Form and Accessibility of the Law Applicable in Wales
A Consultation Paper
Law Commission
Consultation Paper No 223

FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES

A Consultation Paper
THE LAW COMMISSION – HOW WE CONSULT

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

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

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

Availability of materials: This consultation paper is available on our website in English and in Welsh at http://www.lawcom.gov.uk.

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

How to respond

Please send your responses either:

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

By post to: Sarah Young, Law Commission, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne’s Gate, London SW1H 9AG  
Tel: 020 3334 3953

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

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

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# THE LAW COMMISSION

## FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES

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PART 1
THE CURRENT POSITION

CHAPTER 1
INTRODUCTION AND OVERVIEW

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

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

… The second vital consideration – one particular to Wales – is language and bilingualism. As legislation has to be bilingual, it is important that bilingualism enhances access to justice by drafting that produces texts that read fluently in each language and are not merely a translation from one to the other.¹

1.1 In Wales, as in England, it is becoming increasingly difficult to find out what the law is. This is caused in part by the sheer volume of primary and secondary legislation and the frequency with which it is amended. Another major cause of inaccessibility is the form in which legislation is presented. In Wales, however, these difficulties are compounded by factors resulting from the incremental development of devolution. For example, functions under a large number of Acts of Parliament have been transferred to the Welsh Ministers, but this is not apparent on the face of the Acts of Parliament in question. Moreover, further complexity is introduced by the rapidly increasing divergence of the law applicable in Wales from that applicable in England, an inevitable consequence of devolution. The public do not have access, free of charge, to an up to date version of the legislation applying in Wales.

1.2 Lawmaking in Wales is, nevertheless, still in its infancy. This project therefore provides a timely opportunity to consider ways in which the present difficulties in gaining access to the law may be remedied before the situation becomes even more complex. Moreover, the National Assembly and the Welsh Government enjoy the distinct advantage that they are not fettered by traditional approaches

to legislation. As a result, it is to be hoped that the National Assembly and the Welsh Government may be more willing to employ a radical approach to making the law more accessible to its citizens.

BACKGROUND TO THE PROJECT

1.3 The Government of Wales Act 1998 established the National Assembly for Wales (‘the National Assembly’). Executive powers, including powers to make subordinate legislation by statutory instrument in eighteen defined “fields”, were transferred to the new Assembly, but no primary legislative powers were transferred. Since then two further systems of devolution under the Government of Wales Act 2006 have followed in rapid succession.

1.4 The Government of Wales Act 2006 formally separated the executive and the legislature and created the Welsh Assembly Government and the Welsh Ministers. Many of the executive powers and duties of the Assembly, including powers to make subordinate legislation, were transferred to the Welsh Ministers. The Assembly was given power for the first time to enact primary legislation in the form of Assembly Measures. Assembly Measures could be made where legislative competence was granted in relation to a defined “matter” within a particular “field”, by an enactment of the Westminster Parliament or by an Order in Council known as a legislative competence order. The National Assembly enacted some 22 Measures between 2008 and 2011.

1.5 In 2011, following a referendum, a new devolution settlement came into force, under Part 4 of the Government of Wales Act 2006. Part 4 confers vastly increased legislative powers on the National Assembly on a conferred powers basis; the Assembly now has power to legislate in relation to a range of subjects listed in Schedule 7 to the Act.

1.6 The position remains dynamic. The Wales Act 2014 conferred tax-raising powers on the National Assembly and formally renamed the Welsh Assembly Government “the Welsh Government”. In the command paper Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales further devolution is now proposed, this time on a reserved powers basis.

1.7 The powers of the National Assembly and the Welsh Government derive from the United Kingdom Parliament. Wales remains part of the single jurisdiction of England and Wales. Neither the 1999 Act nor the 2006 Act, nor the further

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5 A complete list of Measures as passed by the National Assembly may be found at: www.legislation.gov.uk.
6 Electoral Commission, Report on the referendum on the lawmaking powers of the National Assembly for Wales (June 2011). The referendum was held on 3 March 2011. On a low turnout of 35.63 per cent, 63.49 per cent voted yes.
7 Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020. A “reserved powers” basis means that lawmaking power is transferred to the National Assembly in all areas other than listed areas in which lawmaking power is reserved to the United Kingdom Parliament.
proposals announced in February 2015 change the structure of the jurisdiction.

1.8 Wales shares a system of courts and tribunals with England and these are administered by Her Majesty’s Courts and Tribunals Service, part of the Ministry of Justice. There are nine Crown Courts, 19 County Courts and 23 magistrates’ courts in Wales. All divisions of the High Court sit in Wales, including specialist courts, as do both Divisions of the Court of Appeal. An application to the Administrative Court for judicial review, for example, can be filed, processed and heard in Wales, and the Court is able to sit anywhere in Wales as required. In addition, there are now several Welsh tribunals with responsibilities falling within devolved fields. The Welsh Government is in the process of transferring responsibility for the administration of the Welsh tribunals from their sponsoring departments to the Administrative Justice Unit within the Welsh Government.

1.9 The National Assembly and Government have already created a substantial body of primary and secondary legislation, resulting in a divergence of the law applicable in England and that applicable in Wales in a number of important areas. Significant changes have been made in areas such as education, planning, social services, housing and local government. We will consider the current state of these among other areas of the law in more detail in chapter 5. For current purposes, it is enough to note that further divergence is inevitable.

1.10 As a result of these changes, Wales is developing a distinct legal personality. It has become meaningful to speak of Welsh law as a living system of law for the first time since the Act of Union in the mid-sixteenth century.

1.11 The Welsh Government is well aware of the problems of accessing the law applicable in Wales.8 This project was proposed by the Welsh Government’s Office of Legislative Counsel as well as the Welsh Advisory Committee of the Law Commission in response to our public consultation on the projects to be included in our Twelfth Programme of Law Reform. The Welsh Advisory Committee was established in 2013 to advise the Law Commission on the exercise of its statutory functions in relation to Wales, to help it identify the law reform needs of Wales within both the devolved and non-devolved areas and to identify and take into account specific Welsh issues in all of its law reform projects.

1.12 The project is part of the Law Commission’s Twelfth Programme of Law Reform. In our Twelfth Programme we have two projects exclusively reviewing the law applicable in Wales, the other concerning planning law and the development management system in Wales.

Scope of the project

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

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8 See, for example, National Assembly for Wales Record of Proceedings, 4 October 2011, Counsel General for Wales’ statement on access to laws and developing a Welsh statute book at pp 37 to 38.
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.

Pre-consultation meetings

1.14 In the months leading up to the publication of this paper, we have had many useful and informative meetings with stakeholders both within the public sector and outside it. We have met with members of the Office of Legislative Counsel and officials from a range of directorates within the Welsh Government on a regular basis. We have also met National Assembly officials, members of the judiciary in Wales, legal practitioners and people working within the courts system, academic lawyers and other stakeholders.

1.15 We have also had the benefit of comments and assistance on earlier drafts of this paper for which we are very grateful.

IMPORTANCE OF ACCESS TO THE LAW

1.16 This part of this chapter discusses the importance of accessible law and what is required to make law accessible. It then described the main problems surrounding access to the law in Wales.

Introduction

1.17 It is fundamental to the rule of the law that we are all able to discover and understand the law under which we live. We are bound by the law, whether we know what it is or not, as “ignorance of the law does not excuse”. This is vitally important – the law can have an enormous impact on us. It can authorise severe limits on our lives and liberty by fining us, sending us to prison or imposing other obligations on us. The law also provides us with rights, which would be useless if we can neither find out what they are nor understand them. The law also provides us with methods by which we can hold our government and public bodies to account. It is therefore crucial that as citizens we are provided with an adequate opportunity to access the law. As Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales has observed:

> Good legislation is part of the fabric of democracy and the rule of law. It must be easy for citizens to identify their rights and obligations, and practical to operate in the event of having to launch or defend a challenge.

The rule of law

1.18 The rule of law is a constitutional principle of the United Kingdom, which has continued to develop ever since the first limitations on the arbitrary rule of the

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9 See, for example, Lord Bingham, *The Rule of Law* (1st ed 2010) pp 37 to 47.
10 *R v Chambers* [2008] EWCA Crim 2467 at [64] by Toulson LJ.
monarchy were introduced in the Magna Carta in 1215.  

1.19 At its most basic, the rule of law means that the government must act in accordance with the law and the law must apply equally to all. This, as Dicey observed, prevents the arbitrary exercise of power. Furthermore, “equality before the law” prescribes that no “officials or others” are exempt from the “duty of obedience to the law which governs other citizens.”

1.20 To be meaningful, the rule of law also depends on the form and nature of the law itself. Indeed, our modern understanding of the concept includes the requirement that the law must be accessible. The first principle identified by Lord Bingham in his book *The Rule of Law*, was that the law must be “accessible, and, so far as possible, intelligible, clear and predictable.” He considered that there were three reasons why the rule of law requires the law to be accessible.

1.21 First, the criminal law may impose sanctions, such as financial penalties or imprisonment, and the individuals that may be subject to these sanctions should be capable of finding out how to avoid them. The law will also be ineffective in deterring criminal conduct if the law is not capable of being known. Secondly, civil law may also impose obligations that limit the liberty of individuals, albeit to a lesser extent than imprisonment. Furthermore, civil law may also provide individuals with rights that become worthless if individuals are not capable of knowing their entitlements. Thirdly, accessible laws are crucial for commercial certainty. As Lord Bingham observes:

> 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.

1.22 Accessibility of the law promotes one of the main purposes of the rule of law that underlies Dicey’s conception and modern interpretations, namely that the dignity of citizens should be respected. Joseph Raz has suggested that “respecting human dignity entails treating humans as persons capable of planning and plotting their future.” If citizens are not able to find out what the law is, they are not in a significantly better position to plan their future than if they were subject to the arbitrary exercise of governmental power. In order to exercise their autonomy, citizens must be capable of knowing what they are required to do, entitled to do, may do and must not do.

**Accessibility and the rule of law in the common law**

1.23 The centrality of accessibility to the rule of law has been acknowledged by the

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12 The Constitutional Reform Act 2005 s 1 cites “the existing constitutional principle of the rule of law” without defining what that means. For a recent detailed examination of the Magna Carta, see A Arlidge and I Judge, *Magna Carta Uncovered* (1st ed 2014). Chapter 14 discusses the provisions made for Scotland and Wales in clauses 56 to 58.


common law as a constitutional principle within the United Kingdom, perhaps most explicitly by the House of Lords in *Black-Clawson International Ltd. v Papierwerke Waldof-Aschaffenburg AG*. In the words of Lord Diplock:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.

1.24 The European Court of Human Rights has also emphasised the principle. In the *Sunday Times* case in 1979 it observed:

> The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. … [A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

1.25 The Court of Appeal has understood the precedent established by the *Sunday Times* case to mean that national laws will not be recognised by the European Court of Human Rights to be law unless they are adequately accessible. The *Sunday Times* case was concerned with determining the meaning of the phrase “prescribed by law”. In essence the case provides two conditions of accessibility that must be satisfied before a purported law can be recognised as legitimate. First, the citizen must be informed of what the law is. Citizens must have an opportunity to find out what the law is, and this means that laws must be made publicly available. Secondly, the ability to know the law further requires that the law is clear enough to enable citizens to understand how the law applies to

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18 *Black-Clawson International Ltd. v Papierwerke Waldof-Aschaffenburg AG* [1975] AC 591 at [638].


20 *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74) at [49].


