confusing for users, and agreed that there should be one terminology website with the various bodies feeding ideas into it.

- 10.30 Moreover, the Welsh Language Commissioner suggested that the standardised terms and the new concepts developed should be marketed extensively, with social media being properly utilised to raise awareness of their availability.

²⁰ The Lord Chancellor's Standing Committee on the Welsh Language was established in 2003. Under its terms of reference it seeks to ensure that the various bodies concerned with the administration of justice in Wales give due regard to treating both the Welsh and English languages equally in the administration of justice in Wales.

- 10.31 The Care Council for Wales emphasised the importance of ensuring that legislation in both the English and Welsh languages should be written in the clearest possible language without undue recourse to obscure technical terms.
- Conclusions

Should there be a formal standardisation process?

- 10.32 We consider that standardising Welsh language legal terminology should be a part of the policy development and legislative drafting process, as the Welsh Language Commissioner emphasised. Currently, the Welsh language legal terminology employed in a particular Act is often specified and defined in that Act. For example, Schedule 4 to the Education (Wales) Act 2014 provides a list of defined terms in both Welsh and English.
- 10.33 We are persuaded by the majority of consultees that it is necessary to determine where the institutional responsibility for Welsh legal terminology, including the function of responding to queries about terminology, should lie. Whilst we see merit in the Welsh language continuing to develop in the organic manner described by Keith Bush QC, we consider that there are two main reasons for formalising the terminology standardisation process. First, it is important to ensure that the process of determining Welsh legal terminology is transparent. Secondly, clearly establishing formal responsibility for Welsh legal terminology underlines the status of Welsh as a legal language.
- 10.34 We now turn to consider two further issues: what should the process involve, and who should be responsible for it?

What should the process involve?

- 10.35 Broadly speaking, consultees proposed two models for developing and standardising Welsh legal terminology. The first, which was adopted by almost all consultees who made suggestions as to the process, is the establishment of a body or committee responsible for prescribing legal terminology in the abstract. This body would identify, and then plug, gaps in Welsh legal vocabulary; it would have a similar remit to the Canadian Promoting Access to Justice in Both Official Languages programme, described above.
- 10.36 The second model, proposed by the Welsh Language Commissioner, is the creation of a system that is primarily reactive, rather than proactive, to address terminology issues as and when they arise. This would enable users of Welsh legal terminology such as practitioners and judges to refer questions and issues about particular terminology to a centralised body. The Welsh Language Commissioner considered that the main advantage to this model is that terminology would be developed in response to “real situations and requirements”.
- 10.37 There are a number of features common to both of these models as proposed. Both would require input from legal and linguistic expertise, such as trained jurilinguists.²¹ Determining legal terminology is a multi-disciplinary endeavour, requiring legal expertise in addition to linguistic expertise. For example, the Canadian committee, described above, is staffed by five permanent members,

²¹ That is to say, experts in legal terminology in Welsh and English.

including lawyers, judges, translators and a linguistic expert.

- 10.38 Moreover, consultees generally supported co-operation between the legal terminology body and academic institutions, such as Bangor University, and the Coleg Cymraeg Cenedlaethol, that are undertaking initiatives to improve Welsh language legal terminology. One of the important functions of the Canadian committee is to co-ordinate the efforts of the four linguistic centres at universities across Canada. A centralised co-ordinator helps to avoid duplication of effort or conflicting conclusions.
- 10.39 We consider that the two functions identified by consultees could be undertaken as part of the formal standardisation process. Identifying problematic terms, or gaps in the terminology, in advance and prescribing solutions would be a useful endeavour. Research could identify the underdeveloped areas of Welsh legal terminology and this would ultimately help to prevent problems occurring. Moreover, providing a central and authoritative body that is able to respond to particular issues as and when they arise, would enable terminology to be developed in response to real situations. However, the context in which the need for definition of a term arose may not be the only context in which that term may be used. Therefore, we consider that a merger of both models, a combination of proactivity and reactivity, would best ensure the development and standardisation of Welsh language legal terminology.

Who should be responsible?

- 10.40 Consultees variously suggested that the responsibility for the formal terminology process should lie with the Welsh Government (or, more specifically, the Office of the Legislative Counsel) or the National Assembly. Consultees did not suggest that a new body independent of the Welsh Government or the Assembly be established in order to take on this responsibility.
- 10.41 We agree with the majority of consultees, including the Welsh Language Commissioner, that the Welsh Government should ultimately be responsible for the provision of Welsh language legal terminology. This would ensure that the centralised terminology process has sufficient authority, and that the Welsh Government is able to retain control in determining terms for legislation. We suggest that an independent terminology panel should be established to advise the Welsh Government. This panel should have the necessary expertise, including representatives from the judiciary, practitioners, jurilinguists and terminologists. As the Office of the Legislative Counsel are those who most frequently need to address terminology issues in the process of drafting, we consider that the First Legislative Counsel should chair the panel.
- 10.42 The terms decided on by the panel could then be published on the BydTermCymru website, which would be the authoritative online source of terminology. We consider that this would be an effective aid to interpretation and in the development of Welsh as a legal language.
- 10.43 We therefore conclude that the Welsh Government should be recognised as formally responsible for the standardisation and development of Welsh language legal terminology. We recommend that an independent multi-disciplinary terminology panel is established to advise the Welsh Government on terminology issues. Practitioners, judges and members of the public should be able to refer

problems experienced with Welsh legal terminology to the panel. This panel should also co-ordinate the terminology research being conducted by higher education institutes in Wales.

Recommendation 24: The Welsh Government should be formally recognised as being responsible for standardisation of Welsh language legal terminology. An independent multidisciplinary panel should be established to advise the Welsh Government on Welsh language legal terminology.

AN INTERPRETATION ACT FOR WALES?

Interpretation legislation in the UK

- 10.44 The Interpretation Act 1978 (the 1978 Act) applies to UK and Welsh legislation.²² *Craies on Legislation* describes the Act as follows:

The Interpretation Act 1978 contains provisions of two kinds. First, provisions codifying and thereby putting beyond doubt principles which are largely a matter of common sense and which would probably be applied in the absence of the Act. Secondly, rules which, having been set out once in the Act, enable the draftsman of other legislation to use shortened forms of expression in the knowledge that they will be construed in the light of the principles laid down in the 1978 Act.²³

- 10.45 The 1978 Act has a number of functions. One of its main purposes is to shorten other legislation by providing definitions of terms used in legislation. Providing a central list of definitions avoids the need for repetition of them in other legislation and ensures consistency of meaning. The 1978 Act also contains provisions about the enactment and operation of legislation, as well as rules about interpretation covering matters such as references to gender or number and time of day. It also contains a presumption as to the time of delivery of material sent by post.
- 10.46 The Interpretation Act 1978 extended to Scotland until it was amended by the Scotland Act 1998.²⁴ The Scotland Act 1998 limited the application of the Interpretation Act 1978 to legislation passed by the Scottish Parliament: only sections 15 to 18 of the Act – relating to repealing enactments and duplicated offences – apply to Acts of the Scottish Parliament and instruments made under an Act of the Scottish Parliament.²⁵
- 10.47 The Scotland Act 1998 established the Scottish Parliament.²⁶ Scotland has devolved competence for most of the criminal and civil law and operates a

²² As to the application of the Interpretation Act 1978 to legislation made in the National Assembly see s 23B of that Act, which creates a small number of exceptions.

²³ D Greenberg *Craies on Legislation* (10th ed 2015) p 809.

²⁴ Scotland Act 1998, sch 8, para 16(2).

²⁵ Interpretation Act 1978, s 23A

²⁶ Scotland Act 1998, s 1(1) and sch 5.

different system of courts and, to a large extent, of tribunals.²⁷ In 1999, a transitional Order made provision for the interpretation and operation of Acts of the Scottish Parliament. The Order contained general definitions²⁸ (such as “High Court” meaning the “High Court of the Justiciary”) which were different from the definition found in the Interpretation Act 1978.²⁹ However, the Order was largely based on the provisions of the 1978 Act.

- 10.48 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, a Scotland only Act.³⁰ Much of it duplicates the Interpretation Act 1978, along with other additional provisions. Its schedule of defined terms appears to be based on the corresponding schedule to the Interpretation Act 1978, but contains some additional definitions.

Is there a case for an Interpretation Act for Wales?

- 10.49 Wales does not currently have its own Interpretation Act. In its response to the Constitutional and Legislative Affairs Committee’s inquiry “Making Laws in Wales”, the Learned Society of Wales has suggested that such an Act would usefully improve Welsh legislation generally. In particular they noted that a Welsh Interpretation Act could define technical terms that follow a standard form which could therefore be removed from other statutes. The Society also considered how an Interpretation Act for Wales could facilitate the use of modern technology.³¹ The Constitutional and Legislative Affairs Committee recommended that the Counsel General work towards producing a separate Welsh Interpretation Act.³² The Welsh Government has said that it will consider this recommendation along with our report.
- 10.50 The application of the Interpretation Act 1978 to Wales means that standard legislative terms are already defined in one place and need not, currently, be reproduced in each piece of legislation made in Cardiff. A Welsh Interpretation Act would give the National Assembly the ability to define additional terms.
- 10.51 However, enacting an Interpretation Act for Wales has risks. Even small changes to the current rules on interpretation applying in England and Wales could cause

²⁷ Scotland Act 1998, sch 5. See also Scottish Parliament research papers, *The Scottish Civil Court System* (February 2014) and *The Scottish Criminal Justice System: Legal and Administrative Arrangements* (July 2011). It should be noted that Scotland did have its own distinct court system prior to the 1998 Act. See the Criminal Procedure (Scotland) Act 1995, an Act of the United Kingdom Parliament.

²⁸ Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, SI 1999 No 1379, sch 2.

²⁹ For further discussion see E Clive, “Law making in Scotland: from APS to ASP” [1999] 3 *Edinburgh Law Review* 131.

³⁰ The Interpretation and Legislative Reform (Scotland) Act 2010 broadly restated the law contained in the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, SI 1999 No 1379. This was a transitional Order made by the UK Parliament under the Scotland Act 1998.

³¹ See page 7 of the Learned Society of Wales’ response to the Constitutional and Legislative Affairs Committee’s inquiry into Making Laws in Wales.

³² National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) Recommendation 17.

confusion and error, in particular for lawyers and other professionals who operate on both sides of the border.

10.52 There is, however, one important distinction which is relevant only to Wales: the equal status of English and Welsh as languages of legislation. The 1978 Act makes provision only for English legal terminology. An Interpretation Act for Wales could make provision for the interpretation of Welsh language terminology.

10.53 In our consultation paper we explained that we could see arguments in favour of an Interpretation Act dealing with Welsh legal terminology, possibly containing definitions and/or pairings of English and Welsh language expressions. We therefore asked for consultees' views on all these issues:

Do consultees find the Interpretation Act 1978 and its Scottish and Northern Irish equivalents useful?

Do consultees think that there should be an Interpretation Act for Wales at this stage?

What do consultees think the benefits of an Interpretation Act for Wales would be? What would an Interpretation Act for Wales need to cover?³³

Lessons from consultation

10.54 The majority of consultees could see significant benefits in an Interpretation Act for Wales that establishes a set of definitions of Welsh terminology. The Welsh Government suggested that the lack of defined Welsh legal terminology was inconsistent with the notion of both language versions of Welsh legislation having equal status.

10.55 The Welsh Language Commissioner observed that some specific terms that manifest themselves in Welsh legislation, such as “llesiant” – “well-being” in English – are terms for which it would be useful to specify a definition in both languages. The Welsh Language Commissioner also commented that the necessity of an Interpretation Act for Wales increases as legislative drafting practice develops “Welsh language expression that veers away from slavishly following the pattern of the English”.

10.56 Other consultees, including Keith Bush QC and Dr Huws, noted that an Interpretation Act for Wales would be able to prescribe Welsh language rules concerning gender neutrality. For example, Dr Huws observed that it is difficult for the Welsh language to express a duty in gender neutral terms.

10.57 However, a number of consultees, such as the Law Society Wales, argued that it is too soon in the development of legislative drafting in Wales to set definitions of Welsh language legal terminology. Nor did all consultees agree that a separate Interpretation Act would benefit users of legislation in Wales. For example, the National Trust were of the view that a separate Interpretation Act for Wales would complicate the current legislative framework unnecessarily.

³³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 4-10 to 4-12.

Conclusions

- 10.58 The case for introducing a Welsh Interpretation Act must depend on identifying a useful purpose that it would serve. Many of the rules contained in the 1978 Act are technical and uncontroversial; the only benefit of reproducing in an Assembly Act would be that a text of them would also exist in Welsh. Consultation has identified one clear purpose for a Welsh Interpretation Act: prescribing definitions of Welsh language terms in statute. Providing a clear and authoritative source of definitions of Welsh language terms would ensure consistency in their use and would provide a catalogue of equivalent expressions in Welsh and English. Canada, a bilingual jurisdiction, has an Interpretation Act passed in English and French which establishes the meanings of corresponding terms in both languages.³⁴
- 10.59 Under the Government of Wales Act 2006, the National Assembly has legislative competence over the
- meaning of Welsh words and phrases in Assembly Measures and Acts of the Assembly, in subordinate legislation made under Assembly Measures and Acts of the Assembly and in other subordinate legislation if made by the Welsh Ministers...³⁵
- 10.60 This enables the National Assembly to legislate to define the meaning of Welsh words and phrases in legislation passed in Wales, but the question remains to what extent that is best done centrally in an Interpretation Act or in interpretation sections of Assembly Acts. The Interpretation Act 1978 defines a large but limited number of terms that either are important (such as definitions of particular courts or official posts) or are frequently used in Acts of Parliament. Its existence does not remove the utility of provisions within other Acts defining other terms for the purposes of those Acts. These remain common in Acts of Parliament and Assembly Acts despite the 1978 Act's existence. Centralising every statutory definition of a term in an Interpretation Act would create a piece of legislation that was unwieldy to the point of being unmanageable. It is well arguable that any definition of the term *llesiant*, for example, is better contained in the Well-being of Future Generations (Wales) Act 2015 than in a self-standing Interpretation Act.
- 10.61 We suggest that as a first step towards gauging the utility of a Welsh Interpretation Act, schedule 1 to the Interpretation Act 1978 should be scrutinised with a view to establishing the extent to which the terms it defines could usefully be given statutory Welsh equivalents and the utility of further central definitions of terms for the purposes of Wales.
- 10.62 The practice of legislative drafting in Wales is still in a relatively early stage in its development. We see some force in the point made by certain consultees that the introduction of an Interpretation Act at this stage would be premature. It may well be that further terms suitable for central definition in an Interpretation Act would come to light as the size of the Assembly statute book increased. It is also possible that future legislation might give rise to a need to alter the definition of terms that were given a particular definition now. This could lead to frequent

³⁴ Canada, Interpretation Act R.S.C., 1985, c. I-21.

³⁵ Government of Wales Act 2006, sch 7 para 13.

amendment of the Act and, if definitions changed, confusion.

- 10.63 The Welsh language terminology panel that we have recommended above would help the terminology to evolve. The terms decided on by the panel, which would be published on the BydTermCymru website, could be more easily supplemented and if necessary altered in response to new developments.
- 10.64 Consistency of terminology across Acts of the Assembly is currently being achieved without an Interpretation Act, and legislative drafters have the additional benefit of flexibility to use terms differently in different contexts where necessary. The use of glossaries and schedules to Acts (such as schedule 4 to the Education (Wales) Act 2014) which set out and define the English and Welsh language terms used in the particular Acts are currently sufficient to aid users. We are not sure that a sufficient number of statutory terms suitable to be moved to a “central” Interpretation Act have yet emerged.
- 10.65 As the body of law made in Wales grows, and Welsh legal terminology continues to develop, a role for a Welsh Interpretation Act will emerge. We suggest that the Welsh Government continue to monitor whether that point in time has been reached.

Recommendation 25: We recommend that the Welsh Government and the National Assembly consider, and keep under review, the practical benefits of introducing an Interpretation Act of the Assembly.

CHAPTER 11

BILINGUAL DRAFTING

INTRODUCTION

11.1 In our consultation paper we analysed the drafting practice in Wales and recounted the experience of bilingual drafting in Hong Kong and Canada. We considered that 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.

11.2 We also expressed agreement with Keith Bush QC who identified 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.¹

11.3 We asked:

Do consultees agree with our analysis of the objectives of bilingual drafting?²

11.4 Consultees unanimously endorsed our view of the objectives of bilingual drafting. The Welsh Government supported our analysis and agreed, saying:

Yes, and they are consistent with what we seek to achieve. There are numerous ways of achieving the objectives.

¹ K Bush (now QC), "New Approaches to UK Legislative Drafting: The Welsh Perspective" (2004) 25(2) *Statute Law Review* 144 at 147.

² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 11.13 to 11.51.

- 11.5 The Association of Judges of Wales also endorsed our analysis and commented that:

Anyone who has tried to comprehend an unwieldy, rigidly translated regulation would give anything for a clear, intelligible Welsh version. If communication between co-drafters is good enough, it might even enable the Welsh version to be clearer than its English counterparts, encouraging more of us to turn to the Welsh version first. All legislation and regulations should be drafted in plain English and clear Welsh (“Cymraeg Clir”).

Perhaps objective 5 could be expanded to ensure that we achieve effective equality and usability between the two language versions?

- 11.6 Dr Catrin Fflur Huws (Aberystwyth University) also suggested that:

There is a need to communicate clearly with one audience. In terms of judges, it is necessary for them to be able to interpret two versions of the legislation together. Therefore, although there is a possibility for the individual to refer to one version or the other, the system needs to be able to refer to both.

- 11.7 We too consider it important to ensure that legislation communicates clearly with more than one audience, and that both language versions of legislation are effectively equal and usable. We now turn to assess the extent to which these objectives are met by current drafting practices.

INSTITUTIONAL ARRANGEMENTS FOR DRAFTING LEGISLATION

- 11.8 The Office of the Legislative Counsel is the centralised drafting service within the Welsh Government. All Assembly Bills promoted by the Welsh Government and Government amendments to all Bills are drafted by the Office of the Legislative Counsel. Statutory instruments are usually drafted by legal teams advising Welsh Government policy departments. The Welsh Government’s procedures require provisions in Welsh statutory instruments which amend primary legislation to be cleared with the Office of the Legislative Counsel. Legislative counsel could be instructed to draft statutory instruments that amend primary legislation, but clearance of the provisions drafted by the departmental legal advisers is the usual process followed. Some statutory instruments and other documents such as guidance and directions are drafted by policy officials within departments and submitted to the Office of the Legislative Counsel for approval.

- 11.9 In our consultation paper, we asked:

Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?³

- 11.10 The majority of consultees considered the current arrangements satisfactory. Keith Bush QC, for example, commented that the current system follows the traditional pattern in Whitehall, and noted that it seemed to be satisfactory, whilst

³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 11-5.

observing that it is too early in the history of legislative drafting in Wales to reach a final conclusion.

- 11.11 Some consultees did comment on how the allocation of drafting could be improved in the longer term. For example, Huw Williams (Geldards LLP) observed that the challenges of consistency of language and drafting technique suggest a need for departmental drafters to be kept in touch with drafting developments within the Office of the Legislative Counsel so that they can apply them in their own drafting practice. This would help to ensure that there is no significant qualitative difference between the standards of drafting of primary and secondary legislation.
- 11.12 We consider that the Welsh Government's institutional arrangements for allocating responsibility for drafting legislation have worked well. It is, however, important for departmental drafters, who produce secondary legislation, to keep in touch with drafting developments within the Office of the Legislative Counsel. Regular training of departmental drafters run by legislative counsel could be one means of securing this. The drafting service provided by legislative counsel and in government departments will continue to improve as the cohort of lawyers capable of drafting in both English and Welsh increases.

THE PROCESS OF DRAFTING BILINGUAL LEGISLATION

- 11.13 In our consultation paper we observed that there are several ways of achieving the objectives of bilingual legislation, and in particular, the production of two texts that achieve effective equality between the two languages. We examined the way in which bilingual legislation is drafted in Canada and Hong Kong.⁴

Co-drafting

The full co-drafting method

- 11.14 The Canadian Federal Government employs a system of "co-drafting" for producing bilingual legislation in English and French. Under this process, a law is jointly drafted by one French-speaking drafter and one English-speaking drafter. Once a recommendation for new legislation is approved, a file is assigned to two drafters. Members of the relevant department will then meet the drafters to explain the policy and what is required by way of legislation. The two drafters for each piece of legislation – one native French speaker and one native English speaker – are both bilingual and are equal partners. Both usually attend all meetings and both know all the background to the Bill. The drafters and those instructing them work on one document.⁵ In the consultation paper we referred to this as "the full co-drafting method".⁶

⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 11.1 to 11.38.

⁵ Office of the Counsel General, *Bilingual Lawmaking and Justice: A Report on the Lessons for Wales from the Canadian experience of Bilingualism* (2001).

⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 11.26 to 11.27.

The New Brunswick method

- 11.15 The drafting method practised in New Brunswick differs from the full co-drafting method in two key respects. First, the policy proposal for legislation is brought forward in English from the relevant department. The policy meetings with the department are usually held in English. Secondly, instead of working on one document, the drafting lawyers work on individual documents. The lead drafter will prepare a first draft in one language independently, and then share it with the other lawyer who will comment on it and prepare a draft in the other language. There is still a great deal of communication between both drafters throughout this process.

The process of drafting legislation in Wales

- 11.16 The current process of drafting Government Bills and amendments to Bills is for initial drafts to be produced in one language and then translated into the other. The initial text is usually, but not always, in English. The Office of the Legislative Counsel is responsible for ensuring that the Welsh and English texts are legally equivalent. The Welsh text of a Bill is always produced at a stage before the English text is finally settled. Translators and legislative counsel may identify ways in which the English text could be altered in order to facilitate improvement of the linguistic quality of the Welsh. The production of the Welsh text often highlights problems with the English language version that may not otherwise have been identified.
- 11.17 Occasionally, legislative counsel produce text in both languages – usually when late changes are made to Bills or amendments are made before publication. These are then checked from a linguistic standpoint by the legislative translators when considered necessary. Bilingual drafters will also raise any Welsh terminology issues that occur to them with the legislative translators at any stage in the process.
- 11.18 We suggested that simply translating legislation after it has been drafted and finalised in one language cannot fully achieve the aim of equality between the two texts in the way that co-drafting can. However, we explained that the current drafting process in Wales did produce many of the advantages of co-drafting. The production of a Welsh language text prior to the finalisation of the English language version enables the Welsh text to throw up issues about the meaning of the English. This process can result in the removal of ambiguity from each language version.
- 11.19 We asked consultees the following questions:

Does the system presently employed by the Welsh Government satisfactorily achieve the objectives of bilingual drafting?

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?⁷

⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 11.54 to 11.59.

Lessons from consultation

11.20 Most consultees considered that the current process works sufficiently well, but considered that the Welsh Government should aspire towards introducing a co-drafting process in the longer term. The Welsh Government considered that co-drafting is “attractive in principle”, but emphasised that the current system works well.

11.21 Professor Thomas Watkin, formerly First Legislative Counsel, pointed out that there are several important differences between the bilingual jurisdictions considered in our consultation paper and Wales that militate against simply importing a system of co-drafting. Professor Watkin noted that in Canada, for example, both the languages involved in bilingual legislation had been used for centuries in lawmaking and had developed modern, legal registers. Professor Watkin explained that:

Until such time as Wales has a cohort of lawyers who are capable of drafting freely in both languages, in a context within which the Welsh language has gained parity with English as a legal language as a matter of practice as well as theory, lawyers and linguists will need to continue to work together to develop the techniques appropriate to the existing stage of such bilingual development. As experience elsewhere certainly suggests, the role of suitably qualified translators and revisers is likely to remain of importance for the foreseeable future.

11.22 Other consultees also observed that the need for an increase in the number of suitably qualified bilingual personnel, both in policy teams and in the Office of the Legislative Counsel, was the main obstacle to a fuller co-drafting process. Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) commented that, while a fuller co-drafting system would have advantages, the resources this would require could be more usefully devoted to:

... making those elements of law which are currently available only in English available in both languages, through a process of codification or consolidation. In the meantime, jurilinguists and editors have a central role in the preparation of bilingual legislation in Wales. It is important that they challenge the English drafting if a lack of clarity makes translation difficult. It is also valuable for monolingual drafters to be trained in Welsh language awareness, so that they avoid particular constructions that would give rise to ambiguity in Welsh, such as "shall" and "may".

11.23 The Association of Judges of Wales stressed that satisfaction with the current system should not lead to complacency and suggested that the co-drafting approach taken in Canada was something to aspire to, commenting that:

As the law schools produce greater numbers of Welsh speaking law graduates with expertise in devolved areas of law, more may be achievable. The Canadian experience shows that an approach may have to be adapted in light of the resources available but there is no reason why we should not aspire to an improved system of drafting.

11.24 Keith Bush QC noted that there is confusion regarding what exactly “co-drafting” means, emphasising that what is important is to ensure that the Welsh language version is not simply a translation of the finalised English language version. Mr Bush QC explained that it is necessary to have an iterative process that “allows, for example, the English text to be amended in order to facilitate expressing exactly the same concept in clear, natural Welsh”. He observed that this iterative process is what already happens in Office of the Legislative Counsel, cautioning that what can undermine the process is:

lack of time to discuss and amend the English in order to achieve two texts that express the same meaning and respect the spirit of both languages.

11.25 Some consultees, however, considered the current system unsatisfactory. Dr Huws commented:

It is accepted that it does not draft bilingually – and on many occasions there is no reference, when interpreting, to the Welsh version of the legislation. Lack of bilingual drafting intensifies this situation as the interpreters take it that the Welsh version is a translation. Thus the drafting process needs to move much closer to the system in Canada, especially in terms of primary legislation.

11.26 The Welsh Language Commissioner also considered the current process inadequate. In her view, the

Welsh Government needs to adopt the practice of bilingual drafting of legislation by bilingual drafters drafting legislation in Welsh and in English simultaneously following receipt of bilingual policy directions developed by bilingual policy-makers.

11.27 The Welsh Language Commissioner considered that the two language versions of legislation should be drafted by the same drafter, who would be equally proficient in English and Welsh, but would be able to take advantage of assistance from linguistic experts throughout the process. The Welsh Language Commissioner thought this necessary because

It would ensure faithfulness to the intention of those who promoted the Bill and would ensure that the meaning of the provision is consistent between the text in both languages. It would also be a means of maintaining an effective bilingual legal system and ensure effective equality between both languages [...] Only by discussing both language together can appropriate expression be specified in both languages which conveys the same meaning and expresses the purpose of the legislation.

11.28 The Welsh Language Commissioner recognised that this would require the education system to produce a bilingual workforce with language skills of a high standard in both Welsh and English. Skilled bilingual workers would also need to undertake policy-making functions within the Welsh Government in order to fulfil the needs of those procedures.

11.29 In addition to realising the objectives of bilingual drafting, the Welsh Language Commissioner considered that the following advantages would result from adopting this method of co-drafting legislation:

- (1) Developing text bilingually and simultaneously can improve expression and the intention of the policy and legislation itself. As the present guidelines of the [Office of the Legislative Counsel] reveal, patterns of expression in Welsh and in English are not the same. In discussing the means of expressing the policy objective through legislation in both languages therefore, expression in both languages can be improved and the policy objectives formulated better.
- (2) As a result, it is also an opportunity to develop legal phraseology and patterns that can be understood and are accessible in both languages.
- (3) It would reduce errors between Welsh and English versions of legislation and secondary legislation. I am aware of examples in which there are differences between Welsh and English versions of legislation. Although it is not included in the secondary legislation itself, see page 3 of the explanatory note in the Welsh Language Standards Regulations (Number 1) 2015³⁶ in relation to the policy-making standards of the Welsh Language Measure. In the explanatory note, the word 'pobl' is used three times in the Welsh version to convey 'people' (twice) and 'person' (once) in English. In the legislation itself³⁷ the words 'person/personau' are used in Welsh and 'person/persons' in English. In the explanatory notes to the Regulations only one example in both languages reflects the legislation itself.
- (4) It would reduce the current dependence on the Welsh Government's translation services.
- (5) It would widen the opportunities for people to use their Welsh language skills in the workplace in accordance with the Welsh Government's strategic aim 4 in its strategy document for the Welsh language *laith fyw: iaith byw*.

11.30 The Constitutional and Legislative Affairs Committee of the National Assembly recommended in its report *Making Laws in Wales* that:

The Welsh Government, working closely with the Welsh Language Commissioner:

- (a) puts in place a long term plan for increasing the proportion of Bills that are co-drafted in English and Welsh; and
- (b) identifies criteria for prioritising resources for dual-language drafting to ensure allocation to the Bills most likely to benefit.⁸

11.31 In its response to the report, the Welsh Government stated:

⁸ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) recommendation 16 p 55.

While co-drafting may have benefits in some cases, it is not necessarily an appropriate and efficient model for preparing most Bills. High quality bilingual legislation can be developed in a number of ways, and different ways can be adopted in different circumstances, regardless of internal processes the Welsh government will continue to work to ensure that Government bills are introduced in high-quality English and Welsh versions.⁹

Conclusions

- 11.32 It remains our view that the current system works satisfactorily. It seems to us to strike an appropriate balance between the need to produce two language versions of equal authority and the practical realities of the availability of officials and drafters with sufficient skill in Welsh. In order for the objectives of bilingual drafting to be achieved it is crucial that an iterative process take place in which the development of the Welsh language and English language texts can improve the quality of both. The current drafting process does provide an opportunity for this.
- 11.33 We emphasise the point made by Mr Bush QC, that the current system could be undermined by lack of time to discuss and amend the English text in the light of the Welsh text. Adequate time needs to be built into the process, and vigorously protected, in order for the iterative improvement process across the two language versions to take place.
- 11.34 However, we also agree with the Association of Judges of Wales that, whilst satisfactory, the current system could be improved. The earlier the Welsh language version is produced, the more time there is for the iterative process to improve both language versions. This can be achieved a number of ways.
- 11.35 Production of the Welsh language text simultaneously with the English language version, as is the case under the full co-drafting model, maximises the opportunities for iterative improvements to be made to both versions as the drafting process progresses. However, there are a number of feasibility problems with the Welsh Language Commissioner's recommendation that the English and Welsh versions of legislation are drafted simultaneously on the basis of instructions prepared in both languages.
- 11.36 A significant issue, noted by a number of other consultees, is that there are simply not currently enough suitably qualified persons in the Welsh Government who are proficient to the necessary standard in English and Welsh. The Welsh Language Commissioner observed that her recommendation was considered by a working group tasked with ensuring the equality of French and English versions of legislation in Canada, which was set up by the Canadian Department of Justice in the 1980s. However, this method was abandoned as an option in Canada due to a lack of sufficiently qualified personnel.¹⁰ Currently, 11.9% of officials in the Welsh Government have described themselves as being able to

⁹ Welsh Government, *Written response to the report of the Constitutional and Legislative Affairs Committee entitled Making Laws in Wales* (December 2015) p 17.

¹⁰ S Lortie and R C Bergeron, "Legislative Drafting and Language in Canada" (2007) 28(2) *Statute Law Review* 83 at 104 to 107.

read Welsh fluently, and 7% as being able to write it.¹¹ We therefore consider that the suggested process is not currently feasible.

- 11.37 Policy development is currently conducted almost exclusively in English. In order for the aspiration of bilingual policy making to be achieved, it will be necessary, as the Welsh Language Commissioner explains, for the education system to produce a bilingual workforce with the ability and experience, to develop policy, together with language skills in both Welsh and English of the highest order.
- 11.38 We repeat that the key to optimising the quality of bilingual legislation is ensuring that legislative counsel are provided with sufficient time after the production of the second language version of legislation, to undertake the iterative process of improving the text of both language versions.

ADDITIONAL SUPPORT FOR DRAFTING LEGISLATION

The role of jurilinguists and editors

- 11.39 In our consultation paper we explained that Canadian drafters receive the support of jurilinguists who are specialists in legal language. They are typically linguists first and foremost, although some may have legal training or even legal qualifications. Jurilinguists keep up to date with the evolution of the language, seek to ensure that the two versions convey the same meaning and suggest improvements. Their recommendations are not binding on the drafters but the high quality of their comments is considered by Lortie and Bergeron to have improved the quality of federal statutes.¹²
- 11.40 We therefore asked the following question:
- What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?¹³
- 11.41 Consultees generally saw the role of jurilinguists and editors as supporting legislative counsel, and to help ensure the quality of the Welsh texts.
- 11.42 The Welsh Government stated:

The editing process described is one that is currently undertaken by legislative counsel and jurilinguists. The production of two texts itself involves an editorial process which improves the quality of the drafting.