22 In *Groppera Radio AG and Others v Switzerland* (1990) 12 EHRR 321 (App No 10890/84) at [68], it was sufficient for the government to inform citizens of where they would be able to consult or obtain the relevant regulations rather than to make them available to the public directly. However, the court stressed that this was a “highly technical and complex” area of the law, and the regulations were primarily “intended for specialists”. Nonetheless, if the regulations had not been available to the public at all, it is arguable that they would have failed to meet the conditions set out in the *Sunday Times* case.
1.26 In addition, the principle of legal certainty in European Union law demands that:

In areas covered by Community law ... the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.\(^{24}\)

1.27 The Court of Justice of the European Union echoes the standard of accessibility set by the European Court of Human Rights, and requires an even closer adherence to the rule of law. Not only must the wording of legal rules be unequivocal, and provide persons with a clear and precise understanding of their rights, but the legislation must be available to the citizens concerned.\(^{25}\) Legal certainty is a "pillar of the law of the European Union", as the Court of Appeal has also acknowledged in a case concerning a non-promulgation of legislation.\(^{26}\) Consequently, ensuring access to the law is not simply a laudable ideal but a legal obligation enshrined in domestic and European law.

**Defining “accessibility”**

1.28 The New Zealand Law Commission has suggested that accessibility of law has at least three components: availability, navigability and clarity. First, availability of the law means that the law needs to be promulgated so that those affected by the law can actually view it. Secondly, navigability is defined as ensuring users are able to “find the relevant law without unnecessary difficulty”. If the law on a particular subject is scattered through different legislation, this can render it unnecessarily difficult for a user to navigate. These two notions of accessibility reflect the European Court of Human Rights' first Sunday Times condition. Citizens must be capable of working out which legal rules apply to them. Thirdly, clarity requires that the law is not expressed in an "unnecessarily complicated or obscure way".\(^{27}\) This echoes the second condition of the European Court of Human Rights, that a law must be formulated with sufficient precision to enable a citizen to understand it, and the requirements of the European Union law principle of legal certainty, that citizens must be given a "clear and precise" understanding of the law.\(^{28}\)

\(^{23}\) *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74) at [49]. For a recent example of this principle being applied by the Court of Appeal, see *R (Richards) v Teeside Magistrates’ Court* [2015] EWCA Civ 7, [2015] 1 WLR 1695 at [41].

\(^{24}\) Case 257/86 *Commission of the European Communities v Italian Republic* [1988] ECR 3249.


\(^{26}\) *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230.

\(^{27}\) New Zealand Law Commission and the Office for Parliamentary Counsel, *Presentation of New Zealand Statute Law* NZLC IP2, p 10.

What comprises statute law in the United Kingdom?

1.29 In the United Kingdom statute law is composed of primary and secondary legislation. Primary legislation is written law enacted by the legislature. Secondary legislation, often referred to as statutory instruments, is written law generally made by Government ministers under powers that are delegated by the legislature. There are different procedures for primary and secondary legislation. An important difference between the procedures is that secondary legislation is subject to less scrutiny in its preparation than primary legislation.  

Who reads the law?

1.30 The public at large requires access to the law. The needs of different types of audience will vary.

1.31 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. It is also noteworthy that 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”.

1.32 Members of the public should be able to access legislation as a matter of principle. The number of members of the public accessing legislation online is significant and continually increasing. According to the Office for Parliamentary Counsel’s Good Law Project Report, the United Kingdom’s online legislation service (legislation.gov.uk) has over 2 million individual visitors a month. The National Archives regularly conduct research seeking to identify the categories of users of legislation.gov.uk. 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.

1.33 The National Archives also observe from this research that the majority (approximately 60%) of people accessing legislation are doing so for professional reasons. For example, electoral administrators at local authorities need to consult a vast array of complex primary and secondary legislation in order to understand what their responsibilities are in conducting an election. Entrepreneurs founding “start-up” businesses will also need to be able to find out

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29 See chapter 3, on legislative processes.
30 Office of the Parliamentary Counsel, When laws become too complex (March 2013).
31 National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015).
32 They may be well advised, of course, to obtain legal advice on the precise effect of legislation that could have important consequences for them.
33 Office of the Parliamentary Counsel, When laws become too complex (March 2013).
34 National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015).
35 National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015); Office of the Parliamentary Counsel, What works best for the reader? (July 2014).
how, for example, company or employment law will affect them. People working in the voluntary sector, such as legal advisors at legal advice centres, also need to access legislation to fulfil their roles. Social workers employed by local authorities need to access legislation on social services.

1.34 The National Archives' research also demonstrates the extent to which people may need access to legislation for personal reasons. For example, litigants-in-person representing themselves in a court or tribunal, such as a landlord or tenant in a tenancy dispute, will need to find out how the law governs their agreement. Even if people are not in a legal dispute, they may also need to know what the law is. It is particularly important that legislation is accessible to non-legally qualified persons due to the relatively high cost of legal advice and the limited availability of legal aid. Legislation needs to be accessible to the non-legally qualified public, as well as legal professionals.

The difficulties involved in making the law accessible in the United Kingdom

1.35 Every person is subject to the law, regardless of their knowledge of the law. However, as Lord Justice Toulson stated in *R v Chambers*, the maxim that “ignorance of the law is not an excuse” “is profoundly unsatisfactory if the law itself is not practically accessible.” In that case, the prosecution relied on the wrong regulations to prosecute an alleged excise offence. Those regulations had been superseded by different regulations that had been in force for over five years prior to the hearing, but the public online legal database that the prosecution had used was not up to date. It was only by a “fortunate accident” that this mistake was discovered the night before judgment was delivered. The Court of Appeal expressed warranted concern at the lack of accessibility of the statute book. Lord Justice Toulson identified four reasons why the statute book was not practically accessible, even to the courts.

1.36 First, legislation is voluminous. The exact number of pieces of primary and secondary legislation in force today in the United Kingdom is not known. However, 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.

1.37 The second reason the judge identified for the inaccessibility of the law in the United Kingdom was that on many subjects the legislation cannot be found in one place, but in a “patchwork of primary and secondary legislation”. This can be difficult for citizens to navigate, and can impede understanding of what rights and obligations apply to whom in which circumstances. For example, in *Thoburn v Sunderland City Council*, Lord Justice Laws noted critically the fact that criminal offences had been established by a “maze” of cross-references between pieces

36 *R v Chambers* [2008] EWCA Crim 2467 at [64].
37 For a strong rebuttal of the maxim that ignorance of the law is no excuse, see A Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 Modern Law Review 1.
of secondary legislation, making it necessary to engage in a “paper chase” through various different regulations.40

1.38 Thirdly, Lord Justice Toulson observed that the majority of legislation is secondary legislation, much of which is likely to contain provisions that amend other pieces of legislation. Amending legislation without consolidating it is a common and troubling practice which can make the law hard for even experts to understand.41 Equally, legislation may be inaccessible because its language, style and structure are not easily understandable or navigable by users. Consequently, providing an accessible statute book is a considerable challenge.

1.39 An Act of Parliament takes legal effect “irrespective of publication”, usually at the point of Royal Assent.42 This means a statute’s force is not dependent on the knowledge of those subjected to it.43 In the case which reiterated this principle, ZL and VL v Secretary of State for Home Department and Lord Chancellor’s Department, the applicants had been subject to the immigration appeals regime under the Nationality, Immigration and Asylum Act 2002 after it had come into force, but before it was published. On the facts of the particular case, the applicants had not been adversely affected by the change in procedure introduced by the 2002 Act, but the Court noted that unfairness would have otherwise resulted from its provisions being applied before it was made available to the public.44 Given that legislation has legal effect regardless of whether or not it is published, in order to uphold the rule of law it is necessary to ensure that statute law is available to the citizens to whom it applies, at least by the time it comes into force and preferably well before.

1.40 The fourth reason identified by Lord Justice Toulson is the lack of a comprehensive, up to date statute law database. Ensuring that the law is available does indeed require such a statute law database and, as Lord Justice Toulson observed, accessibility is significantly improved by making legislation available according to its subject matter.45

**Access to the law applicable in Wales**

1.41 In addition to these United Kingdom-wide problems, there are also particular issues hindering effective access to the law applicable in Wales. As the All Wales Convention Report observed:

41 See chapter 7.
43 Equally, subordinate legislation comes into force on a specified date, usually stated in the legislation, and this is not contingent on it being published.
45 We discuss these issues in further detail in chapter 6.
The challenge of devolution for law and the legal profession in Wales is being met, but the rule of law and access to that law is crucial to democracy. This requires greater clarity, access for the citizen to an accurate record of the body of Welsh law, and the development of the capacity, education, and training required to take advantage of new opportunities. This is a necessary response to the changing requirements in Wales. 46

1.42 Similarly, the recent Silk Commission report has recognised that:

It is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. 47

Territorial application and extent

1.43 There is an important difference between a piece of legislation “extending” to a territory and its “applying” to that territory.

1.44 The Government of Wales Act 2006 makes provision for the extent and application of Acts of the National Assembly within the jurisdiction of England and Wales. The combined effect of section 108(3), (4)(b) and (6)(b) is that Acts of the Assembly extend to England and Wales but only apply “in relation to Wales”.

1.45 Distinguishing in this way between the extent and the application of Acts of the National Assembly has the effect that they are a part of the law of England and Wales but they have effect only in relation to Wales. Thus, for example, the Education (Wales) Act 2015 is part of the law of England and Wales but only affects education in Wales. 48

1.46 Professor Watkin explains the matter in the following way:


47 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (2014) at para 10.3.45.

48 The notion of a piece of legislation applying “in relation to Wales” is not synonymous with that of the legislation applying “in Wales”. To take a hypothetical example, a statutory scheme of free school transport for pupils living within a given radius of a school in Wales could relate to Wales even where pupils to which the scheme applied live in England. For brevity we sometimes refer in this paper to legislation applying “in” or “to” Wales, but this is only shorthand.
The laws made by the National Assembly extend to England and Wales, even though they can apply only in relation to Wales. This technical distinction between extent and applicability reinforces the jurisdictional integrity of the two nations, although the reality is that there are now some laws of England and Wales that only apply in England and some that only apply in Wales, although some – the majority – continue to apply in both countries. What the common extent of the three kinds entails is that they can all be enforced and interpreted by courts in either country.49

Changes in the devolution settlement

1.47 The succession of different devolution settlements in Wales has introduced further complexity. We discuss the history of devolution in chapter 2. For example, it can be difficult to work out where secondary legislation-making power resides. This is because secondary legislation-making power has moved, in different phases of devolution, from the Secretary of State to the National Assembly for Wales and then to the Welsh Ministers. Much primary legislation still states that it confers legislative powers on the “Secretary of State”, whereas these powers are now vested in the Welsh Ministers. The transfer of such powers is not always evident on the face of the legislation.

1.48 One example is provided by section 45 of the Wildlife and Countryside Act 1982 which relates to Nature Conservation, Countryside and National Parks.50 “Environment” is a devolved subject under Schedule 7 to the 2006 Act and therefore within the National Assembly’s legislative competence. Section 45 reads:

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

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

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

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


50 This example was suggested to us by Keith Bush QC.
(a) Section 7(5) and (6) of that Act (consultation and publicity in connection with orders under section 5 or 7) shall apply to an order under this section as they apply to an order under section 7(4) of that Act with the substitution for the reference in section 7(5) to the Welsh Ministers of a reference to the Natural Resources Body for Wales… (emphasis added).

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

(1) Establish that the section applies to Wales. The reader may infer that the Act relates to Wales due to the fact that it is contained in an England and Wales statute and the Act has a number of specific references to Wales within it. There is no clear provision that defines how the Act applies to Wales.