¹¹ For more information on the numbers of people who speak and/or write Welsh, see H M Jones, *A statistical overview of the Welsh language* (Welsh Language Board, February 2012). For 2012-13 estimated statistic see H M Jones, *Pa ddyfodol i'r Gymraeg yn 2021? (What Future for the Welsh language in 2021?)* (BBC Cymru Fyw, May 2015), <http://www.bbc.co.uk/cymrufyw/32691390> (last visited 15 June 2016). H M Jones created the website www.statiaith.com which is a statistics website that relates to the Welsh language.

¹² S Lortie and R C Bergeron, "Legislative Drafting and Language in Canada" (2007) 28(2) *Statute Law Review* 83 at 104; *Bilingual Lawmaking and Justice* (2001) 10.4.2. See Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 1.60 to 1.61.

¹³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 11-8.

11.43 More specifically, the Welsh Language Commissioner commented that

It would be necessary to ensure that qualified editors and jurilinguists maintained translation memories, corpuses and machine translation software in order to ensure the accuracy and consistency of the software.

11.44 Keith Bush QC suggested that their role is

To ensure that both texts express the same meaning in two languages and both of which are natural and clear and as easy as possible to use for users of both languages.

11.45 The Legal Wales Foundation were clear that their views should not bind legislative counsel:

The role of editors should be limited to making recommendations.

11.46 We consider that the support currently provided by qualified editors and jurilinguists does effectively assist legislative counsel in the task of bilingual drafting.

Special tools

11.47 Our consultation paper listed the work instruments created by the Department of Justice in Canada to assist in bilingual drafting; they consist of official guides to the drafting of French and English language versions of legislation based on research into recurring language-related problems, a bilingual manual dealing with the legal and technical aspects of legislative drafting, linguistic guidelines and Notes to Drafters.¹⁴

11.48 Lortie and Bergeron propose that measures should be taken to integrate knowledge functionally within systems. In their view the object should be to promote communication by sharing. They consider that information systems serve four specific purposes in legislative drafting: to increase efficiency, to facilitate standardisation, to support unified efforts to improve the quality of language and to contribute to consistency and continuity. Accordingly, they recommend:

The collection of the knowledge accumulated by legislative draftsmen in an authoritative guide to the drafting of legislation;

developing a practice of sending draftsmen instructions on particular issues and general directives as a way of testing ideas with a view to their eventual integration within the guide.¹⁵

11.49 The Welsh Government translation service has already produced an English-Welsh legislative vocabulary and legislative translation style guide for use in the

¹⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 11.25.

¹⁵ S Lortie and R C Bergeron, "Legislative Drafting and Language in Canada" (2007) 28(2) *Statute Law Review* 83.

production of Welsh legislation.¹⁶ The Office of the Legislative Counsel have comprehensive drafting guidance which we considered in chapter 4 of the consultation paper.

11.50 We said:

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.¹⁷

11.51 The Welsh Language Commissioner outlined some of the benefits to bilingual drafting offered by technology:

The utmost use should be made of information technology in order to facilitate the drafting of policy and legislation [...]

Bilingual text drafting software should be used that is populated by sentences and terminology that would have been specified at the beginning of the process of developing policy.

An important step would be to use the texts developed in creating policy and legislation to develop a corpus of Welsh policy and legislation that could be used as a resource to help draw up new legislation by populating the text drafting software above. On the basis of such a corpus machine translation software could be developed dealing specifically with Welsh policy and legislation. Developing such software would facilitate the work of translators and others who draft bilingual documents resulting from legislation. This could bring substantial financial savings as it would not be necessary to re-translate much of the text that was already bilingual.

Already the BydTermCymru website publishes translation memories from bilingual legislation. Based on the bilingual legislation and the policy materials translation memories and text versions of bilingual public policy documents and legislation should be developed and published on the Government website. They should be published alongside the terms specified at the beginning of the policy development process. These resources would facilitate action to develop other texts based on the policy and legislation by other organizations implementing the legislation. In this respect, see the resources published by the European Commission's Translation Directorate.

It would be necessary to ensure that qualified editors and jurilinguists maintained translation memories, corpuses and machine translation software in order to ensure the accuracy and consistency of the

¹⁶ The English-Welsh legislative vocabulary and legislative translation style guide is available on the Welsh Government's website <http://gov.wales/topics/welshlanguage/publications/translation-style-guides/?skip=1&lang=en> (last visited 15 June 2016).

¹⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 11-9.

software.

11.52 The National Archives explained that:

Whilst Wales is alone in producing bilingual legislation in the UK, many other jurisdictions do produce bilingual legislation, including at the European level. Developing tools around common international standards for legislation documents is the best approach, in the long run, for expanding the range of tooling available to the National Assembly for Wales and the Welsh Government for managing bilingual legislation, without incurring excessive development costs.

11.53 Keith Bush QC commented:

The author is aware of a view that legislative drafting should be an art rather than a craft. But it is inevitable that more corporate methods – desk instructions, standard styles and so forth – will become increasingly important. The only other suggestion the author has is that the Government's legislative drafters and academics and professional lawyers in Wales should develop a closer, more open relationship, in order to strengthen the understanding of each of the needs of the other.

11.54 The suggestions made by consultees outline some innovative ways of making the bilingual drafting process more efficient. We have also referred in chapter 8 to the National Archives' work on developing new drafting software. The evaluation of technical drafting tools is outside our expertise. We have collected here the main recommendations of consultees and suggest that Welsh Government pursues them as appropriate.

CHAPTER 12

THE INTERPRETATION OF BILINGUAL LEGISLATION

INTRODUCTION

- 12.1 As we observed in our consultation paper, 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.¹ In this chapter we consider what the appropriate means of determining the meaning of bilingual legislation should be.

THE APPROACH TO THE INTERPRETATION OF BILINGUAL LEGISLATION IN ENGLISH AND WELSH

- 12.2 In our consultation paper we explained that the equal standing of English and Welsh language legislation requires reference to be made to both versions of the text when interpreting bilingual statutes. Section 156 of the Government of Wales Act 2006 establishes that the English and Welsh language versions of legislation have equal standing for all purposes. This means that both language versions of legislation passed in Wales must be interpreted in order to determine what the legislation means. If a court were to rely only on its preferred version, this would be contrary to the underlying principle that both Welsh and English versions should have equal weight and would undermine the official status of Welsh as declared in the Welsh Language (Wales) Measure 2011.²
- 12.3 We considered that the starting point must be that the bilingual texts of Welsh legislation are intended to bear a single meaning. We also considered that it will be necessary to develop a body of rules concerning the approach to the identification of that meaning. It seemed 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.³
- 12.4 We asked consultees a number of questions about how an approach to the interpretation of English and Welsh legislation could be developed in relation to three broad issues. First, we asked consultees about the appropriate approach to the interpretation of legislation made bilingually in Wales. Secondly, we asked questions about resolving discrepancies or differences in meaning between the two language versions. Thirdly, we examined the role of experts in the interpretative process, and asked consultees whether expert evidence should be admissible in relation to the meaning of Welsh text. We now consider each issue

¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 12.12.

² See also 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*.

³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223 paras 12.51 to 12.59.

in turn.

Reference to both language versions

- 12.5 In our consultation paper, we took the view that the approach to the interpretation of bilingual legislation must start from the point of taking both language versions into account.
- 12.6 In international law, the Vienna Convention on the Law of Treaties includes detailed provisions on the interpretation of treaties.⁴ Article 33 makes specific provision for the interpretation of treaties authenticated in two or more languages. Article 33(1) provides that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
- 12.7 Article 33(3) of the Vienna Convention sets out the basic rule that the terms of a treaty are presumed to have the same meaning in each authentic text. The International Law Commission has observed that
- the unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text.⁵
- 12.8 Article 33(4) of the Convention operates when comparison of the different language texts discloses a difference of meaning. In that event it requires the adoption of “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty”.
- 12.9 Similarly, in Hong Kong, the Interpretation and General Clauses Ordinance, provides that the English and Chinese texts of an Ordinance shall be equally authentic, but that the provisions of a statute shall have the same meaning in each authentic language text.⁶ Equally, in Canada the interpretation of legislation requires a consideration of both the English and French versions of texts.⁷
- 12.10 The European Union currently legislates in 23 languages and all language

⁴ Vienna, 23 May 1969, 1155 United Nations Treaty Series 331.

⁵ Yearbook of the International Law Commission 1966 II, 225.

⁶ Interpretation and General Clauses Ordinance, ss 10B(1) and (2).

⁷ Constitution Act 1867 (UK), s 133; Official Languages Act, R.S.C., Ch. 31, para. 13 (1985). See *Att Gen (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).

versions of a piece of legislation are equally authentic.⁸ The Court of Justice of the European Union has accordingly inferred that “an interpretation of a provision of Community law thus involves a comparison of the different language versions”.⁹ A piece of EU legislation has a single meaning throughout the EU, to be gleaned where appropriate from a consideration of all the different language versions.¹⁰

12.11 In the consultation paper we said:

We welcome the views of consultees on the appropriate approach to the interpretation of bilingual legislation in English and Welsh.

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?¹¹

Lessons from consultation

12.12 Consultees generally agreed that all interpretation of the law enacted bilingually needs to take both language versions into account. Professor Thomas Watkin commented that:

The key issue identified by the consultation paper is that the existence of two versions of a statutory text cannot be allowed to make no difference to the manner in which it is interpreted. It is not acceptable to assume or insist that one can rely on either version exclusively to determine the legislative intention. The existence of a further version must be taken into account in seeking an enactment’s meaning.

12.13 Similarly, the Welsh Language Commissioner observed that:

Only by considering both languages together can the law that has been formulated bilingually be interpreted. Furthermore, it can be interpreted that only by doing so can the intention of the legislation be implemented and the equal status of both languages maintained in accordance with section 156 (1) Government of Wales Act 2006 and fair play given to all parties in a case.

⁸ The languages are the 24 official languages of the EU, with the exception of Irish. The official languages are set by Council Reg No 1 of 15 April 1958, which has been amended following each accession of new Member States. Irish was added to the EU’s official languages with effect from 1 January 2007 by Reg 920/2005 OJ L156 18.6.05 p 3. Though the terms of Reg No 1 as amended give the impression that legislation is to be published in all the languages, art 2 of the amending Reg introduced a “derogation” from the obligation to draft official Acts in Irish for a period which is in practice indefinite.

⁹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 at [18].

¹⁰ In Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33 at [2] the Court referred to the Treaty provision for national courts to refer questions of interpretation of EU law to it as having “the object of ensuring that in all circumstances the law is the same in all states of the Community”.

¹¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 12-1 and 12-2.

12.14 The Association of Judges of Wales said that:

On any issue of interpretation regard must be had to both versions.

12.15 However, other consultees pointed out that it will only be in cases where there is a discrepancy between the two language versions or ambiguity in one of them that detailed analysis of the meaning of the legislation will be required. Keith Bush QC commented that:

In most cases it is likely that everyone will agree that the meaning of the two versions is exactly the same. Only in some cases will ambiguity as to the meaning of the legislation mean that the Court will have to consider how the meaning of the Act is expressed in both languages. It is obvious, of course, that a party's legal advisors cannot carry out their work properly unless they have considered whether an argument arises based on the way in which a concept is expressed in both languages.

12.16 This view was shared by David Gardner (Administrative Court Office Wales), who also observed that:

In practice, it is only where there is thought to be some difference in meaning between the Welsh and English texts that such analysis will actually need to take place. If, in every case where the Administrative Court is required to interpret a statute, the Court is required to consider both language versions, then the burden on the Court in terms of time and provision of bilingual judges will be extensive, unnecessary, and it will be (without extensive training to provide further bilingual judges) practically unachievable.

Discussion

12.17 In order for the equal status of both versions of legislation, under section 156 of the Government of Wales Act 2006, to have any real meaning, it is necessary for the interpretation of bilingual legislation to take account of both language versions. To presume conclusively that both texts mean the same would be likely to lead to courts simply relying on the English text.

12.18 We endorse the approach to the interpretation of bilingual legislation advocated by Professor Watkin. This recognises that the exact meaning to be given to legislation depends on the meaning of both language texts.

12.19 This has implications for the accessibility of the law in that it requires proficiency in both languages to arrive at the meaning of the legislation. This is a natural consequence of legislation in two languages each of which is an equally authoritative expression of legislative intent.¹²

12.20 However, we also agree with Mr Bush QC and Mr Gardner that it is only in circumstances where there is a concern that there is a difference in meaning between the English and Welsh texts that detailed analysis of the two texts will

¹² We consider how this requirement for proficiency in both English and Welsh can be met below.

need to take place. We now turn to consider how such divergences in the different language versions should be resolved.

Resolving discrepancies between the Welsh and English language versions

- 12.21 In our consultation paper we examined the variety of approaches taken to interpreting bilingual and multilingual texts in EU law, in Canada and in Hong Kong.¹³

Shared meaning rule

- 12.22 In Canada, a shared meaning rule is applied to resolve discrepancies between the English and French versions of legislation. This requires that:

Where the two versions of a bilingual statute do not say the same thing, if one is ambiguous and the other is clear, the meaning that is shared by both is presumed to be the meaning intended by the legislature.¹⁴

- 12.23 The shared meaning rule is not absolute. It is only one of a number of rules of statutory interpretation. It operates as a presumption as opposed to a definitive basis of interpretation and does not necessarily prevail over other principles of interpretation.¹⁵ As Professor Côté has explained, where deducing a shared meaning is impossible, or seems incompatible with the intention of the legislature as indicated by ordinary rules of interpretation, the meaning arrived at by the ordinary rules should prevail.¹⁶
- 12.24 In *R v Daoust*, Bastarache J explained the procedure to be followed in applying the rule, once discordance between the French and English language versions is identified. Where only one version of the legislation is ambiguous, then the meaning common to both must be identified. The common meaning was explained to be that which is “plain and not ambiguous”. If neither version is ambiguous, or if both are, then Bastarache J considered that the common meaning would normally be the narrower version. If both versions are irreconcilable, then a purposive and contextual approach is taken.¹⁷
- 12.25 Commentators have identified a number of issues with the shared meaning rule. For example, Salembier has criticised the philosophical basis of the rule and has said that a survey of Canadian court decisions showed that courts in fact preferred the language version that led to the most harmonious and effective

¹³ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223 paras 12.19 to 12.50.

¹⁴ R Sullivan, “The Challenges of Interpreting Multilingual, Multijural Legislation” (2004) 29 *Brooklyn Journal of International Law* 985 at 1012.

¹⁵ *R. v. Compagnie Immobilière BCN Ltee* [1979] 1 SCR 865 per Judge Gonthier at pp 871-2. See also *Dore v. Verdun (City)*, [1997] 2 SCR 862; *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)* [1998] 2 FC 303, at paras 20-21. C.f. *R. v. Mac*, [2002] 1 SCR 856, paras. 5-6 (Supreme Court of Canada). See the discussion of this issue in R Sullivan, “The Challenges of Interpreting Multilingual, Multijural Legislation” (2004) 29 *Brooklyn Journal of International Law* 985 at 1012 et seq.

¹⁶ P A Côté, *The Interpretation of Legislation in Canada* (3rd ed 2000) p 324.

¹⁷ *R. v. Daoust* [2004] SCR 217.

operation of the legislative scheme in question. In slightly more than half the cases surveyed, this was the broader of the rival meanings.¹⁸

Having regard to the object and purposes of the legislation

12.26 An alternative approach is a teleological or purposive approach. In Hong Kong, for example, if the ordinary rules of statutory interpretation fail to resolve a linguistic discrepancy, the meaning that best reconciles the texts, having regard to the object and purposes of the statute, is adopted.¹⁹ This mirrors the approach prescribed by article 33(4) of the Vienna Convention.

12.27 It is also similar to the Court of Justice of the European Union's approach, where language versions conflict, of resolving divergences by reference to the "purpose and general scheme of the rules of which it forms a part".²⁰

12.28 In our consultation paper we asked the following questions:

What approach should be adopted to the interpretation of bilingual legislation where different language texts bear different meanings?

Should courts in England and Wales apply a shared meaning rule? If so, in what circumstances should it apply?

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?²¹

Lessons from consultation

12.29 The majority of consultees considered that adopting the shared meaning rule would not be an adequate interpretative approach. Rather, most consultees considered that the usual process of statutory interpretation should prevail, with the aim of identifying the purpose, or object, of the legislation by reference to the legislators' intent. Moreover, most consultees also considered that no account should be taken of its drafting history.