(2) Discover section 41A, which is not referred to in section 45, and which states:

In relation to land in Wales, sections 42 to 45 (which relate to Natural Parks) have effect as if references to Natural England were references to the Natural Resources Body for Wales.51

(3) Discover that the Secretary of State’s functions under section 45 were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999.

(4) Discover that the Government of Wales Act 2006 Schedule 11 paragraph 30 transferred all executive functions, including those under section 45, from the Assembly to the Welsh Ministers.

Westminster statutes

1.51 Further complications arise from the fact that Westminster statutes may now be amended both by the United Kingdom Parliament and the National Assembly.

1.52 For an individual in Wales to understand what the law is in a devolved area it is often necessary to read devolved Welsh legislation together with legislation in areas that are not devolved. Furthermore, the legislation that governs a devolved area may be a mixture of National Assembly and Westminster legislation. For example, in relation to the devolved area of local government, the Local Government Act 1972 and Localism Act 2011 still govern aspects of local government law which are now within the legislative competence of the Welsh Assembly.

1.53 A further consequence of this is that the United Kingdom Parliament and the National Assembly may be simultaneously amending the same provisions of an Act of Parliament. This makes comprehending what the law is in Wales

51 Wildlife and Countryside Act 1981, s 41A. It is worth noting too that as it is displayed on Legislation.gov.uk, section 41A has not been brought up to date and refers to the defunct Countryside Council for Wales which was replaced by the Natural Resources Body for Wales.
particularly difficult, due to the divergent sources of legislation, the lack of a clear or coherent presentational structure and the infrequency of consolidation. Furthermore, there is currently no free, up to date online database containing all of the legislation applicable to Wales, in Welsh and English.

Divergence of the law in Wales and in England

1.54 The law in Wales and England has been diverging at an increasing rate since the Government of Wales Act 2006. This is attributable both to the Westminster Parliament changing the law within England and to the National Assembly passing new legislation for Wales.

1.55 The law relating to children illustrates the complexity this can cause. The Children Act 1989 contains the majority of public and private law relating to children. Part III of the Act makes provisions for children who are in need, placing a duty on local authorities to “safeguard and promote the welfare of children within their area who are in need”. Originally it applied to England and Wales subject to regulations made in respect of Wales. However, the Social Services and Well-being (Wales) Act 2014 repealed Part III in so far as it applies in Wales. Part IV and V of the 1998 Act, whose subject matter is not devolved, remain in force in Wales. The 2014 Act uses the term “well-being”, defined in section 2 of that Act by reference to a list of relevant factors, one of which is “welfare” as “interpreted for the purposes of the Children Act 1989”. As a result anyone attempting to access the relevant law applicable in Wales will first, have to be aware of these changes and secondly, be able to navigate effectively back and forth between two large pieces of legislation.

1.56 As the laws of England and those of Wales diverge further, there will be an increasing need to inform legal practitioners and the public of how these changes affect the law as it applies to them.

Lack of textbook coverage and legal education

1.57 It can be difficult for even legally trained readers to work out what law applies in Wales. There is currently a lack of textbooks that consider the law as it applies to Wales only, although some do exist. The lack of availability of textbooks that address the law in Wales is a significant problem. For example, regulations applying to England only have been wrongly cited in Welsh litigation where regulations applying only to Wales should have been cited instead.

1.58 The situation is exacerbated by the fact that there are only a limited number of textbooks that explain the devolution settlement in detail. Professor Thomas Glyn

52 Children Act 1989, s 17(1)(a). “Need” is defined in s 17(10).
53 Example by Professor John Williams.
54 Notable examples include L Clements, Community Care and the Law (5th ed 2011), although the comprehensive explanation of the law in Wales will not be revised in the next edition; J Luba QC, L Davies and C Johnston, Housing Allocation and Homelessness (4th ed 2015).
55 A series of textbooks on aspects of Welsh law is in the process of being prepared. We discuss this further in chapter 6.
56 These points were made to us in pre-consultation at the Legal Wales conference in Bangor in October 2014.
Watkin has lamented the lack of comprehensive material, noting that in one particular public law text of 870 pages published in 2013, only half a page referred to Wales. Professor Watkin has observed that there are often “mistakes littered throughout the texts” that do explain the settlement, such as interchangeably using “fields” and “matters” in discussions of the Government of Wales Act 2006. Professor Watkin has also criticised the lack of teaching of devolution in law schools across the United Kingdom, which in his view is reflected in the apparent antipathy towards devolution in textbooks:

The narrow approach has also affected the way in which some textbook writers on public law have responded to the challenge of devolution.

The importance of ensuring that legal education and legal training teach devolution effectively cannot be overstated. The further changes in the Welsh devolution settlement that are likely to follow the Silk Commission’s reports only heighten the urgent need for more comprehensive coverage in textbooks.

It is important to stress that it is not simply people living in Wales who need access to the law applicable in Wales. Lawyers who have professional practices based outside Wales may appear before courts in Wales or may have to advise on the law applicable in Wales. Businesses may operate both in England and in Wales. Social workers may need to assess families living on either side of the border. Professionals may be aware that the law differs on either side of the border, but unaware of the extent or nature of the differences.

THE COST OF ACCESSIBILITY

Our research and pre-consultation meetings with stakeholders in Wales suggest that there is a real demand for improvements in the accessibility of law in Wales. The Welsh Government will only be able to make changes which are cost-effective, so we need to think carefully about the costs and benefits of proposed reform as measured against the cost of current arrangements.

In order for the Welsh Government to be able to make reasoned judgements about whether it is justifiable to spend public funds on any consolidation, codification or other work to make the law more accessible, the Government will need to know what the economic impact of those changes that can be monetised are likely to be.

Our final report will provide recommendations for reform and will be accompanied by an impact assessment. Impact assessments place a strong emphasis on valuing costs and benefits in monetary terms. However, there are important aspects of the present law, and of proposals for reform, that cannot sensibly be monetised. These include impacts on fairness, public confidence, and the benefits that could result from no longer having to battle against inaccessibility.

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57 PowerPoint Presentation provided by Professor T G Watkin on “Accessibility of the law: The Distinct Requirements of Wales”.

1.64 To take an example, there is considerable demand for the consolidation of legislation and we discuss this in chapter 7. If the Welsh Government was to fund an exercise to consolidate an area of law, such a project would involve costs such as:

(1) legislative counsel’s time to research and draft the consolidation; this would be the largest area of expenditure;

(2) Government lawyers and other officials’ time to categorise the legislation and assist legislative counsel;

(3) Parliamentary time taken to consider the consolidated legislation;

(4) Government officials’ time in preparing guidance and informing the relevant industries and the public of the consolidated legislation and its effect (even if the effect was not to change the law); and

(5) time taken in the relevant industries to understand and apply any changes in the legislation (even if there are no substantive changes to the law), forms, notices or guidance might need to be changed to refer to the new legislation, and training might need to take place.

1.65 A consolidation project might take several years to complete, so that the costs would be spread out over a long time and any benefits would not start to accrue for several years.

1.66 Benefits might include:

(1) a reduction in the amount of time taken to look up relevant legislation for members of the public, Government lawyers, the National Assembly’s Research Service, lawyers in private practice, advisers and other professionals;

(2) a reduction in errors caused by members of the public not having access to the correct up to date legislation;

(3) a reduction in court costs as less time is taken in court where errors have been made as a result of inaccessibility, or less time is needed for lawyers and judges to find the correct law and possibly even less higher court time is needed where courts have made errors as a result of inaccessible legislation.

1.67 The costs would also have to be compared with any alternative options. As we discuss in chapter 7, consolidation may take place in a number of different ways and the costs and benefits of each procedure would need to be compared.

1.68 We are keen to ensure that the impact assessment for any recommendations we make is as helpful as possible to the Welsh Government in considering options for taking recommendations forward. An inadequate impact assessment can

\[59\] The Welsh Government publishes regulatory impact assessments for all primary legislation and most subordinate legislation.
create real difficulties in reaching decisions on which policy option to follow.\textsuperscript{60}

1.69 In order to achieve this, we ask consultees to assist us in estimating the likely costs and benefits of our proposals. We would welcome views on the costs in time and money the current state of the legislation is causing. Are there particular costs in one sector which are not incurred in another? We ask for consultees' views on whether the accessibility of the law in Wales adds to the expense of practicing or understanding law or otherwise doing business. We would particularly value consultees' practical experiences of having to work out what law applies in Wales, dealing with the complexities of the current situation and using the resources that are currently available.

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

1.71 We ask consultees to keep the question of costs and benefits in mind when reading this consultation paper.

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

**STRUCTURE OF THIS CONSULTATION PAPER**

**Part 1**

1.72 This paper is divided into three parts and 13 chapters. In Part 1, we set out the current position, the background, the current structures and processes and their impact. In this chapter we have aimed to provide an overview of the problems with the form and accessibility of the law in Wales, and to explain why the provision of accessible law is important.

1.73 In Chapter 2, we set out a brief account of Welsh legal history, and consider the development of devolution. We also outline the current status of proposals for further devolution in Wales. In Chapter 3, we describe the legislative process and explain how legislative scrutiny is undertaken in Wales. We also set out some law reform procedures which are used in the United Kingdom and other devolved  

\textsuperscript{60} Auditor General for Wales, Review of the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill (4 December 2014). The Auditor General criticised the impact assessment for numerous weaknesses, including lack of clarity and consistency in the way that cost data is presented; omission of explanations of the underlying assumptions or methods used to calculate some of the costs; different methods used to calculate the cost of staff time in carrying out various tasks; and failure to test assumptions and costs with individual public bodies affected by the Bill.
legislatures and ask if something similar might be appropriate in Wales. In Chapter 4 we look at the drafting of legislation in Wales and consider whether an Interpretation Act for Wales is needed. In Chapter 5, we provide brief case studies in education, social care, waste and the environment, town and country planning and local government, illustrating some of the issues we discuss in this paper.

Part 2

1.74 In the second part, we consider how the law-making structures might be improved and the law made more accessible. In Chapter 6 we discuss the need for a free and up-to-date online source of legislation in Wales, and consider how other materials, such as textbooks and guidance, could improve understanding of the law in Wales. Chapters 7 and 8 consider the need for consolidation and assess the benefits of codification for Wales. In Chapter 9, we consider how scrutiny of legislation could be improved through better control mechanisms in the legislature and government, and in particular, we examine the legislative committee approach adopted in New Zealand.

Part 3

1.75 In the final part of our consultation paper, we turn our attention to the Welsh language. In Chapter 10, we examine Welsh as a legal language. In Chapter 11, we consider Welsh legal terminology, the form of bilingual legislation and bilingual drafting. In Chapter 12, we consider how bilingual legislation is interpreted, drawing on the experiences of bilingual interpretation in jurisdictions such as Canada and Hong Kong.

1.76 Chapter 13 lists all the consultation questions in one place for ease of reference.

The consultation process

1.77 We have decided to refrain from making provisional proposals in this paper. Instead, we describe the background against which reforms would operate, and canvass possibilities. We hope to receive the views of a wide range of consultees within and outside Wales.

1.78 Our formal consultation period will last between 9 July and 9 October 2015. During this time we welcome written responses from all interested parties and will seek to meet as many stakeholders as we can to discuss these issues. Details of how to respond can be found on the inside front page of this consultation paper.

1.79 We aim to publish a final report in time for the Welsh Government to consider our recommendations before the National Assembly elections in May 2016. The report will be purely advisory, and will not contain a draft Bill.
CHAPTER 2
THE LEGAL HISTORY OF WALES

INTRODUCTION

2.1 The last two decades have seen major changes in the government of Wales and its constitutional status. In this chapter we provide a brief legal history of Wales and describe the incremental development of devolution that Wales has experienced.