12.30 The Welsh Government commented that:

While recognising that the approach to be adopted is for the courts to decide, it seems to us that the "shared meaning rule" is inadequate to the interpretative task [...] In our view the more reliable approach is

¹⁸ P Salembier, "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule" (2003) 35 *Ottawa Law Review* 75. For a fuller discussion see Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 12.41 to 12.44.

¹⁹ Hong Kong Government, Law Drafting Division, Department of Justice, *A Paper Discussing Cases where the Two Language Texts of an Enactment are alleged to be Different* (May 1998) paras. 5.1 et seq.

²⁰ See Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 12.19 to 12.34.

²¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 12-3 to 12-5.

to apply the accepted canons of statutory interpretation to both versions of a bilingual provision to arrive at a single meaning most harmonious with the purpose and scheme of the statute [...]

No account should be taken of how the legislation is drafted in interpreting the legislation. In the Welsh system, Bills are laid, scrutinised and amended in both Welsh and English. The fact that the bilingual text of a Bill (or an amendment) is produced by one method rather than another (and this method varies) is irrelevant to the proper interpretation of the legislation. Both texts are presented to the National Assembly at the same time and, if enacted, should be treated equally for all purposes as the law requires. It is an accepted principle that in interpreting legislation a court is required to establish the intention of the legislature and not, for example, the intention of the legislative drafter. This principle applies equally to the language of the text.

12.31 Professor Watkin's view was:

How the courts should approach the interpretation of bilingual legislation is, it is submitted, best left to the courts themselves to determine and develop as experience of interpreting such legislation grows, provided always that the existence of a second version is not discounted as having no necessary part to play in the process.

12.32 The Association of Judges of Wales observed:

No preference should be given to the version in the language in which the statute was originally drafted unless 50% of all legislation is drafted in Welsh. If the definitive version is always going to be the English version, there will be less of an incentive to get to both versions drafted in clear and compatible language at the outset. It also offends the "equal standing" principle.

12.33 Mr Bush QC considered:

Adopting an inflexible rule such as the shared meaning rule would be contrary to the reality that exists in Wales. It presumes that the wording in question has been selected by means of equal processes. Although it will not be possible to know, by looking at the text, which language had priority in drafting the provision in question, there will be a need to consider the possibility that one version is quite a mechanistic translation of the other. Therefore, too much emphasis should not be placed on a detailed analysis of individual words. Rather, by taking into consideration the meaning of both languages, together with everything else that is known about the provision, a conclusion should be reached regarding the intention of the legislature.

12.34 The Welsh Language Commissioner emphasised:

More emphasis should not be placed in the language in which the first draft was prepared and neither should the drafting history be

considered. That would not be consistent with the principle of both languages having equal status.

- 12.35 Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) considered that

In instances where the two language texts are seen to carry different meanings, the intention of the legislator should be ascertained using the usual tools of statutory interpretation. This involves taking account of its legislative history, and explanations given by the Welsh Government, for example. Greater weight should not be given to one language version than the other in principle, as both languages will have been used in the legislative process. The courts should apply a shared meaning rule.

Conclusions

THE DESIRABILITY OF A SHARED MEANING RULE

- 12.36 Overall, the majority of consultees considered that the shared meaning rule was “inadequate” and contrary “to the reality in Wales”. This reflects the strength of the criticisms of the rule made by Paul Salembier, former General Counsel in the Canadian Department of Justice, which we referred to above.²² The shared meaning rule does not provide any assistance in reconciling clear but opposing meanings. Nor does it necessarily produce a satisfactory result where one language version expresses a concept in clear but broad terms, while the other uses clear but narrower language, covering some but not all of the same ground; the rule results in the narrower of the two meanings automatically prevailing, even if that was not the meaning intended by the legislature. Even where one text is clear and the other imprecise or ambiguous, the shared meaning (which by definition is the meaning of the clear text) does not necessarily reflect the intended policy.²³ Therefore, we consider the majority of consultees’ rejection of the shared meaning rule justified.

TAKING ACCOUNT OF DRAFTING AND LEGISLATIVE HISTORY

- 12.37 Most consultees were also emphatic that the drafting history ought not to be taken into account in order to resolve the discrepancy between the two language versions. As policy instructions and the first draft of the Bill are almost always produced in English, this would almost inevitably mean favouring the English language version. In any event, it would not necessarily be appropriate to rely on evidence concerning the drafting history of a piece of legislation. Moreover, as the Welsh Government pointed out, “in interpreting legislation a court is required to establish the intention of the legislature and not, for example, the intention of the legislative drafter”. Introducing evidence about the drafting history of a Bill would risk muddying this distinction.
- 12.38 Of course, as Dame Rosemary Butler AM (Presiding Officer of the Fourth

²² General Counsel are the legislative drafters in the Department of Justice (Canada), the equivalent of legislative counsel in Wales or parliamentary counsel in Westminster.

²³ Salembier reasons in this regard that the imprecise text is likely to reflect imprecise drafting instructions and that the draftsman of the clear text may have misunderstood the instructions.

Assembly) pointed out, determining the intention of the legislature where its legislation is ambiguous may be assisted by recourse to its legislative history in accordance with ordinary rules of statutory interpretation. The court could, for example, refer to clear statements made by a minister or other promoter of the Bill, together with such other Assembly material as was necessary to understand such statements and their effect, in National Assembly proceedings to guide the court in determining the intention of the legislature where the legislative provisions are ambiguous, obscure or led to absurdity.²⁴

THE BEST APPROACH TO THE INTERPRETATION OF BILINGUAL LEGISLATION WHERE DIFFERENT LANGUAGE TEXTS BEAR DIFFERENT MEANINGS

- 12.39 We do not recommend that any legislation should be introduced prescribing a judicial approach to the interpretation of provisions where language versions diverge. We consider that prescribing a particular approach would unduly restrain the courts in developing an appropriate approach for Wales. It is to be hoped that the exercise of comparing language texts at the drafting stage, which have endorsed in chapter 11, will largely avoid cases of inconsistency. Where they nevertheless occur, it will be for judges to reconcile the inconsistency.
- 12.40 The aim of the interpretation exercise must of course be to determine the intention of the legislature as it objectively appears from the texts. Where it is not possible to reach an interpretation consistent with the literal meaning of both language versions, we tend to the view that the legislative intention is better discerned by reference to the purpose or object of the legislation as they appear from the texts than by a search for a shared meaning.

The role of expert linguistic advice

- 12.41 In our consultation paper we noted the view of Dr Catrin Fflur Huws' (Aberystwyth University) that the current situation, in which it will often be the case that the judge hearing the case will not be proficient in Welsh, calls for the input of an expert possessing linguistic knowledge, translating skills and a level of legal expertise. She argues, however, that in cases where the court is unable to evaluate a Welsh language text itself, if an expert determines the meaning of the dual language text the expert will be assuming the role of the judge. This, she suggests, is likely to raise serious concerns in terms of due process and fairness.²⁵
- 12.42 We agree that it is essential to define the role of any person providing linguistic assistance to the judge. We therefore asked:

Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an

²⁴ *Pepper v Hart* [1993] AC 593.

²⁵ See C F Huws, "The Law of England and Wales: Translation in Transition" (2015) 22(1) *International Journal of Speech Language and the Law* 1 at pp 6 to 7; C F Huws, "The day the Supreme Court was unable to interpret statutes" (2013) 34(3) *Statute Law Review* 221 at 229.

interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?²⁶

Lessons from consultation

- 12.43 Consultees were unanimous in the view that, ideally, judges should be sufficiently fluent in Welsh to be able to interpret Welsh legislation bilingually. The Welsh Government explained that

Although interpreters or “advisers” could play a role in some circumstances, differentiating between a linguistic question of fact and matters of law may be difficult or in some instances impossible. Expert evidence may not in our opinion be adequate, therefore, to the task set by the UK Parliament in relation to the proper interpretation of bilingual Welsh legislation. The ideal position would be to ensure that there are sufficient judges skilled in the Welsh language to be able to deal with the issues that arise. This would require continuing effort to improve the Welsh language skills of current judges and the appointment of more judges who are able to work in both languages. This is unlikely to be practical however at least in the short term. Consideration should also be given to alternative arrangements to support judges who are not able to understand Welsh to a sufficient standard; for example, arrangements for the allocation of a second “assessor” Welsh speaking judge to cases when questions about the consistency of Welsh and English texts of legislation arise unexpectedly. The single England and Wales jurisdiction adds to this complexity, as Welsh laws extend to England and Wales and cases involving (bilingual) Welsh laws can be commenced and heard across England as well as in Wales.

- 12.44 A number of consultees considered that expert evidence and linguistic assistance should be available to assist the court. For example, the Legal Wales Foundation suggested that the court be “assisted by an interpreter from the Welsh Language Unit as a court appointed assessor”. Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) commented that expert evidence should be admissible in relation to “the meaning of either text”, just as it would be admissible in relation to technical terminology. However, Dame Rosemary emphasised that it would be advantageous for a bilingual judge to be assigned to cases where expert evidence is required on the meaning of the Welsh text.
- 12.45 The Welsh Language Commissioner stressed that action needed to be taken to increase the number of judges that are able to interpret legislation bilingually. The Welsh Language Commissioner acknowledged that, in the meantime, linguistic advisers should be able to assist the court. The Welsh Language Commissioner considered that interpreters would be inappropriate to take on this role because they should be required to possess legal, as well as linguistic, skills of a high standard.
- 12.46 Mr Bush QC considered that the provision of assistance to the court, whether in the form of expert evidence or a linguistic assessor, was not a tolerable substitute

²⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission

for a bilingual judge:

The Welsh language should not be treated as a foreign language or as technical “jargon”. In a case in which interpretation of the law calls for consideration of the Welsh text, a judge who understands Welsh should be a member of the Court.

Conclusion

- 12.47 Given the equality of legal standing between the English and Welsh versions of legislation, the long term aspiration must be to ensure that there are sufficient numbers of judges, able to work in the Welsh language, to sit on any case involving comparison of language versions. This would remove the risk of an interpreter usurping the judge’s role in interpreting the Welsh language legislation.
- 12.48 Her Majesty’s Courts and Tribunals Service Wales have informed us of the numbers of judges able to conduct hearings in Welsh in 2016. These are:
- (1) 11 out of 31 Circuit Judges;
 - (2) 3 out of 8 Deputy Circuit Judges;
 - (3) 4 out of 48 Recorders;
 - (4) 7 out of 23 District Judges;
 - (5) 3 out of 6 District Judge Magistrates Court, and,
 - (6) 11 out of 49 Deputy District Judges.
- 12.49 Some Welsh speaking Circuit Judges are empowered to sit as Deputy High Court Judges under section 9 of the Senior Courts Act 1981. At least 15 judges are learning Welsh.
- 12.50 There are opportunities for the Welsh speaking cohort of judges to increase. For example, in recent years the Judicial Appointments Commission has stipulated that for certain appointments to the judiciary or the magistracy in Wales, fluency in the Welsh language is essential.²⁷
- 12.51 We agree with Keith Bush QC that in most cases it is likely that everyone will agree that the meaning of the language versions is the same. Consultees’ views were divided on how judges should best be supported in cases where that was not agreed. Two suggestions emerged from consultation.
- 12.52 One option, which was suggested by the Legal Wales Foundation, is for an interpreter from the Welsh Language Unit to be appointed to assist the court. However, there are a number of issues with this. The first, identified by the Welsh Language Commissioner, is that interpreters do not have adequate expertise to

Consultation Paper No 223, consultation question 12-6.

²⁷ See, generally, 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.

be able to assist judges. The Welsh Language Commissioner considered that it would be necessary to have legal skills, as well as “an awareness of Welsh and English legal and linguistic sources to refer to when advising on the meaning of specific terminology, glossary and clauses in Welsh and in English”. Moreover, an interpreter or other linguistic expert determining the meaning of particular Welsh language terms could, as we observed above, usurp the judge’s role.

- 12.53 An alternative option, suggested by the Welsh Government, is for a second judge to be allocated to assist in cases where issues with the interpretation of the Welsh language version of legislation arise. This judge would have the necessary linguistic and legal skills. The Welsh speaking judge would assist only with the issue of interpretation. The fact that a judge is being called in to assist assuage concerns about an interpreter undermining the judge’s role.
- 12.54 A variation on this option would be to have a referral process, so that the Welsh language legislation interpretation issue can be determined in a separate proceeding. The original proceedings would need to be suspended pending the determination. There is a precedent for such a process in the Government of Wales Act 2006, which enables any court or tribunal to refer a “devolution issue”, such as whether an Act of the Assembly is within the National Assembly’s legislative competence, to a superior court to determine.²⁸
- 12.55 We do not favour creating a role for personnel other than judges in the interpretative process, for the reasons mentioned by the Welsh Government. The “judicial assessor” and “referral” options have some attractions, but we doubt that they would be satisfactory in practice. Both options split the trial process, possibly artificially and would involve delaying proceedings. We are not convinced that there is much real benefit in making special provision for circumstances which are likely to be exceptional. We therefore do not consider that is a sufficiently strong case for us to recommend these options.
- 12.56 We conclude that, in the circumstances where an issue of possible divergence of the language versions arises, the solution is for rules of court to require a party to give advance notice of an intention to raise such an issue. The case should be listed before an appropriate Welsh speaking judge.

²⁸ Government of Wales Act 2006, sch 9, paras 6 to 8.

CHAPTER 13

OFFICIAL PUBLICATION OF LEGISLATION

INTRODUCTION

- 13.1 For the law to be accessible, we must be able to find it. In the consultation paper we explained how access to texts of the law applicable in Wales is currently deficient. We considered how legislation could be published in a way that provides free access for the public to up to date legislation that is easily navigable. We also assessed how effective secondary materials, such as explanatory notes, guidance, commentary, and textbooks were as aids to understanding the law.¹
- 13.2 We observed in the consultation paper that there is no source of up to date legislation in the United Kingdom that is available free at the point of use. This is a fundamental barrier to accessibility. Moreover, sources of legislation online, secondary materials and textbooks do not consistently reflect the increasing divergence between the law of England and Wales in an accurate or clear manner. The fragmented and unwieldy state of legislation applicable in Wales exacerbates the situation further. This means that it can be extremely difficult to determine what the law is in Wales.
- 13.3 It is no surprise therefore that this part of the project attracted the widest interest from consultees. What people really wanted was to be able to search online or in a book for the answer to a legal question and to be confident that the law they found was accurate, up to date and available in its entirety in one place. Consultees also wanted explanations of the law applicable in Wales, such as what would be found in a textbook, to be more widely available.
- 13.4 In chapter 1 we explained that the rule of law requires that citizens should be able to access the law that applies to them.² We mentioned that the number of people looking at legislation online is significant and continually increasing.
- 13.5 In this chapter we look at how legislation is published. In the two following chapters we consider how a legal website for Wales could provide the best possible service for the population of Wales and go on to consider how legal education and the provision of textbooks and commentary can aid understanding of the law in Wales.

RESPONSIBILITY FOR PUBLISHING LEGISLATION

- 13.6 In the consultation paper we explained that the United Kingdom Government has acknowledged responsibility for ensuring that statute law is available to the public.³ There is, however, no statutory obligation on the Welsh Government, or

¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 6.

² We examined the rule of law in more detail in Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 1.

³ Hansard (HC), 13 June 1991, vol 529, cols 613-614. See also, Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 6.

indeed the United Kingdom Government, to publish statute law, to do so free of charge, or to make it available online. The only authoritative and official version of an Act of Parliament is that kept in the House of Lords on the passing of an Act.⁴ In practice, however, copies of Acts published by the Queen's Printer are treated as authoritative.⁵

- 13.7 The responsibility for publishing legislation as it is enacted rests with the Queen's Printer on behalf of the Crown. The Queen's Printer is appointed by the Queen by Letters Patent.⁶ In relation to Acts of Parliament and secondary legislation made in Westminster, the Queen's Printer's function is to arrange for their publication.⁷ This duty extends to the publication of Welsh primary and secondary legislation.⁸
- 13.8 The Queen's Printer does not have legal responsibility for the publication of all devolved legislation. The Government Printer for Northern Ireland has responsibility for Northern Ireland legislation. Section 92 of the Scotland Act 1998 established a Queen's Printer for Scotland with responsibility for the publication of Scottish primary and secondary legislation. The Scottish Parliament has made detailed provision for the printing and publication of Scottish legislation in the Interpretation and Legislative Reform (Scotland) Act 2010 (the 2010 Act). For example, section 39 of the 2010 Act obliges the Clerk of the Scottish Parliament to ensure that the Queen's Printer for Scotland receives copies of Acts of the Scottish Parliament as soon as practicable after they have received Royal Assent. The Queen's Printer for Scotland is accountable to the Scottish Ministers.
- 13.9 Currently, the Offices of Queen's Printer, Queen's Printer for Scotland and Government Printer (in Northern Ireland) are held by the same person, who is also the Controller of Her Majesty's Stationery Office.
- 13.10 In practice, the function of publishing legislation is performed by the National Archives. Acting in partnership, the National Archives and The Stationery Office⁹ have created a website, legislation.gov.uk, on which primary and secondary legislation is published online.
- 13.11 legislation.gov.uk was launched in July 2010 and is managed by the National Archives. Reflecting the public demand for access to legislation, the database is available to all who can access the internet. The National Archives' user research

⁴ For further explanation, see D Greenberg, *Craies on Legislation* (12th ed 2010) para 9.2.5.