A BRIEF LEGAL HISTORY

From Hywel Dda to the Acts of Union

2.2 The native laws of Wales were reduced to writing during the reign of Hywel Dda (Hywel the Good) who ruled over most of Wales in the tenth century. Hywel Dda ruled during the age of the native princes and his codification of the law is considered "among the most significant and cultural achievements of the Welsh". He compiled the laws and customs of the Kingdom into tractates. These native laws continued in force in many parts of Wales even after the Edwardian conquest.

2.3 Wales is made up of Principalities and largely preserved its distinct legal identity until 1284, when Edward I imposed the English system of government and administration of justice on the Principalities of north and south Wales. Edward I finally conquered Wales between 1277 and 1283, marking the end of Welsh independence, but the native Welsh laws continued to be used in many parts of Wales for some centuries afterwards.

2.4 The official union of England and Wales occurred in the reign of Henry VIII through the Act for Law and Justice to be Ministered in Wales in like Form as it is in the Realm of England of 1535/1536, commonly referred to as the Act of Union. The Act incorporated the Principality of Wales into the Kingdom of England. It aimed to “reduce” Welsh citizens to the “perfect order”, including imposing English as the official language in all courts and other official procedures.

2.5 A second Act of Union, the Act for Certain Ordinances in the King’s Dominion and Principality of Wales of 1542/1543, introduced a separate system of courts for

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5 Preamble of Act for Law and Justice to be Ministered in Wales in like Form as it is in the Realm of 1535/6. We will deal in more detail with the challenges the National Assembly faces as a bilingual legislature with a fierce commitment to its indigenous language in part 4 below.
Wales called the Courts of Great Sessions. These were modelled on the Sessions which had been held in the principalities of north and south Wales since their conquest and annexation by Edward I.

2.6 Historians have argued that the Acts of Union were “propaganda rather than reality”. Wales continued to have a unique system for administering justice until 1830 when the Courts of Great Sessions were abolished.

THE PHASES OF DEVOLUTION

2.7 The first Westminster statute to apply only to Wales was the Sunday Closing (Wales) Act 1881. This had a particular significance in that it recognized Wales as having a different culture from England. Passed at a time when as many as 80% of the people of Wales belonged to non-conformist Christian denominations, the Act prohibited public houses from opening on Sunday. The Church of England was later disestablished within Wales by the Welsh Church Act 1914.

2.8 Limited administrative devolution took place in the early years of the 20th century. In 1907 a Welsh department of the Board of Education was established, followed in 1912 by the Welsh Insurance Commissioners and in 1919 by the Welsh Board for Health (which commenced the exercise of its functions in 1921) and a Welsh department of the Ministry of Agriculture and Fisheries.

2.9 From 1886 until 1914, Cymru Fydd (“Young Wales”), a quasi-political organisation with connections to the Liberal Party, campaigned unsuccessfully for self-government for Wales. The failure of this campaign and of the concept of ‘Home rule all round’ considered in the aftermath of the First World War marked the end of any serious attempt at devolution until after the Second World War, although the Welsh administrative bodies accrued further functions over the period.

2.10 In 1951, a new post of Minister of State for Welsh Affairs was created, initially as a junior ministerial post in the Home Office and from 1957 as a post held jointly

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6 National Assembly for Wales Constitutional and Legislative Affairs Committee, Inquiry into a Separate Welsh Jurisdiction (2012).
8 T H Jones, “Wales Devolution and Sovereignty” (2012) 33(2) Statute Law Review 151 at 159. This view has been supported by T G Watkin, The Legal History of Wales (2nd ed 2012) and C G A Bryant, The Nations of Britain (1st ed 2006).
11 See further T G Watkin, The Legal History of Wales (2nd ed 2012) p 191. See the British National Insurance Act 1911, s 82; Ministry of Health Act 1919; Ministry of Agriculture and Fisheries Act 1919.
12 Papers relating to Cymru Fydd are held by the National Library of Wales and include diaries and letters of prominent activists of this time, including David Lloyd George’s diaries from this period.
with that of Minister of Housing and Local Government. In 1964 the position of Secretory of State for Wales was created and the Welsh Office was established. The Welsh Office was granted its own annual budget, and for the first time there was a member of the cabinet whose sole remit was to represent the interests of Wales.

2.11 From 1965, responsibility for housing, local government and roads was transferred to the Secretary of State for Wales. The Secretary of State became responsible for certain specific Ministerial functions under Acts of Parliament some of which were only exercisable jointly with other Ministers. Other areas of responsibility, such as education and training, health, trade and industry, and the environment and agriculture were gradually added over the years.

2.12 A Royal Commission on the Constitution was set up by the Labour Government in 1969 and reported in 1973: the Kilbrandon Commission. Although divided in its findings, the Commission recommended the development of legislative devolution for Wales. The Wales Act 1978 was enacted as a result. It set out the statutory basis for a new Welsh Assembly to come into force only if approved by a referendum. In 1979 a referendum was held asking the people of Wales whether they wanted the provisions of the 1978 Act to be put into effect. Nearly four out of five of the 58.8% of the electorate who voted rejected the proposal. Welsh devolution halted for almost 20 years.

2.13 In July 1997 the newly elected Labour Government published a White Paper A Voice for Wales, which set out proposals for a devolved administration in Wales. A referendum was held on 18 September 1997, asking voters whether they agreed with the proposition that there should be a Welsh Assembly. Of those eligible to vote, 50% turned out, of whom 50.3% answered “yes”. The Government of Wales Act 1998 was duly enacted, and began the process of legislative devolution which continues today.

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16 The Secretary of State for Wales and Minister of Land and Natural Resources Order 1965. Transfer of functions orders made under the Ministers of the Crown (Transfer of Functions) Act 1946 and the Ministers of the Crown Act 1964 transferred various powers to the Secretary of State for Wales.
17 The Secretary of State’s initial responsibilities were housing, local government and roads.
18 The Secretary of State for Wales and Minister of Land and Natural Resources Order 1965 and Transfer of Functions (Wales) Order 1969/388. See also Transfer of Functions (Wales) (No.1) Order 1978/272.
23 Research Service at the National Assembly for Wales, Key Events in the Development of the National Assembly for Wales, First Assembly 1999-2003.

2.14 The Government of Wales Act 1998 established the National Assembly for Wales (the National Assembly). The National Assembly was made up of 60 Assembly Members, 40 Members elected by Assembly constituencies, which were the same as the Westminster Parliamentary constituencies and 20 Members elected by electoral regions, which were the same as the then five European Parliament constituencies, each of which elected four Members. The Wales Office, the renamed United Kingdom Government department serving the Secretary of State for Wales, continued in existence to ensure the smooth working of the devolution settlement in Wales and to represent the United Kingdom Government in Wales as well as Welsh interests in Westminster.

2.15 The National Assembly had no power to pass or amend primary legislation or to raise taxes. It was designed as a single corporate body, with executive, legislative and scrutiny functions. It had executive powers to make and amend subordinate legislation in the fields for which it was granted responsibility. Schedule 2 to the 1998 Act listed eighteen fields in which functions were to be transferred by Order. This has been described as “executive devolution”.

2.16 The executive and scrutiny powers were exercised together by the National Assembly. Executive powers rested with certain Assembly Members appointed by the First Secretary. Appointed Assembly Members, known as Assembly Secretaries, each had responsibility for a particular remit such as education or health. The First Secretary and the Assembly Secretaries formed an executive committee which was accountable to the National Assembly. Subject committees were also set up to scrutinise executive functions in each field. This was similar to the existing practice in local government at the time.

2.17 The National Assembly for Wales (Transfer of Functions) Order 1999 was the first order made under the 1998 Act transferring functions of the Secretary of State for Wales to the National Assembly. It listed ministerial functions under numerous Acts of the United Kingdom Parliament which were transferred to the National Assembly or which might only be exercised either jointly with, or with the consent of the National Assembly. Further transfer of functions orders followed, creating a “jigsaw” or “kaleidoscope” of powers, which made the National Assembly: The fields listed in the Government of Wales Act 1998, sch 2 were: agriculture, forestry, fisheries and food; ancient monuments and historic buildings; culture (including museums, galleries and libraries); economic development; education and training; the environment; health and health services; highways; housing; industry; local government; social services; sport and recreation; tourism; town and country planning; transport; water and flood defence and the Welsh language.

28 J Williams, “Law making in a devolved Wales: work in progress” [2014] 14(04) Legal Information Management 266. The fields listed in the Government of Wales Act 1998, sch 2 were: agriculture, forestry, fisheries and food; ancient monuments and historic buildings; culture (including museums, galleries and libraries); economic development; education and training; the environment; health and health services; highways; housing; industry; local government; social services; sport and recreation; tourism; town and country planning; transport; water and flood defence and the Welsh language.
31 National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999 No 672, art 2 and sch 1.
Assembly’s remit particularly difficult to define. It has been noted that the 1998 Act itself provided “little clue as to what functions may be exercised by the Assembly”. The executive functions of the National Assembly could be identified only by scrutinising the primary legislation listed in the transfer of function orders, which proved to be a “time-consuming and complex task”.

2.18 There were clear, built-in constitutional constraints on the powers the National Assembly was able to exercise. The National Assembly took over existing powers of ministers to make subordinate legislation; this meant, as Professor Watkin explains, that the Assembly was

Dealing with how the policies of the Westminster government were to be carried into effect within Wales, but without the power to initiate major policy changes by enactment.

2.19 The combined executive and legislative functions caused tensions and the National Assembly soon created a de facto separation between the executive functions exercised by the committees defined in statute, and scrutiny functions to be exercised by the Assembly. The National Assembly delegated most of its executive powers to the First Minister.

2.20 In 2002, a Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (“the Richard Commission”) was established under the chairmanship of Lord Richard of Ammanford QC. The Richard Commission described the constitutional tension as follows:

Once the Assembly was in place … it became clear that Members wanted it to operate more like a parliament with a separation between government and opposition, so that it would be clear to the people of Wales who was responsible for decisions and policy implementation. Following its own cross-party review of procedures in 2001-02, the Assembly resolved unanimously to create a de facto separation between the “executive” (Welsh Assembly Government) and “parliamentary” arms of the Assembly – and to take this as far as possible within the constraints of the Government of Wales Act.

36 Government of Wales Act 1998, s 56 and s 57.
This tension between the original design of an executive body subordinate to the UK Parliament at Westminster, and the aspirations of a body with its own democratic mandate, was identified in debate during the passage of the Government of Wales Bill. One of the resulting modifications to the Bill that foreshadowed later developments was the introduction of an executive cabinet structure to exercise the devolved functions.\(^{38}\)

2.21 As the Rt Hon Dafydd Wigley MP commented:

> We should remember that the Assembly will be composed of only 60 persons. The Executive will therefore not be remote from its membership…\(^{39}\)

2.22 Commentary on the arrangements under the 1998 Act has been mixed.\(^{40}\) Some academics have noted how much real change was effected, given the limitations on executive power.

> When one considers the fact that, as has been emphasized, the law-making powers of the Assembly were limited under the 1998 Act, some of the developments that came about between 1999 and 2006 were quite remarkable.\(^{41}\)

2.23 The Richard Commission report recommended the reconstitution of the legislative assembly for Wales, based on a reserved powers model and giving primary lawmaking powers in devolved areas. The Commission also recommended the legal separation of the executive and the legislature with a view to enhancing the Assembly’s effectiveness.\(^{42}\)

2.24 In 2005 the United Kingdom Government published a White Paper entitled *Better Governance for Wales*. The White Paper recognised the tensions described above, and agreed with the findings of the Richard Commission that the system of subject committees had an adverse impact on the scrutiny of legislation:

> Ministers’ membership of subject committees had inhibited the exercise of an effective scrutiny function, and that a culture of scrutiny on parliamentary lines had failed to develop.\(^{43}\)

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\(^{39}\) *Hansard* (HC), 2 February 1998, col 748.


\(^{41}\) O Rees, “Devolution and Family Law in Wales: A Potential for Doing Things Differently?” (2012) 33(2) *Statute Law Review* 192 at 196. Rees noted, in particular, regulations reflecting policy difference between England and Wales, such as the Child Minding and Day Care (Wales) Regulations 2002, SI 2002 No 812, regs 10(5) and 24, which prohibited the use of corporal punishment in child minding and day care settings.

\(^{42}\) As explained in chapter 1, a “reserved powers” model means that lawmaking power is transferred to the National Assembly in all areas other than listed areas in which lawmaking power is reserved to the United Kingdom Parliament.

2.25 In the White Paper, the Government proposed an increase in the legislative powers of the National Assembly, but not the adoption of a reserved powers model. Legislation followed in the form of the Government of Wales Act 2006.  


2.26 The Government of Wales Act 2006 gave the National Assembly limited primary legislative powers. Part 4 of the 2006 Act, discussed below, contained provisions which, following a referendum, would give the National Assembly primary law-making powers in all devolved areas. However, between 2007 and 2011 the National Assembly operated under the system contained in Part 3 of the 2006 Act.

2.27 The 2006 Act formally separated the executive and the legislature, but did not increase the size of the National Assembly. The “Welsh Assembly Government” comprised the executive arm of government, and the Assembly the legislative arm.

2.28 The “Welsh Assembly Government” was set up under Part 2 of the Government of Wales Act. The Welsh Assembly Government was to consist of a First Minister, Welsh Ministers, a Counsel General and deputy Welsh Ministers. The First Minister selected Welsh Ministers from elected Assembly Members.

2.29 The model of devolution operating under the 2006 Act is described as a “conferred powers” model, under which all law-making power remains with the United Kingdom Parliament unless it is explicitly devolved to the National Assembly. Both the Scottish Parliament and the Northern Ireland Assembly operate under a “reserved powers” model, in which law-making power is devolved save to the extent that it is explicitly reserved to the United Kingdom Parliament. The conferred powers model has been the subject of considerable criticism, and there has been uncertainty about the extent of the National Assembly’s legislative competence. The United Kingdom Government has recently given a commitment to move Wales to a reserved powers model.

2.30 Part 3 of the Act gave the National Assembly power to pass primary legislation in the form of “Measures”. The 2006 Act listed 20 devolved “fields”. Measures could be passed on “matters”, in effect policy areas situated within the devolved “fields”. When the Government of Wales Act 2006 was originally enacted the only matters listed were within field 13: National Assembly for Wales. The National Assembly could only legislate on a matter if it was added to a field by Act of the UK Parliament or through a Legislative Competence Order (a form of Order in...
Council).\textsuperscript{51} For example, field 18 of schedule 5 is “town and country planning”. However the National Assembly could only pass measures within that field once section 202 of the Planning Act 2008 passed by the United Kingdom Parliament had added three matters to the field, and then only in relation to those matters.\textsuperscript{52}

2.31 Executive powers which had been granted to the National Assembly between 1999 and 2006 were transferred to the Welsh Ministers.\textsuperscript{53} The Welsh Ministers continued to be granted executive powers through Acts of the United Kingdom Parliament, Assembly legislation or transfer of functions orders.

2.32 The 2006 Act attracted criticism for vesting too much power in the executive:

The effect of the Act will be to create a very strong executive. This is partly because the Assembly will have a very limited initial role in legislating, as most of its existing functions, including its present role in making secondary legislation, will transfer to the Assembly Government.\textsuperscript{54}

2.33 Between 2008 and 2011 the National Assembly passed Measures on a variety of matters such as local government, education and the Welsh language. The National Assembly used its powers to create the office of Welsh Language Commissioner, the first official post with the principal aim of promoting and facilitating the use of the Welsh language.\textsuperscript{55}

2.34 The first Welsh Government elected after the 2006 Act came into force and established the All Wales Convention, a nationwide public consultation chaired by a former diplomat, Sir Emyr Jones Parry. The Convention was tasked with gauging public opinion with a view to preparing the ground for a referendum on full law-making powers for the National Assembly to be held at the time of or before the next Assembly election in 2011.\textsuperscript{56}

2.35 Commentary on the effectiveness of this period of devolution is mixed. T H Jones concluded:

\textsuperscript{51} Government of Wales Act 2006 Part 3. An Order in Council is used when an ordinary Statutory Instrument would be inappropriate, such as transferring responsibilities between government departments. Orders in Council are issued “by and with the advice of Her Majesty’s Privy Council” and have been used to transfer powers from UK Ministers to devolved legislatures.

\textsuperscript{52} An illustration of the complex and time-consuming processes for obtaining legislative competence orders and then passing legislation in the National Assembly may be found in the National Assembly ‘Members’ Research Service publication, \textit{A Quick Guide – Legislative Competence Orders MRS 07/0716} (2009).

\textsuperscript{53} Government of Wales Act 2006, sch 11.


\textsuperscript{55} Welsh Language (Wales) Measure 2011, s 2 and 3.

\textsuperscript{56} All Wales Convention Report (2009). The All Wales Convention reported that they held 23 public events attended by over 1,700 people, met each of the local authorities, contacted over 200 organisations, held 13 oral evidence sessions, as well as addressing a number of external conferences and events, ran a Wales-wide radio campaign and schools competition and used interactive website and Facebook pages. They received nearly 3,000 consultation responses.
The procedure was cumbersome, time and resource intensive, and put the National Assembly in a rather unfortunate position via-a-vis the Westminster Parliament.\(^{57}\)

2.36 The All Wales Convention concluded that transferring powers to the National Assembly under Part 4 of the 2006 Act offered “substantial advantages” over the previous arrangements and would be

…more efficient, permit a more strategic approach to the drafting of legislation, provide greater clarity and reflect the emerging maturity of the National Assembly for Wales.\(^{58}\)

2.37 The Convention concluded that a “yes” vote in a referendum on Part 4 would be possible. However, it also reported that many people had only a limited understanding of the devolution settlement.\(^{59}\)

2.38 A referendum was held on 3 March 2011, asking the electorate of Wales “Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?” 63.5 per cent of those who voted were in favour, although the turnout was only 35.6 per cent of the electorate.\(^{60}\) The third phase of devolution, in the form of Part 4 of the Government of Wales Act 2006, was brought into force and Part 3 consigned to history.


2.39 Part 4 of the 2006 Act gave the National Assembly power to make Acts of the Assembly in relation to a substantial number of devolved “subjects” listed under twenty headings in Part 1 of Schedule 7 to the Act.\(^{61}\)

2.40 Schedule 7 superseded schedule 5, providing a list of “subjects” on which the National Assembly had the power to legislate. Schedule 7 also lists exceptions to the areas of competence. For example, under subject 1 the National Assembly has competence to legislate on agriculture, horticulture, forestry, fisheries and fishing, animal health and welfare, plant health, plant varieties and seeds and rural development. However, the following are exceptions listed under the subject:


\(^{58}\) All Wales Convention Report (2009) para 6.2.2.


\(^{60}\) Electoral Commission, Report on the referendum on the law-making powers of the National Assembly for Wales (June 2011).

\(^{61}\) Government of Wales Act 2006, sch 7 lists the following headings for the subjects: agriculture, forestry, animals, plants and rural development; ancient monuments and historic buildings; culture; economic development; education and training; environment; fire services and fire safety; food; health and health services; highways and transport; housing; local government; National Assembly for Wales; public administration; social welfare; sport and recreation; tourism; town and country planning; water and flood defence; Welsh language. Inclusions and exceptions are listed under each heading and general exceptions are set out in sch 7 part 2.
(1) hunting with dogs;
(2) regulation of scientific or other experimental procedures on animals;
(3) import and export control, and regulation of movement, of animals, plants and other things, apart from, broadly speaking, where the movement is in and out of Wales; or
(4) authorisations of veterinary medicines and medicinal products.

2.41 The United Kingdom Parliament, as the sovereign legislature, reserves the right to legislate in areas where the National Assembly has competence and/or to repeal any Acts passed by the Assembly. Under the “Sewel Convention”, a United Kingdom Government policy, there is an understanding that the United Kingdom Parliament will not ordinarily legislate on a devolved matter without the prior consent of a devolved legislature.\(^{62}\) The “Sewel Convention”, named after its proponent Lord Sewel, concerns Scotland. Similarly, there is a convention in Wales that Parliament will not legislate on a devolved subject without a legislative consent motion being passed by the National Assembly.

2.42 Schedule 7 also sets out general restrictions on the National Assembly’s power. The National Assembly cannot, for example, make modifications to the Human Rights Act 1998 and. Acts of the Assembly must comply with both European Union law and the Convention rights set out in the Human Rights Act 1998.\(^{63}\)

**DECISIONS OF THE SUPREME COURT ON THE SCOPE OF THE DEVOLVED POWERS**

2.43 Under section 112 of the 2006 Act the Attorney General for England and Wales or the Counsel General for Wales can refer to the Supreme Court the question of whether an Assembly Act or Bill, or any provision in an Assembly Act or Bill, is within the National Assembly’s legislative competence. The National Assembly’s legislative competence is determined by section 108 of, and Schedule 7 to, the Act.

2.44 Assembly Acts and Bills are subject to review on the basis of the National Assembly’s legislative competence under the 2006 Act, but not on common law grounds such as irrationality or unreasonableness.\(^{64}\)

2.45 Daniel Greenberg has described the action of challenging legislative competence in the following terms:

\(^{62}\) Government Minister Lord Sewel proposed the convention during the debate on the Scotland Bill in 1998, *Hansard* (HL), 21 Jul 1998, vol 592, col 791. It was later enshrined in an agreement between the United Kingdom Government and devolved administrations contained in a Memorandum of Understanding and Supplementary Agreements, Cm 5240 (December 2001).

\(^{63}\) See Government of Wales Act 2006, sch 7, part 2 and part 3.

\(^{64}\) *AXA General Insurance Ltd v Lord Advocate (Scotland)* [2012] AC 868 at paras 52, 147. This case was decided under the Scotland Act 1998, but similar principles apply to Wales.
Referring an Assembly Bill to the Supreme Court under s.112 is of course a politically aggressive action, but one can see that it has its place in the scheme of things. In essence, it recognises the distinction between legal effect and potential impact: a Bill might have no formal connection with an area of law that is outside legislative competence, but still have an unavoidable impact on that area.65

2.46 Three such references have been made since Part 4 of the 2006 Act came into force.

The Local Government Byelaws (Wales) Bill 2012

2.47 The Local Government Byelaws (Wales) Bill (the 2012 Bill) was introduced into the National Assembly in 2012 and aimed at simplifying procedures for making and enforcing local authority byelaws in Wales. It was the first Act passed by the National Assembly using its powers under Part 4 of the 2006 Act. After the Bill was passed, but before it received Royal Assent, the Attorney General for England and Wales referred it to the Supreme Court.66

2.48 The reference was to determine whether sections 6 and 9 of the 2012 Bill were within the National Assembly’s competence.67 Section 6 was intended to establish that certain byelaws did not require confirmation by the Welsh Ministers or by the Secretary of State before coming into force.68 Schedule 1 specified the enactments which provided for the byelaws to which section 6 applied. Section 9 gave Welsh Ministers the power to add enactments to this schedule.