⁵ Section 19(1)(c) of the Interpretation Act 1978 provides in general that a reference in one Act to another is to be read as referring to the Queen's Printer's version of the Act, or to the version printed under the superintendence or authority of Her Majesty's Stationery Office.

⁶ See HL Deb, November 2, 1998 cc. 14-15.

⁷ See D Greenberg, *Craies on Legislation* (12th ed 2010) para 9.2.7 and the Statutory Instruments Act 1946 ss 2 and 3.

⁸ Responsibility for the latter is statutory, and stipulated in the Statutory Instruments Act 1946 (as amended by the Government of Wales Act 2006) and The Statutory Instrument Regulations 1947.

⁹ Her Majesty's Stationery Office (HMSO) was founded in 1786. It is the holder of Crown copyright and has been the official printer and publisher of all Acts of Parliament since 1889. The publishing arm of Her Majesty's Stationery Office has since been privatised, and rebranded as The Stationery Office. The official functions of Her Majesty's Stationery Office are now performed by the National Archives, a non-Ministerial department.

shows that a wide range of citizens use this service, including both lawyers and those with no legal training. Legislation.gov.uk provides access to all United Kingdom, Welsh, Scottish and Northern Irish legislation enacted from 1988 onwards, and most of the earlier legislation. It aims to publish legislation within 24 hours of enactment. The database has a specific Wales area, including the English and Welsh language versions of Assembly Acts and statutory instruments made by the Welsh Ministers.

- 13.12 We noted in the consultation paper that the website was not fully up to date with the incorporation of later amendments into primary and secondary legislation. Unfortunately, this is still the case. We return to this topic below.
- 13.13 In New Zealand, the Parliamentary Counsel Office is obliged to publish legislation electronically as well as in printed form under the Legislation Act 2012. In addition, the Parliamentary Counsel Office can issue official versions of legislation in electronic and printed form, and these versions are presumed to be correct. The 2012 Act also requires that electronic versions of legislation are, as far as practical, available free of charge at all times on an internet site maintained by or on behalf of the New Zealand Government. This enshrines in statute the New Zealand Government's responsibility for ensuring legislation is available.
- 13.14 We therefore asked the following consultation questions:
- (1) Should the Government's responsibility for the publication of statute law free of charge be the subject of a statutory duty?
 - (2) If so, should the duty extend to making legislation available online?¹⁰

Lessons from consultation

- 13.15 All consultees who responded to these two consultation questions considered that there should be a statutory duty on the Welsh Government to publish Welsh primary and secondary legislation. A significant number of consultees considered that imposing this obligation was justifiable as a matter of constitutional principle. Consultees explained that the rule of law requires that individuals subject to the law must be able to gain access to it. It is, as one consultee put it, "intolerable" that individuals could be affected by legislation that has not been made freely available to them.
- 13.16 Some consultees related the practical difficulties they currently experience due to the lack of freely available up to date legislation. For example, the National Trust, which is tasked with caring for historic and culturally significant sites across England and Wales, needs to have recourse to legislation in order to carry out this responsibility. The National Trust's activities are such that a large amount of the legal work it undertakes concerns property law.
- 13.17 The National Trust reported that the lack of updated, authoritative versions of legislation available free of charge means that it is forced to subscribe to commercial providers. The National Trust foresaw that it would continue to have to pay for commercial providers to access legislation applying in England only,

¹⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 6-1 and 6-2.

but placing a statutory duty on the Welsh Government to publish up to date statute law would “set the pace”. The imposition of an obligation on the Welsh Government to publish legislation would help to alleviate these problems.

- 13.18 Others described benefits of imposing an obligation on the Welsh Government to publish Welsh legislation free of charge and online included the convenience of accessing legislation, the lower cost of publishing legislation online and the possibility of amending online legislation more quickly. Keith Bush QC also pointed out that online publication is the modern means of communication, and a suitable medium for a body of knowledge that is constantly developing through a process of statutory amendments. Moreover, the Association of Judges of Wales observed that ensuring online access to legislation is particularly important considering that Her Majesty’s Courts and Tribunal Service is undertaking a reform programme to digitalise the courts.
- 13.19 A number of consultees also noted that the legislation published online would need to be authoritative, so that it could be the main source of information for the public. Dame Rosemary Butler AM (Presiding Officer of the Fourth Assembly) referred to the risks of relying on general web searches which might throw up out of date information, and noted that there should be clarity in the law about where responsibility for publishing Welsh legislation free of charge lies.

A statutory publication duty?

- 13.20 Consultees’ responses highlighted the need for legislation to be published free of charge online in an updated form. We wholeheartedly endorse that view. Whether a duty to do this should be enshrined in statute, and on whom it should be imposed, is a separate matter.
- 13.21 Under the Government of Wales Act 2006, the National Assembly’s competence includes:
- Arrangements for the printing of Acts of the Assembly, of subordinate legislation made under Assembly Measures and Acts of the Assembly and of other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General.¹¹
- 13.22 What constitutes “printing” is not defined in the Act. This section does not obviously confer competence on the National Assembly to legislate for online publication of legislation.
- 13.23 In the consultation paper we said that it was beyond the scope of this project to determine where the internal institutional responsibility for the publication of Welsh legislation should lie.¹² Arrangements for the responsibilities for publishing legislation made by the National Assembly were debated during the passage through Parliament of the Government of Wales Act 2006. An amendment was proposed to the Bill to create a Queen’s Printer for Wales. The United Kingdom Government responded:

¹¹ Government of Wales Act 2006, sch 7, para 13.

¹² Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 6, para 6.4.

Resting that responsibility [for the publication of all UK legislation] in one body ensures coherence in that all UK legislation is available to all in a consistent form and from a single location. [This amendment] would cut straight across that arrangement.¹³

13.24 Some consultees, however, expressed views on the potential benefits of a Queen's Printer for Wales and the precedent set by the creation of a Queen's Printer for Scotland.

13.25 The Welsh Government saw

... merit in making the process of publishing Welsh legislation more transparent, and in principle a Queen's Printer for Wales should be appointed, who could be subject to a suitable statutory duty.

13.26 Dame Butler expressed a need for

... clarity in law about where responsibility for publishing statute law free of charge lies.

13.27 One of the rationales of the creation of a separate Queen's Printer for Scotland was to

Ensure that the Scottish parliament and Scottish administration have an appropriate degree of control over the arrangements for the publication of Acts of the Scottish parliament and material produced by the Scottish administration. The Scottish parliament will be able to legislate to confer additional functions on the Queen's Printer for Scotland for example, in relation to the printing and publication of Scottish works. As a Scottish public authority, the parliament could legislate about the funding and receipts of the office and would be able to provide for the Scottish Ministers to give directions in connection with the exercise of her functions.¹⁴

13.28 This was also reflected in the explanatory notes to the Scotland Act 1998:

The intention is to ensure that the Scottish Parliament and the Scottish Administration have an appropriate degree of policy control over the arrangements for publication and printing of Acts of the Scottish Parliament and material produced by the Scottish Administration.¹⁵

13.29 The Constitutional and Legislative Affairs Committee recommended that the Welsh Government explore the practicalities and feasibility of establishing a

¹³ *Hansard* (HL) 6 June 2006, cols 1220 and 1221.

¹⁴ *Hansard* (HL) 2 November 1998, vol 549, cols 12 and 13.

¹⁵ See <http://www.legislation.gov.uk/ukpga/1998/46/notes/division/3/48/12> (last visited 15 June 2016).

Queen's Printer for Wales.¹⁶ The Welsh Government has said that it is doing so.

- 13.30 We continue to regard it as a matter for the United Kingdom and Welsh Governments to determine, as part of the devolution settlement, how responsibility for publishing legislation for Wales should be practically allocated. Our consultation questions referred to the responsibility that has so far been retained by the United Kingdom Government (which, as we have seen, resisted the creation of a Queen's Printer for Wales in debates during the passage of the Government of Wales Act 2006). We take no position on whether there should be a Queen's Printer for Wales or on whether the ultimate responsibility for publication should be transferred from Westminster to Cardiff.
- 13.31 We see merit in the duty (wherever held) to publish the law applying in England and Wales becoming a statutory one, but do not consider that we should formally recommend this as our terms of reference are limited to the law applying in Wales.

Keeping legislation up to date

- 13.32 We explained in the consultation paper that a fundamental and essential feature of an online resource for legislation is that it should be up to date in its incorporation of amendments made to legislation; we described this as "up to date legislation".¹⁷ Providing access to legislation which is out of date can be misleading and does not meet the need to provide access to the law. Without up to date legislation, it is necessary to pull together manually all amendments to a piece of legislation in order to work out what the current version is. This is time-consuming, intricate work, and almost impossible for someone without legal training. Moreover, the fact that a database is known to be not up to date in all respects inevitably reduces confidence in it and undermines its utility. Access to up to date legislation online was perhaps the improvement most consistently requested both in consultation meetings and in written consultation responses.
- 13.33 In chapters 2 to 5 we made recommendations that aim to promote and facilitate the consolidation and codification of legislation. The process of consolidation and codification will have the effect of bringing legislation up to date. However, up to date published versions of legislation will still be needed where the law has not been codified or consolidated and where consolidations and codes are further amended. It is therefore necessary for the publication process to ensure that legislation presented online is up to date.
- 13.34 The National Archives has been working to consolidate amendments in order to create an up to date database of legislation on legislation.gov.uk and is confident that this goal will be achieved reasonably soon. The National Archives informed us that its editors had updated 80% of all primary legislation as of 30 May 2016. They intend to move on to look at the much bigger task of updating subordinate legislation once primary legislation is up-to-date.
- 13.35 The National Archives has faced considerable criticism from professionals in law

¹⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) recommendation 34.

and academia for the continuing failure to bring legislation.gov.uk up to date. We share this concern – it seems to us wholly unacceptable that reliably updated legislation is not available free of charge anywhere in the United Kingdom. However we have been impressed with the commitment and forward-thinking approach of those responsible for legislation.gov.uk. They have created an impressive platform for the online display of legislation and made great leaps forward in bringing the mass of United Kingdom legislation up to date. The fundamental obstacle to successfully reaching this goal remains the resources to carry out this work.

- 13.36 We consider that in principle the duty to publish legislation should extend to ensuring that the legislation is kept updated. However, resource constraints and the scale of the task make it unrealistic to impose such a duty in prescriptive terms at present. We also note that the publication duty imposed on the New Zealand Government by the Legislation Act 2012 does not specifically prescribe that the legislation must be available in an up to date form. Nonetheless, it is of fundamental importance that the National Archives complete the updating of Welsh primary and secondary legislation as soon as possible, and to maintain it in an updated form.
- 13.37 We now turn to consider how changes to the way legislation is presented online could improve its accessibility.

ACCESSING WELSH LANGUAGE LEGISLATION ONLINE

- 13.38 The English and Welsh language versions of primary and secondary legislation enacted or made in both languages are, for all purposes, equally authoritative.¹⁸ The law is to be found in both language versions. It is therefore imperative that access to Welsh and English language legislation be equal. Furthermore, the databases, which are essentially the tools that enable users to access the legislation, should be available in the Welsh language.
- 13.39 According to the National Archives statistics, during the period October 2014 to December 2014, 19% of users who accessed Welsh primary legislation on legislation.gov.uk used the Welsh language versions. In addition, 9% of users who accessed Welsh secondary legislation used the Welsh language versions.¹⁹
- 13.40 There is an additional issue caused by the lack of access to up to date Welsh language legislation. Commercial databases generally do not provide access to Welsh language legislation, so there is currently no source (whether public or commercial) of updated versions of some Welsh language legislation. Given that this significantly undermines the accessibility of bilingual legislation, updating Welsh language legislation is an urgent priority. We think it would be desirable for the Welsh Government to support the National Archives to achieve this.
- 13.41 In the consultation paper we explained that we saw scope for improving the

¹⁷ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 6.18 to 6.28.

¹⁸ Government of Wales Act 2006, s 156.

presentation of Welsh language legislation on websites. Printed versions of Welsh legislation present the English and Welsh language texts in parallel – printing them on opposite pages in the case of Assembly Acts and in a two column format in the case of regulations. However, on legislation.gov.uk the option of viewing Welsh legislation in this way is only available via a pdf download. The National Archives has tested an “interactive dual language view with an option to see both texts side by side, or to bring one or other to the fore”. The National Archives has indicated an interest in developing this further, and has noted that it was popular with users. We therefore asked consultees the following question:

Should Welsh language legislation be capable of being viewed alongside English language legislation on legislation.gov.uk?²⁰

Lessons from consultation

- 13.42 Most consultees who commented thought that Welsh language legislation should be capable of being viewed alongside English language legislation on legislation.gov.uk.
- 13.43 Some consultees emphasised the importance of the principle of parity of both languages. For example, the Welsh Government and Dr Catrin Fflur Huws (Aberystwyth University) both stressed that the Welsh version of the legislation is part of the law and therefore the legislation should be available in Welsh and English side by side, so that the reader can understand the law and compare as necessary. Mr Bush QC suggested that to do otherwise would be to treat the two languages differently, and considered that this was “not sustainable”.
- 13.44 Similarly, the Welsh Language Commissioner highlighted that the Government of Wales Act 2006 accorded the same status to the Welsh language as the English language and therefore “only by being read together do they [Welsh and English] represent the legislation of Wales”. The Welsh Language Commissioner identified the following benefits of presenting the two language versions alongside each other:

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

- 13.45 Other consultees related some of the practical benefits of doing this for users of bilingual legislation. For example, Citizens Advice Cymru informed us of its research *English by default* which found that Welsh speakers “frequently find it easier to use Welsh language services on websites if it’s easier to “toggle”

¹⁹ The National Archives, Evidence to Constitutional and Legislative Affairs Committee Inquiry into *Making Laws in Wales*(January 2015).

between the Welsh and English version”. The Association of Judges of Wales noted that displaying the Welsh and English language legislation alongside each other could assist the courts stating:

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

Conclusion

13.46 We consider that a Welsh language version of bilingual legislation should be accessible alongside the English language version. This presents a number of practical benefits for users of the bilingual legislation, including the judges who are required to interpret it.

13.47 The National Archives informed us of its in-depth user-testing with Welsh language users of legislation.gov.uk. The National Archives created a prototype to user-test the presentation of Welsh and English legislation. Displaying the Welsh and English language legislation side by side “tested well”. They stated:

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

13.48 Currently, users are able to view three pdf versions of Welsh legislation: an Welsh language version, a English language version, and an English and Welsh language version. Whilst the bilingual version of the legislation does present both texts side by side, it does not enable users to switch easily between the two different language versions. Moreover, users are not able to view the two texts of legislation side by side on the html website version of the legislation. This is problematic because the pdf file is not as navigable as the html version. For example, the latter enables users to move easily between different sections.

13.49 We therefore recommend that it should be possible to read both the Welsh and the English versions of the legislation side-by-side on legislation.gov.uk. This would, as the user-testing indicates, more easily facilitate a bilingual interpretation of legislation for Welsh language users. Presenting legislation side by side would also more clearly reflect the parity of both languages.

Recommendation 26: The Welsh and English language versions of legislation should be capable of being viewed side by side on legislation.gov.uk.

²⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 6-6.

DISPLAYING THE TERRITORIAL APPLICATION OF LEGISLATION

- 13.50 In the consultation paper we explained that in order to secure accessibility of the law in Wales, it is necessary to ensure that the territorial applicability of legislation is clearly indicated. Understanding what the law is in Wales, in both devolved and non-devolved areas, involves a consideration of primary and secondary legislation enacted both in Westminster and in Cardiff. We observed that none of the current public or commercial database services distinguish between the territorial extent of legislation and its applicability.²¹
- 13.51 There is an important difference between a piece of legislation “extending” to a territory and its “applying” to that territory. Acts of Parliament that have effect in any part of England and Wales “extend to” the whole of the jurisdiction of England and Wales. So do all Acts of the Assembly. The concept of Assembly Acts extending to England and Wales²² means that they are part of the law within the whole of England and Wales, and can be taken notice of as such by courts. However, Assembly Acts can only *apply* “in relation to” Wales.²³ “Applying”, for these purposes, broadly means creating rights, powers or obligations. Equally, some Acts of the United Kingdom Parliament, or sections of such Acts, only apply to England or only apply to Wales.²⁴
- 13.52 Acts of the United Kingdom Parliament rarely contain provisions explicitly stating their territorial application as such. Instead they are so phrased as to apply only to (for example) local authorities in England or local authorities in Wales. However, the fact that the legislation applies to local authorities in one or the other territory is not made obvious. This complicates the task of determining which provisions of an Act of Parliament apply in Wales. The difficulties are compounded by the fact of an Act of Parliament “extending to” England and Wales although many or all of its provisions are so phrased as not to have any application within Wales.
- 13.53 For example, section 1 of the Localism Act provides local authorities in England with a general power of competence. However the section itself only makes reference to “local authorities”. To find out which local authorities have this power, the reader has to go to section 8, which provides a definition of “local authorities” as meaning:

(a) a county council in England;

(b) a district council;

(c) a London borough council;

²¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, chapter 6, para 6.37.

²² Government of Wales Act 2006, ss 108(3), (4)(b) and (6)(b). See also T G Watkin, *The Legal History of Wales* (2nd ed 2012) p 208

²³ We explain the concept of Assembly legislation applying “in relation to Wales” in the consultation paper at paras 6.29 to 6.35; in this report, as in the consultation paper, we refer to legislation applying “in” or “to” Wales as a convenient shorthand.

²⁴ Government of Wales Act 2006, ss 108(3), (4)(b) and (6)(b); T G Watkin, *The Legal History of Wales* (2nd ed 2012) p 208. See also Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 1.43 to 1.46 and 6.29.

(d) the Common Council of the City of London in its capacity as a local authority;

(e) the Council of the Isles of Scilly; or

(f) an eligible parish council.²⁵

13.54 Even with this definition, the reader has to be aware that there is no such thing as a “district council” or “parish council” in Wales in order to appreciate that “local authorities” does not include Welsh local authorities.²⁶ Understanding the territorial application of the section is thereby made complicated.

13.55 Similarly, most of the Care Act 2014 does not apply in Wales, but this information is not stated expressly in the Act. Instead it must be discerned through reference to various provisions in the Act, such as the definition of a “local authority” for the purposes of the well-being duty which lists four types of council, all of which only exist in England.²⁷

13.56 In order to facilitate the identification of provisions of Westminster legislation that apply in Wales it seemed to us desirable that online legislation databases should make it clear which provisions in legislation of the United Kingdom Parliament apply to Wales. We therefore asked the following question:

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?²⁸

Lessons from consultation

13.57 All consultees who answered this question were in favour of a database clearly identifying the legislation of the United Kingdom Parliament (and parts of that legislation) that apply to Wales. The lack of any form of identification of UK legislation that applies to Wales was acknowledged by consultees to be a significant problem for a number of reasons.

13.58 The main problem faced by consultees is that legislation databases, whether public or commercial, note the extent but not the applicability of legislation. User research carried out by the National Archives has revealed that the majority of people, including many legal professionals, struggle to understand the conceptual difference between extent and territorial application. This means that indicating the extent of legislation on online databases may confuse users and in any event, does not enable users who are alive to the distinction to find out whether or not the legislation applies to Wales. We recommend that application be indicated as well.

13.59 The Welsh Government agreed that clearly identifying the territorial application of

²⁵ Localism Act 2011, s 8.

²⁶ The principal areas in Wales are county, county borough, city or city and county councils.

²⁷ Care Act 2014, s 1(4).

²⁸ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 6-3.

legislation is important due to the “patchwork of legislation” that exists. The piecemeal development of the Welsh devolution settlement has exacerbated this problem. Since the Government of Wales Act 1998, many Acts of the UK Parliament have made separate provision for Wales and England, often through amendments to existing legislation. After the 2011 referendum led to an increase in the National Assembly’s legislative competence, the divergence between the law in England and in Wales, whether contained in Acts of the Assembly or Acts of the United Kingdom Parliament, increased.

- 13.60 This is an ongoing problem. For example, the National Trust related that the Small Business, Enterprise and Employment Act 2015, recently passed by the United Kingdom Parliament, made some changes to the operation of the security of tenure provisions of the Landlord and Tenant Act 1954 in relation to home workers.²⁹ The National Trust explained that it was not straightforward to work out whether or not these changes applied only to England or to both England and Wales. In addition, the Wales Council for Voluntary Action cited the Localism Act 2011 as having a complex territorial application, with the majority of provisions applying in England only, some in Wales and England, others in Wales only, and some having UK-wide application. The overwhelming majority of consultees therefore considered that it would be extremely helpful if an online database identified the territorial application of legislation.
- 13.61 It is not necessarily a straightforward task for database editors to determine a particular section’s territorial application. LexisNexis UK related that it can be difficult to conclude definitely that a section applies only in England or Wales; database editors must therefore engage in a time consuming task that involves interpretation of statutory provisions, and carries the risk of error.

Identifying the territorial application of legislation online

- 13.62 There is a strong demand for online databases to identify clearly the territorial application of legislation. If a user of legislation needs to determine whether a particular section applies in Wales, he or she should be able to do so straightforwardly. The current situation can be improved in two ways.
- 13.63 We recommend that databases should identify the territorial application of each section, as they currently do as regards the extent of legislation. This would enable users to search for legislation that specifically applies in Wales. It should also provide users with the option of viewing only the legislation applicable in Wales. Some progress towards this aim is already being made, but it is a massive task. The National Archives has developed a “tool capable of capturing both extent and territorial application information for all UK legislation.” However this tool is not failsafe and research will nonetheless be necessary in order to verify the application of legislation. The National Archives commented that utilising the tool and identifying United Kingdom legislation that applies in Wales is a

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

²⁹ Small Business, Enterprise and Employment Act 2015, s 35.

partners towards such a goal.

- 13.64 Given the difficulty which databases face in identifying the territorial application of legislation, legislative drafters have a role to play in improving the current situation. Legislative drafters need to define the application of provisions precisely, for example listing the local authorities to which legislation applies as in the examples given above rather than using looser wording such as “applies to Wales”. We do not disagree with that approach, but suggest that drafters at the same time take care to ensure that texts are clear as to their territorial application. Explanatory notes could usefully identify the application of particular sections within legislation. For example, the explanatory notes to the Localism Act 2011 explain the territorial application of the Act on a provision by provision basis.
- 13.65 This is not consistent practice, however. The explanatory notes to the Care Act 2014 set out an overview of the territorial application of different aspects of the Act, but do not specify this in the notes to particular sections. A user may only wish to view the explanatory note corresponding to a particular section, rather than viewing the document in its entirety. It would therefore be helpful if it was clear on the face of Westminster legislation, or at least in explanatory notes to each provision, whether a particular section applies in relation to Wales. This could make the task of database managers significantly easier. A review of the existing legislation with a view to identifying applicability would also be worth pursuing.

Recommendation 27: Online versions of legislation should identify the territorial applicability of the legislation.

PRESENTATION OF EXPLANATORY NOTES

- 13.66 Explanatory notes are published alongside Acts in order to explain the purpose and effect of their provisions. In chapter 8 we considered how explanatory notes could be made more useful. Our consultation paper also asked consultees:

How could explanatory notes best be presented?³⁰

- 13.67 Consultees expressed different views on how explanatory notes should be presented. The National Trust noted that it would be helpful for explanatory notes to be capable of being viewed online alongside the legislation they relate to. However, Mr Bush QC was concerned that the text of explanatory notes should not be included within the legislation, even as footnotes, as this would give the explanatory notes too much status and undermine the primacy of the legislation. David Michael (Neath Port Talbot County Borough Council) thought that explanatory notes should be available by hyperlink from the legislation itself. This could enable users to view a particular section’s explanatory notes easily from the link in the legislation, without the text being within the legislation itself.
- 13.68 The National Archives believes that there are opportunities to present explanatory notes better, “[i]n particular bringing the portion of the text of the explanatory note together with the portion of the legislation to which it relates.”

³⁰ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation question 6-11.

13.69 The National Archives informed us that:

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

13.70 We consider that the National Archives' work on producing a more interactive form of explanatory notes, which would enable them to be presented alongside the text of the legislation, should continue to be developed and implemented on legislation.gov.uk. We consider that, as Mr Bush QC warned, this work ought to ensure that explanatory notes do not undermine the legislative text. User-testing should prevent readers of the texts being led into paying more attention to the explanatory notes than the sections of the legislation itself.

Recommendation 28: We recommend that explanatory notes should be linked on legislation.gov.uk to the sections to which they relate.

OPEN SOURCE EDITING

13.71 A challenge facing the implementation of a successful online legislation database is ensuring the availability of resources to complete and maintain it. In our consultation paper, therefore, we suggested that enabling the legislation or additional materials to be updated by volunteer legal experts, in addition to the managers of the database, would assist in increasing the efficiency with which legislation is edited. We envisaged that this would require a process of verification in order to determine whether someone has the necessary legal expertise to make edits. We asked the following questions:

Should legislation available on an online legal database for Wales be editable by volunteer legal experts?

If so, what safeguards should be put in place?³¹

13.72 Nearly all consultees that responded to this question raised serious concerns about having volunteer legal experts editing an online legal database for Wales. Some consultees considered that there may be some benefits, such as monetary savings, but considered the drawbacks overwhelming.

13.73 Concern over the quality of the editing process was commonly expressed by consultees. Mr Bush QC regarded the editing of legislation as work "too important" to be left to volunteers and as work that should be "funded and

³¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 6-8 and 6-9.

carefully organised”. Huw Williams (Geldards LLP) questioned whether the editing process would attract enough volunteers to achieve a database that is sufficient and up to date.

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

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

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

- 13.75 We consider that the National Archives’ expert participation is an interesting and innovative idea which goes some way to filling the gap we saw in legislation editing. We therefore encourage the continuation of this programme. However, given the views of consultees, we are persuaded that a general move to open source editing would not be desirable or feasible.

CHAPTER 14

A LEGAL WEBSITE FOR WALES

INTRODUCTION

- 14.1 In the consultation paper, we considered the need for a website to provide legal information. We reviewed the various resources currently available, including the new *Cyfraith Cymru/Law Wales* website, the National Archives website (legislation.gov.uk), BAILII, and commercial websites such as LexisNexis, Westlaw and Lawtel.

CURRENT SERVICES IN WALES

- 14.2 We have described legislation.gov.uk in chapter 13. In addition to legislation.gov.uk there are several websites providing information on behalf of the Welsh Government and Assembly. There is a Welsh Government website and a National Assembly for Wales website.¹ Both of these provide users with information about Government Bills and other legislation passing through the National Assembly, including copies of some draft legislation and Bills. The National Assembly's Research Service also provides information on the Assembly website on law, policy and legislation passing through the Assembly. For example, it provides summaries of Bills and Acts of the Assembly, as well as information about broader issues such as EU policy updates.²

Cyfraith Cymru/Law Wales

- 14.3 In July 2015 the Welsh Government, in partnership with Westlaw UK, launched a website called *Cyfraith Cymru/Law Wales* with the aim of providing a guide to the law applicable in Wales, organised by reference to the devolved subject fields. *Cyfraith Cymru/Law Wales* enables users to browse legislation by broad subject matter headings. Each subject matter heading includes a broad overview and a section on the key legislation on that subject matter. The sections on the key legislation provide links to legislation on legislation.gov.uk. The website provides explanatory narrative and commentary on all areas of law devolved to Wales. This includes articles provided by Westlaw UK from its "Westlaw UK Insight" services free of charge and articles by lawyers who have contributed to the site.

A SEPARATE LEGISLATION DATABASE FOR WALES?

- 14.4 Some consultees thought that a separate database of legislation for Wales should be created. The Welsh Government saw little merit in attempting to replace the legislation.gov.uk website, whilst acknowledging that the service could be improved. However, the Welsh Government referred to the development of "a distinct or separate legal jurisdiction" that "may require consideration to be given to the development of a separate database for Wales". It was nevertheless highlighted by the National Archives that Scotland and Northern Ireland continue to use legislation.gov.uk regardless of the fact that they are separate jurisdictions.

¹ See <http://gov.wales/> and <http://www.assembly.wales/> (last visited 15 June 2016).

² See <http://www.assembly.wales/cy/bus-home/research/Pages/research.aspx> (last visited 15 June 2016).

- 14.5 We take the view that it would neither be practicable nor useful to create an alternative legislation database for Wales distinct from legislation.gov.uk, which should continue to be the main Government source of up to date, free-to-access legislation. We have referred in chapter 13 to the problem of legislation.gov.uk not being up to date, and reiterate the importance of its being brought up to date; a parallel website would face the same problem.
- 14.6 We suggest that more could be done, however, to integrate the legislation provided by legislation.gov.uk into a more context-rich, user friendly site for users in Wales. We think that *Cyfraith Cymru/Law Wales* provides the Assembly and the Welsh Government with an opportunity to do that.
- 14.7 *Cyfraith Cymru/Law Wales* could, with co-operation from the National Archives, provide a portal through which access to legislation applying in Wales on legislation.gov.uk is improved, and embedded within a useful context. On this model, legislation.gov.uk would provide the legislative content, but the experience for the user would be of navigating a single site rather than clicking away from *Cyfraith Cymru/Law Wales* every time legislation was accessed.
- 14.8 In the event that the process of codification develops as we recommend, we would hope to see each code with its own section on *Cyfraith Cymru/Law Wales*. We imagine it would be possible to devise a user-friendly way of setting out the contents of the code itself, the secondary legislation made under it and even relevant statutory guidance. The aim would be to provide a comprehensive and accessible summation of the relevant law.
- 14.9 *Cyfraith Cymru/Law Wales* has been an initiative of the Counsel General, and we understand that its running has been supported by Welsh government lawyers, in particular within the Office of the Legislative Counsel. Keith Bush QC emphasized the importance of ensuring that the *Cyfraith Cymru/Law Wales* website is placed on a robust and permanent footing. We envisage that more personnel and financial resources will need to be made available to ensure the website's success.

SEARCH ENGINE OPTIMISATION

- 14.10 In the consultation paper we explained that the majority of people looking for a piece of legislation will begin their search on a general web search engine, such as Google. The National Archives' research indicates that an average of 60% of visits to legislation on the legislation.gov.uk website originate from a general web search.³
- 14.11 We asked:

Do consultees attach importance to legislation being accessible through a general web search?⁴

³ The National Archives, *Evidence to Constitutional and Legislative Affairs Committee* (January 2015); Office of the Parliamentary Counsel, *What works best for the reader?* (July 2014).

⁴ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 6.43 to 6.46 consultation question 6-4.

- 14.12 The majority of consultees agreed that it is important for legislation to be accessible through a general web search. This reflects the fact that it is a very popular means of commencing legal research even, as one consultee observed, amongst PhD level law students. However, consultees' responses drew attention to three main concerns about the effectiveness of general web searches.
- 14.13 The first is that web searches will often link to the versions of legislation on legislation.gov.uk, which may be out of date. This is a serious problem. We take the view that there is no practical alternative to waiting for, and encouraging, the completion of the updating of legislation.gov.uk and stress the importance of ensuring that legislation available online is up to date.
- 14.14 The second concern is that legislation needs to be accessible through a general web search in both Welsh and English. We discuss this below.
- 14.15 Thirdly, consultees observed that it can be difficult, particularly for non-legally trained people, to find a piece of legislation through a search engine. For example, a large number of pieces of legislation may be listed that have similar titles. Wading through the search results can be time consuming and, as the Association of London Welsh Lawyers observed, "potentially fruitless". Moreover, general web searches may take users to sources that are unofficial. David Gardner (Administrative Court Office Wales) related that he had seen occasions where litigants in person extensively quoted Wikipedia.

The importance of ensuring legislation is available by a general web search

- 14.16 We think it necessary to ensure that legislation is easily available from a general web search. The National Archives related that efforts have been made in order to achieve this:

Thanks to a very high number of external links, a page on legislation.gov.uk will generally be returned in the first one or two results when searching for any piece of legislation on one of the major search engines [...]