2.49 There were two main issues for the Supreme Court:

(1) whether these sections fell within restrictions limiting the legislative competence of the National Assembly so that the Assembly cannot remove or modify or confer a power to remove or modify a function of a Minister of the Crown which existed prior to the commencement of the devolution settlement under Part 4 of the 2006 Act;69 and

68 The byelaw confirmation requirements are set out in section 236 of the Local Government Act 1972. Specifically, subsection 236(11) stated that where the enactment under which the byelaws are made does not specify the authority or person who need to confirm the byelaws, the default confirming authority is the Secretary of State. Article 2 of the National Assembly for Wales (Transfer of Functions) Order 1999 subsequently prescribed that this confirming function of the Secretary of State under section 236(11) to be exercisable concurrently with the Welsh Ministers.
69 Government of Wales Act, s 108, and sch 7, part 2 para 1. Powers that are in existence prior to 5 May 2011 are referred to as “pre-commencement functions” in the Government of Wales Act 2006, see sch 7, part 2 para 1(3).
if so, whether the restrictions did not apply because they were “incidental to, or consequential on any other provision contained in the Act of the Assembly”.70

2.50 The Supreme Court unanimously held that sections 6 and 9 of the 2012 Bill were within the National Assembly’s competence. Although both sections had the effect of removing powers from the Secretary of State, the Court accepted that the removal of these powers was incidental to, or consequential on the primary purposes pursued.71

**General approach to the construction of the Government of Wales Act 2006**

2.51 Lord Hope set out the approach that should be adopted for the interpretation of the Government of Wales Act 2006. In the later *Agriculture Sector (Wales) Bill* case, discussed below, the Supreme Court summarised Lord Hope’s approach in three principles:

i) the question whether a provision is outside the competence of the Assembly must be determined according to the particular rules that section 108 of, and Schedule 7 to, the 2006 Act, have laid down;

ii) the description of the 2006 Act as an Act of great constitutional significance cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted in the same way as any other statute; and

iii) when enacting the Government of Wales Act 2006 Parliament had to define, necessarily in fairly general and abstract terms, permitted or prohibited areas of legislative activity. The aim was to achieve a constitutional settlement. It is proper to have regard to that purpose if help is needed as to what the words mean.72

**The meaning of “incidental to, or consequential on any other provision in the Act of the Assembly”**

2.52 In upholding the National Assembly’s competence to pass the Byelaws Bill, the Supreme Court noted that deciding whether a particular provision is incidental to, or consequential on another provision “may to some extent be a question of fact and degree, and it should turn on substance rather than form”.73

2.53 The Court found a comparison between the Government of Wales Act 2006 and paragraph 3(1)(a) of Schedule 4 to the Scotland Act 1998 helpful. That paragraph

70 Government of Wales Act, s 108, and sch 7, part 3, para 6(1).


enables the Scottish Parliament to “modify the law on reserved matters” if the modification is “incidental to, or consequential on, provision made … which does not relate to reserved matters”. The Supreme Court had considered this provision, in determining whether an Act of the Scottish Parliament was within the Scottish Parliament’s competence in Martin v Most.\textsuperscript{74}

2.54 In that case Lord Rodger described amendments as falling within paragraph 3(1)(a) if they “raise[d] no separate issue of principle” and stated that the paragraph was:

\begin{quote}
Intended to cover the kinds of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raise no separate issue of principle.\textsuperscript{75}
\end{quote}

2.55 Lord Hope’s judgment in the same case described the provision under consideration as “important” because it imposed, and conferred a power on Scottish Ministers to impose, a custodial sentence of more than six months for certain offences. It therefore could not be “incidental to or consequential on provisions found elsewhere in the enactment”.\textsuperscript{76}

2.56 The court in the Local Government Byelaws case considered and applied the approach taken by Lord Hope and Lord Rodger in Martin v Most. Lord Neuberger listed reasons why the removal of the Secretary of State’s confirmatory powers by section 6 of the Bill in relation to the scheduled enactments would be incidental to, and consequential on, its primary purpose:

\begin{enumerate}
\item the primary purpose of the Bill cannot be achieved without that removal;
\item the Secretary of State’s confirmatory power is concurrent with that of the Welsh Ministers;
\item the confirmatory power arises from what is in effect a fall-back provision;
\item the scheduled enactments relate to byelaws in respect of which the Secretary of State is very unlikely indeed ever to exercise his confirmatory power;
\item section 7 of the Bill reinforced this conclusion; and
\item the contrary view would risk depriving the “incidental or consequential” exception of any real effect.\textsuperscript{77}
\end{enumerate}

2.57 Lord Hope provided further guidance as to the approach to applying the exception, stating that:

\begin{itemize}
\item \textsuperscript{74} Martin v Most [2010] UKSC 10, [2010] SC (UKSC) 40.
\item \textsuperscript{75} Martin v Most [2010] UKSC 10, [2010] SC (UKSC) 40 at [128].
\item \textsuperscript{76} Martin v Most [2010] UKSC 10, [2010] SC (UKSC) 40 at [40].
\end{itemize}
If the removal has an end and purpose of its own … it will be outside competence. If its purpose or effect is merely subsidiary to something else in the Act, and its consequence when it is put into effect can be seen to be minor or unimportant in the context of the Act as a whole … it can then be regarded to as merely incidental to, or consequential on, the purpose that the Bill seeks to achieve.\(^7\)

2.58 However, the Court observed that section 9 could be interpreted as being outside the scope of the National Assembly’s competence. It conferred a power to add byelaws to the list covered by paragraph 6, which was, as Lord Hope noted, “open ended”.\(^7\)

**Interpreting provisions of an Act of the Assembly so as to be within legislative competence**

2.59 The court held that a narrower interpretation of section 9 could be reached by invoking section 154(2) of the 2006 Act - which requires that a provision be read as narrowly as necessary for it to be within legislative competence.\(^8\)

2.60 On determining whether section 154(2) could be relied upon to narrow the interpretation of a provision, Lord Neuberger held that:

> It would not be permissible to invoke [section 154(2) of the 2006 Act] if it was inconsistent with the plain words of section 9.\(^8\)

2.61 Lord Neuberger held that it was possible to invoke section 154(2) of the 2006 Act to read section 9 of the 2012 Bill sufficiently narrowly to keep it within the National Assembly’s legislative competence. He noted that:

> Such an interpretation is consistent with the thrust of the bill as a whole, and does not conflict with any other provision in the Bill.\(^8\)

2.62 Lord Hope agreed. In his view, since the National Assembly’s competence is limited to removing, or delegating the power to remove, functions of a Minister of the Crown where doing so satisfies paragraph 6(1)(b) of Part 3 of schedule 7 to the 2006 Act, the National Assembly could not confer wider powers than that on Welsh Ministers. Therefore, section 9 was interpreted as only conferring power on Welsh Ministers to add or remove a function of the Secretary of State where

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80 Local Government Byelaws (Wales) Bill 2012: Reference by the Attorney General for England and Wales [2012] UKSC 53, [2013] 1 AC 792 as per Lord Neuberger at [64] and Lord Hope at [84]. S 154(2) reads: the provision is to be read as narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly. For further discussion, see Rt Hon. Lady Justice Arden DBE, “What is the safeguard for Welsh devolution?” [2014] 2 Public Law 189.


doing so was incidental to or consequential on some other provision of the Bill. Section 9 was deemed to be within the National Assembly’s legislative competence.\(^83\)

2.63 Lord Neuberger considered that section 9 could alternatively be interpreted as being within the legislative scope of the National Assembly without recourse to section 154(2). Instead, he invoked the common law principle “\textit{nemo dat quod non habet}” (no one can give what they do not have), holding that as the National Assembly could only confer a power on Welsh Ministers to remove a function of a Minister of the Crown where it would be incidental or consequential, “the wide words of section 9 must be read as being circumscribed in their scope so as to render the section valid”.\(^84\)

\textbf{The Agricultural Sector (Wales) Bill}\(^85\)

2.64 The Agricultural Sector (Wales) Bill 2013 was an emergency Bill introduced into the National Assembly in July 2013 and passed within nine days of the abolition of the Agricultural Wages Board of Wales by the Regulatory Reform Act 2013, by an Act of the UK Parliament.\(^86\) The Agricultural Sector (Wales) Bill provided for the setting of minimum terms and conditions of employment for agricultural workers through the establishment of the Agriculture Advisory Panel for Wales. The National Assembly considered that, as the Bill related to agriculture, it was within their competence.\(^87\) The Attorney General contended that in reality the Bill related not to agriculture but to employment and industrial relations, and was therefore not within the National Assembly’s competence.\(^88\)

\textit{Determining whether the Bill relates to a devolved subject}

2.65 Section 108(4) of the 2006 Act requires that an Act of the Assembly must relate to a devolved subject, and must not fall within any of the exceptions listed in Part


\(^86\) The Bill was tabled as an “emergency Bill” under Standing Order 26.95 - 26.104, Standing Orders of the National Assembly for Wales. The Agricultural Wages Board of Wales was abolished under the Enterprise and Regulatory Reform Act 2013, despite the National Assembly having rejected a legislative consent motion to give the UK Parliament the power to consider the Bill in relation to the Agricultural Wages Board of Wales. See Plenary Session National Assembly for Wales, Plenary, \textit{Record of Proceedings at [16:20].}


1 of Schedule 7 regardless of the heading under which they are listed.\(^{89}\)

2.66 In the *Agricultural Sector (Wales) Bill* case, the Supreme Court had first to decide how the subject matter “agriculture”, should be defined. The court held that the meanings of the devolved subjects are to be determined within the context of the 2006 Act, specifically in the context of the other subjects listed in schedule 7. This is because:

Each is intended to designate a subject-matter which is the object of legislative activity. In this context, it is clear to us that agriculture cannot be intended to refer solely to the cultivation of the soil or the rearing of livestock, but should be understood in a broader sense as designating the industry or economic activity of agriculture in all its aspects…\(^{90}\)

2.67 The Supreme Court then had to determine whether the Bill related to one or more of the devolved subjects, or fell within an exception. The court considered that for an Act to “relate” to a devolved subject, it would be necessary for it to have “more than a loose or consequential connection” with that subject.\(^{91}\) Section 108(7) prescribes that in determining whether a Bill “relates” to a devolved subject matter it is necessary to have regard:

To the purpose of the provision, having regard (among other things) to its effect in all the circumstances.\(^{92}\)

2.68 The Court therefore considered that it is necessary to “look not merely at what can be discerned from an objective consideration of the effect of its terms”, but the context generally, including any relevant reports of the National Assembly or the report that led to the Bill.\(^{93}\) After considering the Bill’s provisions, and the consultation document that led to the Bill, the Supreme Court held that the purpose of the Bill was the regulation of agricultural wages, so that the agricultural industry in Wales would be supported and protected. This related to agriculture and did not fall within any of the exceptions listed in the Schedule.\(^{94}\)


\(^{92}\) Government of Wales Act 2006, s 108(7).


The Court then considered whether, in addition to “agriculture”, the Bill also might be considered to relate to other subjects that were not within National Assembly’s legislative competence, even though not mentioned as specific exceptions in the 2006 Act. Specifically, the court considered whether it was relevant that the Bill related to employment and industrial relations, which were not listed either as devolved subjects or as exceptions in the 2006 Act. The court unanimously concluded that:

Provided that the Bill fairly and realistically satisfies the test set out in section 108(4) and (7) and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved. The legislation does not require that a provision should only be capable of being characterised as relating to a devolved subject.

To decide otherwise, would:

Give rise to an uncertain scheme that was neither stable nor workable. In contrast, the application of the clear test in section 108 provides for a scheme that is coherent, stable and workable.

The Bill therefore fell within the competence of the National Assembly.

The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill provided for the recovery from employers of costs incurred by NHS Wales in providing treatment to employees exposed to asbestos, in cases where judgment had been obtained or a compensation agreement entered into between the employee and the employer. The two provisions of the Bill in dispute were sections 2 and 14.

Section 2 made those “by whom or on whose behalf” compensation payments were made to sufferers of asbestos-related diseases (generally employers, referred to in the Bill as “compensators”) additionally liable to the Welsh Ministers for the cost of NHS services provided to the disease sufferers.

Section 14 extended the scope of the compensators’ employment liability insurance policies to cover the sums which the compensators would be required to pay under section 2. These liabilities cast on insurers were novel and applied retrospectively. Undertakings in the insurance industry had expressed concerns about the National Assembly’s competence to pass the Bill under the 2006 Act.

To settle the matter, the Counsel General for Wales referred to the Supreme

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Court the question of whether the Bill was within the National Assembly’s legislative competence.98

2.76 The Supreme Court addressed the question of whether the Bill related to the “Organisation and funding of national health service”, which is a devolved subject under the heading “Health and health services”.99 The court also considered whether the Bill contravened article 1 of protocol 1 to the European Convention on Human Rights, which provides for the peaceful enjoyment of possessions. Under the terms of the 2006 Act, a Bill that does not comply with Convention rights is outside the National Assembly’s competence.100

2.77 The court unanimously decided that the Bill was outside the National Assembly’s competence. Lord Mance, with whom Lord Neuberger and Lord Hodge agreed, gave the judgment for the majority. Lord Thomas, with whom Baroness Hale agreed, dissented in part on how this conclusion should be reached.

**Does the Bill relate to a devolved subject?**

2.78 The court had first to determine whether section 2, which imposed liability for NHS costs on compensators, was within the National Assembly’s legislative competence. Section 15 of the Bill required that Welsh Ministers have regard to the “desirability” of spending amounts equalling the charges raised under section 2 on treatment of, research into or services related to, asbestos-related diseases. The first question for the court was whether, in accordance with sections 108(4) and (5) and paragraph 9 of schedule 7 to the 2006 Act, these sections “related” to the “Organisation and funding of national health service”.

2.79 Lord Mance concluded that;

Any raising of charges permissible under para 9 [of the 2006 Act] would have, in my opinion, to be more directly connected with the service provided and its funding. The mere purpose and effect of raising money which can or will be used to cover part of the costs of the Welsh NHS could not constitute a sufficiently close connection.101

2.80 Lord Mance held that the charges under section 2 of the Bill had “at best an indirect, loose or consequential connection” to the “Organisation and funding of the national health service”.102 Lord Mance further held that, even if section 15 obliged Welsh Ministers to spend amounts equalling the charges raised under section 2 on asbestos-related disease treatment, research or services, the National Assembly’s legislative competence to organise and fund the National Health Service under paragraph 9 does not:

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100 See the Government of Wales Act 2006, s 108(6).


102 Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, [2015] 2 WLR 481 at [27].
Permit the Welsh Ministers to raise money in any way they choose even if the only purpose for which the moneys raised can be used is on the Welsh NHS.¹⁰³

2.81 This view of “Organisation and funding” is notably narrower than that of the devolved subject “agriculture”, which was given a broad meaning by the Supreme Court in the Agriculture Sector (Wales) Bill case. Lord Mance also considered that the words in Schedule 7 paragraph 9 could not have been devised to allow, “in reality”, the rewriting of the law of tort and breach of statutory duty.¹⁰⁴

2.82 Lord Thomas dissented on this point, and considered that section 2 of the Bill was within the National Assembly’s legislative competence. He held that “Organisation and funding of national health service” encompasses a general power to raise funds for the Welsh NHS through the imposition of charges on patients. Such patients as have suffered the ill-effects of asbestos poisoning could recover those charges from a liable employer, who in turn could claim on his or her insurance. In the view of Lord Thomas, it was therefore open to the National Assembly to impose charges directly on the employer.¹⁰⁵

2.83 Lord Mance held that, even if section 2 was within the National Assembly’s legislative competence, section 14 of the Bill, which extended the scope of compensators’ liability insurance, was not. He held that section 14 of the Bill did not satisfy the requirements of section 108(5) of the 2006 Act, which enables a provision of an Act of the Assembly to be within the National Assembly’s legislative competence if:

1. it provides for the enforcement of another provision (which is within competence),¹⁰⁶

2. is appropriate for making such a provision effective, or

3. is otherwise incidental to, or consequential on, such a provision.¹⁰⁷

2.84 Lord Mance held that section 14 did not provide for the enforcement of section 2, and was not appropriate for making it effective. Lord Mance considered that the scheme under section 14, facilitating financial recourse to third party insurers by compensators, was “separate” from the provision for financial recourse to compensators by the Welsh Ministers.¹⁰⁸

2.85 Equally, Lord Mance considered that section 14 was not “otherwise incidental to,

¹⁰⁴ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, [2015] 2 WLR 481 at [27].
¹⁰⁶ For the purposes of section 108(5), the provision must provide for the enforcement of a provision within section 108(4) of the Government of Wales Act 2006.
¹⁰⁸ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, [2015] 2 WLR 481 at [29].
or consequential on” section 2. Following the guidance prescribed in Martin v Most [2010] and the Local Government Byelaws Bill case, section 14 was not merely subsidiary to section 2 and “minor or unimportant in the context of the Act as a whole”, but had an end and purpose of its own. Lord Mance considered that the rationale for imposing the scheme for recovering NHS costs from compensators under section 2 did not extend to insurers under section 14. Lord Mance observed that section 14 also raised important separate issues of principle:

Legislation imposing on insurers new contractual liabilities under old insurance policies years after they were made engages obvious and important general principles.109

2.86 Lord Thomas also held that section 14 was outside the competence of the National Assembly. Whilst Lord Thomas considered that section 14 had been intended to be merely an enforcement provision of section 2 and had “no other purpose or end in itself”, the terms in which it was drafted meant that it impermissibly went “much further”.110 In Lord Thomas’ view, section 14 would have had the effect of extending an insurer’s liability to the compensator beyond that of the liability the compensator had to the victim for NHS charges. Lord Thomas therefore agreed with Lord Mance that section 14 of the Bill did not satisfy section 108(5) of the 2006 Act.111

Was the Bill compatible with Convention rights?

2.87 Although the Supreme Court held that the Bill was outside the National Assembly’s legislative competence because it did not relate to any of the devolved subjects, the court also considered that the Bill was incompatible with article 1 of protocol 1 to the European Convention on Human Rights. Article 1 to protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.112

2.88 Section 108(6)(c) of the 2006 Act stipulates that a provision of an Act of the Assembly will be outside the Assembly’s legislative competence if it is incompatible with a Convention right. The court unanimously concluded that the

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110 Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, [2015] 2 WLR 481 at [132] and [133].

111 Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3, [2015] 2 WLR 481 at [133].

112 Human Rights Act 1998, schedule 1, part 2, protocol 1 article 1.
article was engaged both for employers (under section 2) and insurers (under section 14), as:

Both are affected and potentially deprived of their possessions, in that the Bill alters their otherwise existing legal liabilities and imposes on them potentially increased financial burdens arising from events long-past and policies made long ago.\(^{113}\)

2.89 Lord Mance considered that, as no special justification had been shown for the retrospective changes made by the Bill that would upset the legitimate expectations of the employers and insurers, their right to respect for their property was contravened.\(^{114}\)

2.90 However, Lord Thomas disagreed that employers’ rights to property had been contravened. He considered that the interference of the Bill with employers’ Convention rights was proportionate to its economic and social purpose of funding Welsh NHS services for asbestos victims. However, Lord Thomas did agree that the insurers’ right to property had been contravened, but on a narrower ground. Lord Thomas held that if section 14 had been limited to providing an indemnity solely in respect of the liability incurred by the employers to the Welsh Ministers for NHS charges, then a fair balance would have also been struck under article 1 of protocol 1. Lord Thomas considered that insurers or employers do not have a legitimate interest which protects them against the withdrawal of the state benefit conferred in the provision of free medical treatment and care for diseases caused by negligence or breach of statutory duty, irrespective of whether that negligence or breach of statutory duty occurred in the past, particularly in circumstances where the consequences of such wrongdoing take many years to become manifest.\(^{115}\)

2.91 The analysis of the Bill’s compatibility with article 1 to protocol 1 undertaken by Lord Mance and Lord Thomas demonstrates the extent of the scrutiny to which the court is willing to subject the underlying policy of a bill.

**Judicial deference towards devolved legislatures**

2.92 The judgments of the majority and minority in the *Asbestos Diseases (Wales) Bill* case also provide contrasting views on the degree of deference that should be shown to the devolved legislatures, as compared to the United Kingdom Parliament. As the academic Adam Tomkins observes:

\(^{113}\) *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 2 WLR 481 at [41].

\(^{114}\) *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 2 WLR 481 at [61] to [66].

\(^{115}\) *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 2 WLR 481 at [140].
Whereas, for Lord Thomas, the Court should give the same “great weight” to the judgment of the Welsh Assembly as it would to that of the United Kingdom Parliament, for Lord Mance, the Court should give “weight” to the Assembly’s judgment whilst remembering that “it is the court’s function, under GoWA, to evaluate the relevant considerations and to form its own judgment”. 116

2.93 Lord Mance considered that the fact that article 9 of the Bill of Rights, which provides that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” does not apply to the National Assembly, may indicate “a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions”.117 Lord Thomas strongly disagreed:

Although the Welsh Assembly is a body…to which article 9 does not apply, I would find it difficult to make any logical distinction in the context of the United Kingdom’s devolved constitutional structure between these legislatures and the United Kingdom Parliament in according weight to the evaluation of the different choices and interests in respect of matters which are within the primary competence of the legislatures.118

THE SILK COMMISSION

2.94 In 2011 an independent Commission chaired by Mr (now Sir) Paul Silk, clerk to the National Assembly for Wales from 2001 to 2007, was established to review the financial and constitutional arrangements for Wales.119 The “Silk Commission” carried out its work in two parts, first looking at the fiscal powers of the National Assembly and then at the constitutional settlement more generally.

Silk I and the Wales Act 2014

2.95 The first report of the Silk Commission was published in November 2012.120 It made 33 recommendations, 31 of which were for consideration by the United Kingdom Government. The United Kingdom Government accepted in whole or in part 30 of the 31 recommendations, several of which have since been enacted in the Wales Act 2014.

2.96 The Wales Act 2014 (the 2014 Act) received Royal Assent on 17 December 2014. The majority of its provisions relate to finance and the devolution of powers

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119 Commission on Devolution: Terms of reference (November 2011).

of taxation to the National Assembly. The National Assembly is given power to set rates of income tax for Welsh taxpayers, subject to the outcome of a referendum to be held in Wales to decide whether the income tax provisions should come into force. The Act also provides for the National Assembly to exercise powers in relation to a land transaction tax and landfill tax.

The Act is not limited to fiscal matters. Section 4 officially changes the name of the “Welsh Assembly Government” to the “Welsh Government” or “Llywodraeth Cymru”. Provision is made in relation to the timing of Assembly elections (altered from every four years to every five), to the removal of the bar introduced by the 2006 Act preventing candidates from standing both in a constituency and on regional list in Assembly elections and to the rules on disqualification from the National Assembly by virtue of being a Member of the United Kingdom Parliament.