We use a protocol called "sitemaps" to tell the search engine crawlers which pages to index and the relative priority of those pages. For example, this allows us to explicitly prioritise the table of contents over any part of the legislation, favouring a latest available version over the original version. This was complicated to do, given the scale of legislation.gov.uk, but our approach has worked well and the user need is well met in terms of access to legislation from a general web search.

- 14.17 Moreover, we consider that it should be straightforward for users to search for legislation in the Welsh language. In fact, a Welsh language search through search engines, such as Google, will return Welsh language results from websites such as legislation.gov.uk and the National Assembly's website. We discuss searching in Welsh within databases below.

ACCESSING LEGISLATION BY SUBJECT MATTER

Internal website searches and searching legislation by subject matter

- 14.18 In our consultation paper we explained that legislation is usually presented online by type (such as an Act of the Assembly or a statutory instrument made in Westminster or Cardiff), year or title. This is common to commercial services and legislation.gov.uk. We considered that the ability to view legislation organised by subject matter would greatly simplify the task of understanding what the law is in a particular area. This would be particularly helpful in Wales where, as observed above, the law that applies in a devolved area may be an unwieldy mixture of Welsh and Westminster legislation.
- 14.19 We formed the view that making legislation searchable by subject matter could be a beneficial tool in accessing legislation on both public and commercial databases. We asked consultees:

Do consultees consider that legislation should be accessible through a database's internal search engine, including being searchable by subject matter?⁵

Presenting legislation by subject matter online: the Defralex model

- 14.20 In our consultation paper we described the database established by the Department for Environment, Food and Rural Affairs (Defra) with the National Archives on the legislation.gov.uk website, as a good example of how organising legislation by subject matter could work. This Defralex database categorises all legislation for which Defra is responsible by subject matter so that the legislation may be searched or browsed by subjects relevant to users.
- 14.21 Defra found that the Defralex work enabled them to identify accurately and map all the legislation for which the Department was responsible. This in itself strikes us a useful endeavour. It enables government to manage its legislation better, to identify opportunities for deregulation and the simplification of legislation and also provides a much clearer understanding and starting point for further law reform.
- 14.22 We also asked consultees:

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?⁶

Lessons from consultation

- 14.23 Consultees were generally keen to be able to access the legislation applicable in Wales by subject matter. Many consultees observed that this would have benefits for users as it would make the legislation easier to navigate. Many consultees

⁵ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 6.47 consultation question 6-5.

⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 6.57 to 6.66 consultation question 6-7.

commended the Defralex model structure. The Welsh Government also advocated this approach, acknowledging that good accessibility of legislation requires “easy access by reference to subject matter”.

- 14.24 Many consultees also considered that legislation should be capable of being searched by subject matter through a search engine within a website. The National Archives related that although most users find legislation through a general web search, searching legislation by subject heading helps the user by providing some “framing” for areas of legislation.

Determining the subject matter criteria

- 14.25 Consultees emphasised that the subject matter classifications need to be carefully devised. They expressed a range of views on how exactly the criteria should be decided. The Welsh Government said that the organisation of the indexing options should be kept under regular review to ensure the accessibility of legislation is maximised; it found the Defralex model is of interest, but said that there are other models of arranging legislation, used in Commonwealth jurisdictions, that could also be considered. Dr Sarah Nason (Bangor University) identified some considerations in determining how a subject matter division would work:

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

- 14.26 Consultees from local authorities in North Wales explained that if one searches legislation.gov.uk for “local government” legislation there are 65 United Kingdom Acts with “local authority” in their title. Identifying the correct piece of legislation is therefore a skilled task that would be daunting to many.
- 14.27 This demonstrates the importance of ensuring that subject matter criteria are properly user-tested. The National Archives, which assisted in creating the Defralex model, suggested that if it were to be involved in any such organisation of legislation for Wales it would seek to do some more user-testing to understand users’ needs better.
- 14.28 Other consultees stressed that presenting, or making legislation searchable, by subject matter is not a substitute for consolidation. Keith Bush QC agreed with the consultation question in principle but warned that the priority should be to simplify legislation “rather than mitigating its complexity by means of sophisticated search methods”. Our preferred model of codification would simplify legislation, and would reduce the number of sources that need to be consulted. It would also make the business of publishing legislation much easier.

Accessing legislation by subject matter

- 14.29 Some consultees also expressed views on whether legislation should be

presented by subject matter on legislation.gov.uk itself, or on the *Cyfraith Cymru/Law Wales* website which could serve as a portal to the versions of legislation on legislation.gov.uk with a facility for users to browse by subject matter. Overall, consultees preferred the option of developing the *Cyfraith Cymru/Law Wales* website as a subject matter portal. As Dr Nason observed, “this should avoid duplication of effort and allow Wales to take ownership of presenting material in a clear and innovative fashion.”

- 14.30 There is clear demand for improving internal subject matter searches. Doing so would particularly help people who are unaware of the name of the legislation they are searching for, or the year in which it was enacted, to better access legislation online. We acknowledge the concerns expressed by consultees about the effectiveness of the subject matter criteria, and agree that they need to be carefully considered. Internal subject matter searches must also be capable of being made in Welsh.
- 14.31 The National Archives has recognised the demand for legislation to be searchable by subject matter, and has made some progress in achieving this end. It has a service on legislation.gov.uk that permits users to search statutory instruments by subject using particular subject matter headings. The National Archives stated that it is developing its search options so that users will be able to search “by subject, sub-subject, and other pertinent information, such as enabling power, in future”. The National Archives explained that, whilst subject based searches help the user, identifying which parts of the legislation concern the relevant subject matter is a “difficult and potentially time consuming task”. The National Archives explained that they have explored different technologies but they described the results as “disappointing”.
- 14.32 The National Archives stated that “there are some exciting new opportunities to approach subject based classification of legislation in new ways”. For example, it has developed a new technology which looks at commonly occurring words in legislation such as “employment” and “company”. The National Archives also related that it has retained in its data, although not presented to users, “the subject based classification of Acts of Parliament used for the discontinued print publication, Statutes in Force”. Moreover, the National Archives explained the several advanced search options available on legislation.gov.uk:
- For example, it will be possible to search named parts of the document, based on words or phrases in proximity to other words or phrases.
- 14.33 We consider that there is great value in the further development of this technology. The Welsh Government could profitably do further work with the National Archives to provide users of legislation.gov.uk and *Cyfraith Cymru/Law Wales* with the ability to search legislation by subject matter. In addition, the Welsh Government would benefit from working with the National Archives to categorise legislation applicable in Wales under suitable subject headings. We agree with consultees that the subject matter criteria need to be very carefully devised and properly user-tested.
- 14.34 In addition to the benefits this would have for users of legislation, it would also assist policy-makers and lawyers alike in understanding what law they are

responsible for and making assessments about where legislation is superfluous, or what reforms are necessary to achieve their policy aims. It could be a way of giving each directorate “ownership” of the legislation for which they are responsible.

- 14.35 The *Cyfraith Cymru/Law Wales* website currently provides users with key legislation under different subject matters that approximately correspond to the competences devolved to the National Assembly under the Government of Wales Act 2006. The current sub-divisions within subject matters could be further developed. For example, one of the subjects is “health & health services”. Under this broad heading is a list of over 40 Acts and measures of the National Assembly presented in chronological order. This is not particularly helpful for users. We consider that developing the website in the ways we have discussed would enable the Welsh Government to devise a means of accessing legislation by subject matter that is suitable for Wales.

PUBLISHING OFFICIAL GUIDANCE

- 14.36 Guidance on legislation seeks to assist users to determine what the law means, in order to help them to comply with its requirements. Official guidance is promulgated from government and non-departmental public bodies (such as the Electoral Commission or Data Commissioner). In this section we use the term “guidance” as shorthand for official guidance. Broadly speaking, there are two kinds of official guidance: statutory guidance and non-statutory guidance. Legislation may impose an obligation on government departments or local authorities to produce statutory guidance, such as a code of conduct. For example, section 24 of the Education (Wales) Act 2014 obliges the Welsh Ministers to publish a code of conduct for persons registered as part of the education workforce.
- 14.37 Public bodies and local authorities may also publish guidance that is not mandated by statute, which is termed “non-statutory guidance”. In certain circumstances, it may be obligatory for public bodies to follow non-statutory guidance to which they are subject unless there are good reasons not to do so.⁷ Therefore, given that guidance may have legal effects, ensuring that it is accessible is extremely important.
- 14.38 In the consultation paper we explained that guidance can help make difficult provisions intelligible. Given the desirability of the public being able to understand legislation, it is all the more important that means of improving the accessibility of legislation are used. However, it is important that official guidance should not usurp the authority of the primary source of the law: the legislation. We therefore sought consultees’ views as to whether guidance should be accessible on an online legislation database, such as *Cyfraith Cymru/Law Wales*, and if so, how detailed it should be.⁸
- 14.39 The majority of consultees considered that it would be useful for official guidance

⁷ See for example *Mohammed Mohsan Ali v London Borough of Newham* [2012] EWCH 2970 (Admin).

⁸ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 6.86 to 6.96.

to be made easily available and navigable on *Cyfraith Cymru/Law Wales*. For example, the Care Council for Wales explained that “clear, accurate guidance, including statutory guidance, describing key responsibilities in relation to the legislation will be essential”. A significant number of consultees also stressed the importance of guidance being detailed and accurate.

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

14.41 The Welsh Government observed that:

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

14.42 This view was shared by the Wales Local Government Association, which also commented that it is very difficult to relate statutory instruments to primary Acts; therefore it would be useful if a webpage included “all subsequent statutory instruments and statutory guidance associated with a particular Act” and a schedule of commencement dates so as to enable users to see when particular provisions have come into force.

14.43 We appreciate the importance of ensuring that official guidance is easily available. This is a priority as official guidance may, as we noted above, have legal effects. We consider that the *Cyfraith Cymru/Law Wales* website could usefully provide access to statutory guidance. The website is managed by the Welsh Government, which could co-ordinate the collation of statutory guidance from the government directorates responsible for it, and present the statutory guidance on the website, alongside links to the relevant parent legislation on legislation.gov.uk. This would enable users to browse statutory guidance by subject matter in the same manner as legislation, as we proposed above.

14.44 It would also be desirable to include other official guidance on the *Cyfraith Cymru/Law Wales* website. A single stream of official guidance would be extremely beneficial for users. The Welsh Government already provides overviews of particular areas of law on *Cyfraith Cymru/Law Wales*. These overviews are summaries and help users gain a general understanding of the

contours of a particular subject. We consider that links to existing more detailed official guidance, such as that published by the Electoral Commission or the Information Commission, should also be provided on the website. For example, the “environment” section on *Cyfraith Cymru/Law Wales* could include a link to the Natural Resources Wales guidance website. This would help direct users to authoritative and detailed guidance.

COMMENTARY – EXPLAINING THE LAW

- 14.45 Commentary can provide users with a deeper understanding of how legislation will affect them. Commentary may emanate from a variety of sources, and have a range of purposes. The government or public bodies may produce commentary. For example, the Welsh Government has produced “overviews” for *Cyfraith Cymru/Law Wales* which provides a summary introduction to a particular area of law.
- 14.46 Unofficial commentary (that is, not emanating from government or public bodies) on legislation generally elaborates on how the legislation has been interpreted by judges in more detail than guidance. This can, for example, explain what particular terms used in legislation have been understood to mean by judges. Furthermore, in the event of a conflict of interpretation between cases, commentary can explain with greater specificity how the differences were reasoned. Articles may offer arguments about the meaning of a statute which may not necessarily be widely accepted. Commentary may also explain recent changes, and provide the opportunity to focus on specific issues in greater detail.
- 14.47 We sought consultees’ views as to whether commentary should also be provided on an online legislation database, such as *Cyfraith Cymru/Law Wales*, and if so how detailed its coverage should be.

Lessons from consultation

- 14.48 Consultees’ views on whether an online legislation resource for Wales should provide access to commentary were mixed. Some consultees considered that it would be helpful for *Cyfraith Cymru/Law Wales* to provide access to commentary. For example, the Wales Council for Voluntary Action supported the production of a single authoritative source of legislation, official guidance and commentary. The Council suggested that such a resource could “have different areas or streams for citizens, advisors and practitioners, so that each person could access information that is relevant to their need”. Of course, as Huw Williams (Geldards LLP) commented, there should be a clear distinction between information that has legal standing and general commentary, and such a distinction would need to be a feature of any website.
- 14.49 The majority of consultees, however, warned that providing too much detailed additional commentary would be excessive, and could be confusing and unwieldy. Dr Nason, for example, commented that “the main concern should be stressing clarity in practical operation as opposed to a more in-depth analysis of the nature and aspirations of the provision”.

Improving access to commentary

- 14.50 The *Cyfraith Cymru/Law Wales* website currently provides users with brief

overviews of particular areas of law. It is also designed to offer further commentary in the form of articles. It is our understanding that the amount of additional commentary available will be likely to increase. This would enable the website to assist a broader range of users.

- 14.51 An important consideration raised by consultees in determining the nature and quantity of commentary that ought to be included is: who is the audience? Overviews and commentary, for example, are catering to different audiences. The former provide for people who are seeking to gain a broad understanding of an area of the law, and the latter for people who have a general understanding but wish to deepen their knowledge.
- 14.52 In our view, *Cyfraith Cymru/Law Wales* must prioritise ensuring that the general public are able to gain an understanding of the law in Wales. However, this does not mean that providing access to further commentary in addition to the overviews is not also desirable. It is our understanding that the Welsh Government does not intend to publish any detailed commentary of its own, and we consider that it would be inappropriate for it to do so. Rather, *Cyfraith Cymru/Law Wales* provides access to Westlaw UK Insight articles relating to areas of law devolved to Wales that are written by independent experts in their field. This enables users to engage more deeply with a particular area of the law. We commend the Welsh Government's current approach. We consider that the provision of both overviews and commentary on *Cyfraith Cymru/Law Wales* enables the website to appeal to as broad an audience as possible.

Recommendation 29: The Welsh Government should work with the National Archives to continue to develop *Cyfraith Cymru/Law Wales* into a portal through which citizens can access legislation applying in Wales.

Recommendation 30: The Welsh Government should work with the National Archives to make legislation available online by subject matter.

Recommendation 31: The Welsh Government and the National Assembly should develop access through *Cyfraith Cymru/Law Wales* so that citizens can find all of the law relating to a particular code in one place, including primary and secondary legislation, statutory and non-statutory guidance and other sources as appropriate.

Recommendation 32: Official guidance, including statutory guidance, should be available from the *Cyfraith Cymru/Law Wales* website.

CHAPTER 15

LEGAL EDUCATION AND TEXTBOOKS

LEGAL EDUCATION

- 15.1 Currently, law courses in the medium of Welsh are offered at all five Welsh law schools. However, all those seeking to practise in the legal professions in Wales, whether fluent in Welsh or not, will require at least a basic knowledge of the operation of a bilingual legal system. In the consultation paper, we explained our preliminary view that the study of bilingual legislation and its interpretation should form part of university law degree courses in Wales.
- 15.2 All of the judges currently sitting in Wales who are Welsh-speakers will have completed their legal training through the medium of English and will have practised before appointment primarily through the medium of English. There is therefore a particular need for continuing training to enable judges to develop their skills in the Welsh language and in using it in court. The Judicial College has in recent years provided annual training courses for the Welsh speaking judiciary which have been particularly well received by the participants.
- 15.3 The consultation paper asked the following questions:

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.

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?

Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?¹

Lessons from consultation

- 15.4 Consultees emphasised the importance of ensuring that legal practitioners and students take into account bilingual legislation and, indeed, the divergences in the law between England and Wales. Consultees were unanimously supportive of ensuring that legal education and training takes account of bilingual legislation, and the challenges of working in a single jurisdiction with two official languages.
- 15.5 Consultees were generally supportive of making the study of bilingual legislation and its interpretation a compulsory part of university law degree courses in

¹ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 12-7, 12-8 and 12-9.

Wales, and indeed, some consultees also considered, in England as well. For example, the Welsh Language Commissioner explained that students from Wales could study law in England and vice versa, and may end up, in either case, practising in Wales. Therefore, the Welsh Language Commissioner considered universities across England and Wales should cover matters involving bilingual legislation and the administration of justice in Wales.

- 15.6 A number of consultees commented favourably on the current efforts of universities in Wales to improve bilingual legal education. For example, Keith Bush QC related that the activity of the Coleg Cymraeg Cenedlaethol has increased the number of students studying part of their legal courses through the medium of Welsh. The Welsh Governance Centre also welcomed the commitment by University of Wales Press (UWP) and the Coleg Cymraeg Cenedlaethol to publish a series of Welsh language textbooks for students who are studying law in Wales, which it considered would greatly assist with the teaching of the law in Welsh universities.²
- 15.7 Consultees also generally considered that there should be provision of training courses, and opportunities for professional development, to improve Welsh language skills, to learn about bilingual interpretation and to increase awareness about substantive divergences between the law in England and in Wales. Consultees considered that legal practitioners based in England as well as Wales will need to have an awareness of the particularities of Welsh law, including the interpretation of bilingual legislation and relevant substantive divergences. For example, the Welsh Government thought it necessary to raise awareness amongst lawyers, students and citizens as to the divergence of, and differences between, the laws applicable in Wales and those applicable in England. This, the Welsh Government considered, included knowledge of the substantive differences as well as the interpretation of bilingual legislation.
- 15.8 The Welsh Language Commissioner considered that training should be available in the form of continuous professional development plans for people who are already practitioners to increase their skills and should be part of legal practice courses, such as the Legal Practice Course for prospective solicitors and the Bar Professional Training Course. Some consultees, including the Association of Judges of Wales, Dame Rosemary Butler AM (Presiding Officer of the National Assembly) and the Legal Wales Foundation, considered that similar training should be available for judges. Huw Williams (Geldards LLP) agreed with the importance of improving access to educational courses for practitioners and noted that such courses could be challenging. Mr Williams observed that developing a body of practitioners with sufficient confidence to use Welsh in the courts and in day to day practice is likely to require persistence and a constant effort over many years.
- 15.9 The availability of further education and training is also important for non-

² We discuss Welsh language textbooks later in this chapter.

practitioners, such as academics. For example, Dr Sarah Nason (Bangor University) noted that:

It would be helpful if there were more support for university academics who have learnt Welsh to a certain standard but who ideally require further training and support to be able to conduct research and teaching through the medium of Welsh. E.g., the Welsh Government Sabbatical Scheme is not of general application to those working within Higher Education. The demands of the Research Excellence Framework (alongside teaching and administration) mean that it is largely unheard of for academic staff to be able to take time during the working day to focus on learning Welsh (including improving their knowledge of legal Welsh). Supporting those lecturers who wish to improve their own Welsh is one way of ensuring that the impacts of bilingual interpretation of legislation are properly understood and that Welsh medium legal education provision is extended.

Conclusions

- 15.10 Legal education should in our view give appropriate coverage to devolution in Wales, the way that law is made in Wales and the substance of that law.
- 15.11 We consider that Welsh devolution and the powers of the National Assembly and the Welsh Government should form part of the constitutional law syllabus of a qualifying law degree. Practitioners, whether practising in England or in Wales, should have a sufficient knowledge of those matters to enable them to identify a possible Welsh dimension of a matter upon which they are advising; those who practise in the law applying in Wales will need to understand the substance of the law that applies.
- 15.12 Outside the core subjects required for a qualifying law degree, we would encourage those designing courses in fields where the law is divergent, such as family law or housing law, to consider whether the differences between the law in England and in Wales should be reflected in their syllabus.
- 15.13 The profession is aware of the challenges that devolution throws up for those qualifying today. Recently the Legal Education and Training Review consulted on whether the education and training of legal professionals in Wales should differ from the education and training of legal professionals in England. The large majority of respondents expressed the view that, for the time being at least, it

should not.³ Both the Bar Standards Board and the Solicitors' Regulatory Authority are currently reviewing professional legal education. They may wish to include consideration of what level of instruction or knowledge of Welsh law is required for practitioners in England and Wales. Since many of those in practice will not have studied Welsh devolution, this could be an appropriate topic for continuing professional development.

- 15.14 As we mentioned in chapter 10, in addition to legal requirements, it is Welsh Government policy to promote the Welsh language.⁴ We trust that universities in Wales will continue to ensure that bilingual students wishing to pursue modules in the medium of the Welsh language are adequately catered for. As we have noted above, Welsh language courses are offered at all five law schools in Wales.
- 15.15 We welcome the creation of further opportunities for academics, legal practitioners and the judiciary to increase their awareness of divergences in the law between England and Wales, their understanding of bilingual lawmaking in Wales and, as Dr Nason suggests, their Welsh language skills. The Welsh Government Sabbatical Scheme for Welsh Language Training is a language course designed for teachers, lecturers, instructors and classroom assistants who want to raise their standard of Welsh. This could usefully be extended to those working in higher education.
- 15.16 Equally, professional development opportunities should be available for legal practitioners and judges. Consultees reported a lack of training for provision in the Welsh language for solicitors and barristers. This is a matter for the Law Society Wales and the Bar Council. As we noted above, the Judicial College is already providing annual training courses for the Welsh-speaking judiciary, and might wish to consider developing training on divergent English and Welsh law.

TEXTBOOKS ON THE LAW APPLICABLE IN WALES

- 15.17 The law is complex and textbooks that dissect and explain the law in a digestible manner can be invaluable in making the law accessible. Lawyers practising in England have the benefit of a choice of textbooks that explain the law and its effect. Currently this is not available to their Welsh counterparts. Books that address the law of England and Wales do not commonly consider in detail the

³ This review, established by the Solicitors Regulation Authority, the Bar Standards Board and ILEX Professional Standards and conducted by the UK Centre for Legal Education (UKCLE) Research Consortium, published a report *The Future of Legal Service Education and Training Regulation in England and Wales* in June 2013. Of all those who responded to the consultation, 86% said that legal education in the two countries should either never, differ, or not differ now. Of those resident in Wales and identifying as Welsh, that number was 70.3% (table 3.2).

⁴ The Welsh Government website contains pages on "Promoting the Welsh language", where they say "We want to see an increase in the number of people able to speak Welsh and the number that use it." See: <http://gov.wales/topics/welshlanguage/promoting/?lang=en> (last accessed on 15 June 2016).

divergences in the law applicable to Wales.⁵

15.18 In our consultation paper, we asked the following questions:

Have consultees experienced difficulties due to the limited availability of textbooks on the law applicable to Wales?

What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?⁶

Lessons from consultation

15.19 The overwhelming majority of consultees reported experiencing difficulties due to the limited availability of textbooks on the law applicable to Wales. They expressed concern that standard legal texts barely covered the law applicable in Wales. For example, University of Wales Press commented that “current coverage is inadequate for user needs either at academic or practitioner level, being confined to a few pages and/or merely by footnotes”. Dr Catrin Fflur Huws (Aberystwyth University) said that she had come across textbooks that state that the law is different in Wales but fail to describe the differences.

15.20 Some consultees emphasised the importance of textbooks as an aid to understanding the law. For example, Citizens Advice Cymru emphasised the important role of textbooks as “often the simplest and most readable source of law” that are used widely by students and sometimes members of the public who may wish to research some basic law. David Gardner (administrative court lawyer for Wales) commented that:

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

15.21 Many consultees attributed this lack of material to perceptions surrounding the financial viability of Welsh law textbooks. The Association of Judges of Wales noted “the lack of funding arrangements in relation to research in the Higher Educational Institutions.” The Association of London Welsh Lawyers suggested that the lack of textbooks covering the law applicable in Wales may be because the “task of assimilating, commenting, presenting a definitive academic and legal

⁵ There are exceptions. See, for example, L Davies, J Luba QC and C Johnston, *Housing Allocation and Homelessness* (3rd ed, 2012). Jordan Publishing have announced that the 4th edition, due for publication in September 2015 will include “a comprehensive account” of the Housing (Wales) Act 2014.

⁶ Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, consultation questions 6-13 and 6-14.

come on the law in Wales would undoubtedly be a time consuming task for the most able of Welsh lawyers". The Association commented that a potential author would have to balance carefully the market for such a publication against the time and effort it would take to produce the publication.

- 15.22 Consultees offered a range of possible ways in which access to the law in the form of textbooks could be promoted. Some consultees argued that funding should be arranged so as to create an incentive for publishers. University of Wales Press explained that legal academic publishing is a commercial venture for the law publishers, dependent on high demand and economies of scale afforded by substantial print runs and sales to a large market. It observed that the Welsh market is much smaller than that in England. University of Wales Press added that law textbooks are written by leading academics whose labour-intensive input to successive editions is rewarded by a significant level of royalties from substantial sales; the much smaller market in Wales promises a much more modest financial return for authors.
- 15.23 University of Wales Press also considered that the costs of operating in a bilingual environment would be considerable. They emphasised the significant funding required in order for a coherent and effective law publishing industry to be created for Wales.
- 15.24 Other consultees argued that universities and the academic community should take responsibility for improving access to the law in Wales through textbooks. For example, Marie Navarro (You Legal Eyes) felt that universities should develop research and specialisation in Welsh laws that would in turn have an effect on the material available. The Association of Judges of Wales also suggested that higher education institutions might offer relevant postgraduate theses for publication on *Cyfraith Cymru/Law Wales*. Such research into comparatively narrow subjects would assist to compare and contrast the law as it applies in England and Wales and how the common law is evolving to meet the challenge.
- 15.25 Academics described a lack of incentives to write textbooks on Welsh law in their institutions. Dr Nason suggested that specific incentives could be developed for academics in association with their employers to write textbooks on the law applicable in Wales.
- 15.26 Some consultees highlighted the progress that is being made. For example, Keith Bush QC referred to developments with regard to textbooks covering the law in Wales; we take this to refer to the textbooks books being prepared by the Coleg Cymraeg Cenedlaethol and University of Wales Press. Mr Bush QC suggested that these developments should be supported by the Welsh Government, as did the Association of London Welsh Lawyers, who said:

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

- 15.27 The Welsh Language Commissioner also drew attention to the Welsh and English language textbooks being developed by the Coleg Cymraeg Cenedlaethol and University of Wales Press. However, the Commissioner said

that there remains a “pressing need” for books that raise awareness of the diverging law of England and Wales.

Improving the availability of textbooks on the law applicable to Wales

- 15.28 The importance of textbooks that cover the law applicable to Wales is clear, and the limited availability of such textbooks is likely to become increasingly problematic as the volume of legislation made in Wales increases.
- 15.29 Evidence has emerged from our consultation that the main cause of this is concern about the commercial viability of Welsh law textbooks. Market demand may increase as the law diverges further between England and Wales, and it becomes increasingly important for differences in the law to be clearly understood. The Welsh Government could consider ways of stimulating the production of additional commentary for publication on *Cyfraith Cymru/Law Wales*.
- 15.30 Incentives for academics to produce textbooks on the law applicable in Wales could be increased. Academics could perhaps be supported by individual higher education institutions to produce legal textbooks for Wales.

CHAPTER 16

RECOMMENDATIONS

- 16.1 Recommendation 1: We recommend that the Welsh Government pursues a policy of codification, executed in accordance with the recommendations that follow.
- 16.2 Recommendation 2: We recommend that codification should involve
- (1) bringing together legislation whose subject matter is within the legislative competence of the National Assembly for Wales and which is currently scattered across various pieces of legislation of the United Kingdom Parliament and/or the Assembly in a piece of Assembly legislation;
 - (2) reform of the legislation as appropriate.
- 16.3 Recommendation 3: We recommend that those areas in which the law is in most need of being brought together in Assembly legislation should be identified and the process of bringing the legislation together should be undertaken.
- 16.4 Recommendation 4: A flexible streamlined legislative procedure should be introduced into the Standing Orders of the National Assembly for:
- (1) codification or consolidation Bills that include alteration or reform of the law; and
 - (2) other law reform Bills prepared by the Law Commission,
- where the alterations or reforms are judged by the Assembly not to be controversial.
- 16.5 Recommendation 5: Such a Bill should be accompanied by an Explanatory Memorandum endorsed by the Counsel General which should explain the effect of each of the Bill's sections and include or be accompanied by recommendations as to the suitability of sections for committee or Assembly scrutiny.
- 16.6 Recommendation 6: A committee of the Assembly should consider the Bill and Explanatory Memorandum and recommendations as to the suitability of sections for committee or Assembly scrutiny. The committee should determine whether particular sections of a Bill are controversial, or make significant changes to the existing law such as to require scrutiny by the full Assembly, while others are suitable for scrutiny by an appropriate committee.
- 16.7 Recommendation 7: Assembly Members should be able to call for a debate on the committee's report.
- 16.8 Recommendation 8: Codes should not be formally distinct from Acts of the Assembly. An Act of the Assembly should be identified as a code by a section of that Act and its short title.
- 16.9 Recommendation 9: Codes should be preserved by a rule that, where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code.

- 16.10 Recommendation 10: A procedure should be established by the Assembly for considering whether to allow any piece of legislation to pass through the Assembly which does not comply with the requirement to legislate within the code.
- 16.11 Recommendation 11: The standing orders of the National Assembly should enable the Presiding Officer to put forward a motion that a Bill (in whole or part) falls within the subject area of a code and should be treated as such.
- 16.12 Recommendation 12: When secondary legislation is amended, the updated text of the statutory instrument should then be laid before the National Assembly, rather than an amending statutory instrument.
- 16.13 Recommendation 13: The resolution of the National Assembly should be limited by standing order to the changed text only.
- 16.14 Recommendation 14: The Welsh Government should institute regular programmes of codification.
- 16.15 Recommendation 15: The Counsel General should be obliged to present a codification programme, and report to the National Assembly on the progress of the programme at regular intervals.
- 16.16 Recommendation 16: We recommend that a Code Office should be set up to manage the process of codification and consolidation and maintain codes. The Code Office should be distinct from the existing Office of the Legislative Counsel.
- 16.17 Recommendation 17: We recommend that the Code Office functions should include the following:
- (1) approval or oversight of the exercise of technical maintenance of the codes;
 - (2) periodic technical reviews; and
 - (3) managing the process of identifying more substantive defects in codes and drafting amendments to correct them.
- 16.18 Recommendation 18: We recommend that the Code Office should be accountable to the Counsel General and led by First Legislative Counsel.
- 16.19 Recommendation 19: We recommend that the Counsel General be responsible for publishing a set of legislative standards.
- 16.20 Recommendation 20: We recommend that, insofar as the standards relate to the design and content of legislation, they be reviewed by the National Assembly and, if accepted, adopted by resolution.
- 16.21 Recommendation 21: We recommend that the National Assembly establish a regular structure for:
- (1) pre-legislative scrutiny of Bills, including their impact on the accessibility of the statute book; and

- (2) post-legislative scrutiny of Bills, including their impact on the accessibility of the statute book.
- 16.22 Recommendation 22: We recommend that standing orders should require that the Explanatory Memorandum to a Bill disclose and justify any departure from legislative standards.
- 16.23 Recommendation 23: We recommend that standards for the content of explanatory notes be included in legislative standards.
- 16.24 Recommendation 24: The Welsh Government should be formally recognised as being responsible for standardisation of Welsh language legal terminology. An independent multidisciplinary panel should be established to advise the Welsh Government on Welsh language legal terminology.
- 16.25 Recommendation 25: We recommend that the Welsh Government and the National Assembly consider, and keep under review, the practical benefits of introducing an Interpretation Act of the Assembly.
- 16.26 Recommendation 26: The Welsh and English language versions of legislation should be capable of being viewed side by side on legislation.gov.uk.
- 16.27 Recommendation 27: Online versions of legislation should identify the territorial applicability of the legislation.
- 16.28 Recommendation 28: We recommend that explanatory notes should be linked on legislation.gov.uk to the sections to which they relate.
- 16.29 Recommendation 29: The Welsh Government should work with the National Archives to continue to develop *Cyfraith Cymru/Law Wales* into a portal through which citizens can access legislation applying in Wales.
- 16.30 Recommendation 30: The Welsh Government should work with the National Archives to make legislation available online by subject matter.
- 16.31 Recommendation 31: The Welsh Government and the National Assembly should develop access through *Cyfraith Cymru/Law Wales* so that citizens can find all of the law relating to a particular code in one place, including primary and secondary legislation, statutory and non-statutory guidance and other sources as appropriate.
- 16.32 Recommendation 32: Official guidance, including statutory guidance, should be available from the *Cyfraith Cymru/Law Wales* website.

(Signed) DAVID BEAN, *Chairman*
NICK HOPKINS
STEPHEN LEWIS
DAVID ORMEROD
NICHOLAS PAINES

PHIL GOLDING, *Chief Executive*
15 June 2016