Section 25 of the Wales Act 2014 amends the Law Commissions Act 1965 to enable the Welsh Government to request the Law Commission to undertake law reform projects and to enter into a protocol with the Commission. At the time of writing a protocol between the Law Commission and the Welsh Government is in the process of being prepared.

Silk II and Powers for a Purpose: Towards A Lasting Devolution Settlement for Wales

Silk II

The second report of the Silk Commission was published in March 2014. It made 61 recommendations for progress towards a “clear, well-founded devolution settlement for Wales”. Its key recommendations included moving to a reserved powers model and further devolution in various fields. The Welsh Government responded to the second Silk report on 1 July 2014 stating that it supported the direction of the report.

Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales

The United Kingdom Government responded to Silk II in February 2015. The report, Powers for a purpose: Towards a lasting devolution settlement for Wales, addressed the recommendations of Silk II as well as considering what the new

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121 Wales Act 2014, s 6 to 23.
122 Wales Act 2014, s 8 to 11 and Wales Act 2014, s 12.
123 Wales Act 2014, s 15, 16, 17 and 18.
124 Wales Act 2014, s 1 to 4.
125 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
127 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
powers for the Scottish Parliament suggested by the Smith Commission could mean for Wales. \(^{129}\)

2.101 Publication of the report followed a cross-party process conducted by the Secretary of State for Wales to secure political consensus on further devolution for Wales. The majority of the Silk II recommendations were accepted by all parties. There were fourteen recommendations with no cross-party consensus, many of which related to policing and criminal justice and these recommendations will not be taken forward. \(^{130}\)

2.102 Notably, the United Kingdom Government agreed with the cross-party consensus that the Welsh devolution settlement should move to a reserved powers model. Appended to the report is a provisional illustrative list of areas in which powers would be reserved to the United Kingdom Parliament. \(^{131}\) The Government stated its intention to undertake further work on the list, as well as to engage in a consultation process with the intention of introducing a bill early in the next Parliament to give the National Assembly competence on the reserved powers model. \(^{132}\)

2.103 The United Kingdom Government also agreed that the National Assembly should be free to decide how it operates, which includes removing restrictions on the composition of Assembly Committees and allowing the National Assembly for Wales to change its name if it wishes. \(^{133}\) Moreover, the Government acknowledged the existence of a strong case in favour of devolving full legislative and executive competence regarding the conduct of Assembly elections, which would include the ability to lower the voting age to sixteen, a power already held by the National Assembly in respect of the referendum on devolving income taxation powers. \(^{134}\)

2.104 There was no cross-party consensus on devolving the justice system, including youth justice. The United Kingdom Government considered the Silk II recommendation that there should be at least one United Kingdom Supreme Court judge with particular knowledge and understanding of the distinct requirements of Wales to be a matter for the judiciary.

2.105 The report also undertook to “further consider and analyse the recommendations made by the Smith Commission” and consider whether they present a strong


\(^{130}\) Powers for a Purpose: Towards a lasting devolution settlement for Wales (2015) Cm 9020 pp 38 to 40.

\(^{131}\) Powers for a Purpose: Towards a lasting devolution settlement for Wales (2015) Cm 9020 Annexe B.

\(^{132}\) Powers for a Purpose: Towards a lasting devolution settlement for Wales (2015) Cm 9020 pp 15 to 16.

\(^{133}\) Powers for a Purpose: Towards a lasting devolution settlement for Wales (2015) Cm 9020 pp 18 to 19.

case for implementation in Wales.\textsuperscript{135} The Smith Commission was established following the Scottish referendum on 18 September 2014; its report recommended the biggest transfer of powers to the Scottish Parliament since its establishment.\textsuperscript{136}

\textsuperscript{135} Powers for a Purpose: Towards a lasting devolution settlement for Wales (2015) Cm 9020 chapter 3.

CHAPTER 3
THE CURRENT LEGISLATIVE PROCESS AND THE WELSH GOVERNMENT

INTRODUCTION
3.1 In this chapter we look at the structure and operation of the National Assembly for Wales, the way in which Assembly Members are appointed and the process by which Welsh legislation is passed. We also describe the composition and functions of the Welsh Government.

THE NATIONAL ASSEMBLY FOR WALES
3.2 The National Assembly for Wales was set up under the Government of Wales Act 1998. It was conceived with a view to exercising secondary legislative powers only: certain regulation-making powers previously vested in Ministers of the Crown were transferred to the National Assembly.¹ This was an unusual constitutional arrangement, quite unlike the devolved administrations in Scotland and Northern Ireland.

3.3 Under the Government of Wales Act 2006 the Assembly gained competence to make primary legislation and its executive and legislative branches were formally separated.² However, certain features of the Assembly have remained unchanged – it consists of one chamber and comprises 60 members elected by the additional member system (AMS). All of these features have an important bearing on the law made in Wales.

Unicameral
3.4 The National Assembly for Wales has a single legislative chamber (“the Senedd”). Unicameral legislatures are common across the world, in particular in small jurisdictions where a second chamber might be an inefficient complication.³ By contrast, the division of the United Kingdom Parliament into two chambers is integral to the way in which that Parliament legislates. An Act must generally be approved by both Houses (and the monarch) before it becomes law.⁴ Although the relative power of the House of Lords has decreased in modern times, a great deal of the practical business of legislative scrutiny is carried out in that chamber. Legislation passing through the Assembly can only be scrutinised in the Senedd; consequently a system of committees has been put in place with a view to ensuring that legislation receives appropriate scrutiny.

3.5 In a unicameral Assembly all Members have a wider involvement in the business of the Assembly.⁵ It has been argued that requiring legislation to survive the scrutiny of a second chamber ensures that both a different perspective is brought

¹ See chapter 2.
⁴ Save where the procedure in the Parliament Acts 1911 and 1949 is followed.
to bear on legislation and, simply, more time is afforded to the legislative scrutiny process.\textsuperscript{6}

The mere presence of a second legislative chamber creates the possibility of quality control in the more modern sense. Quality control rests on two ideas. The first is preventive: knowing that someone else will examine the product makes the producer more careful initially. Second, there is a system to discover mistakes after they have been committed. A second chamber, regardless of its level of expertise and wisdom, constitutes such a quality-control mechanism.\textsuperscript{7}

3.6 A single chamber, however, has advantages. It can encourage efficient and cooperative lawmaking, and as such is well suited to a relatively small, close-knit country like Wales.

3.7 It is worth noting that a single chamber in a certain practical sense limits the legislative capacity of the Assembly. In a bicameral legislature, two chambers can work simultaneously on different pieces of legislation. Creativity is needed to develop models to encourage effective and efficient law-making in a single chamber. In particular, the National Assembly must ensure that views from outside the Assembly are welcome. As we shall see, the Assembly’s committee processes encourage public consultation in the early stages of legislation.

\textbf{Assembly Members and their election}

\textit{The size of the Assembly}

3.8 The Government of Wales Act 1998 created an Assembly composed of 60 members. The then Secretary of State for Wales explained that:

\begin{quote}
[The size] was arrived at by a policy commission of the Labour party... The 60 figure results from the fact there are 40 parliamentary constituencies. At that time, we had five European constituencies. It was believed that a first-past-the-post system based on the existing parliamentary constituencies and an additional member system using the combination of five European constituencies, each with four members, would be the best way of achieving an Assembly that was broadly proportionate.\textsuperscript{8}
\end{quote}

3.9 This number has stayed constant despite the changing function and competence of the Assembly. It is small compared to both the Scottish and Northern Irish legislatures. Recently the Silk Commission noted:

\begin{quote}
With its sixty members, or one member per 51,000 of the Welsh population, the National Assembly is more stretched than either the Scottish Parliament (129 members, or one member for every 41,000
\end{quote}

\textsuperscript{6} G Tsebelis and J Money, \textit{Bicameralism} (1997) p 16.

\textsuperscript{7} G Tsebelis and J Money, \textit{Bicameralism} (1997) p 40.

\textsuperscript{8} \textit{Hansard} (HC), 8 December 1997, col 675 to 676.
members of the public) or the Northern Ireland Assembly (108 members, or one member for every 17,000 members of the public).³

3.10 The size of the National Assembly has been criticised since the beginnings of devolution.¹⁰ In 2004, the Richard Commission recommended that the Assembly should have eighty rather than sixty members.¹¹ The Commission observed that while there were benefits to having a small Assembly – for example, Members communicated effectively and committees were well attended – there were also clear disadvantages. Disadvantages included problems with scrutiny due to both the sheer volume of legislation that was being passed and the close-knit nature of the Assembly. It was suggested that the Assembly was overstretched.

3.11 Similar concerns were echoed by the Silk Commission, which explored the Assembly’s “capacity gap”.¹² Noting that the Assembly deals with a wider range of subject areas, including specialist areas and that the pressure to scrutinise effectively has increased, the Silk Commission suggested that eighty members would “balance enhanced scrutiny capacity with restraint in public spending”.¹³

3.12 The 2015 Assembly Commission report, as discussed later, expressed similar concerns:

With only 60 Members, the National Assembly is under-powered and over-stretched. It is small by any objective local, national or international comparison; its Members are thinly spread in their committee work especially; and its legislative and fiscal responsibilities are increasing. Assembly Members face a weekly cycle of committee work, demanding a high level of specialised policy, legislative, financial and procedural expertise, timetabled around two plenary sessions where a high level of attendance and participation is the norm, added to for many by the demands of key leadership roles upon which the institution relies.¹⁴

3.13 In the command paper Powers for a purpose: Towards a lasting devolution settlement for Wales there was cross-party consensus to accept the following Silk Commission recommendation:

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³ Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
¹² Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
¹³ Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
¹⁴ National Assembly for Wales, Assembly Commission, The future of the Assembly: ensuring its capacity to deliver for Wales (2015).
The size of the National Assembly should be increased so that it can perform its scrutiny role better.\textsuperscript{15}

3.14 The command paper does not discuss how the size of the Assembly may or may not affect its ability to perform its scrutiny role. Rather, there is agreement to give the Assembly the power to take decisions “on issues of fundamental constitutional importance”. The paper states that there is a “strong precedent already established in the Assembly for a two-thirds majority on issues of constitutional importance”:\textsuperscript{16}

To provide an adequate check on Assembly legislation proposing changes to the franchise for Assembly or local government election in Wales, the electoral system or the ratio of constituency and regional Assembly members, the UK Government’s firm view is that such legislation should be passed by two-thirds majority of all Assembly Members.\textsuperscript{17}

3.15 Dame Rosemary Butler AM, the presiding officer, responded to the command paper saying:\textsuperscript{18}

I am pleased to see a commitment to ensure that the Assembly will: … have the power to increase its capacity to match the size of its task. This will allow us to fully scrutinise the growing policy and legislative programme of the Government and its new tax raising powers… \textsuperscript{19}

3.16 The National Assembly is still a young institution, and its power to make primary legislation is younger still. There has also been significant turnover in Assembly Members. In the 2011 election over a third of the Assembly’s membership changed.\textsuperscript{20} Two of the new Members had served as Members of Parliament at Westminster and eleven had been local councillors.\textsuperscript{21} In its report on the experiences of new members, the Hansard Society found that those who had previously been local councillors “felt more confident coming into the role” but that the “differences between the Assembly and a local council have sometimes been a source of confusion and frustration”.\textsuperscript{22}

\textsuperscript{15} Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020 para 2.2.
\textsuperscript{16} Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020 paras 2.2.18 to 2.2.19.
\textsuperscript{17} Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020 para 2.2.19.
\textsuperscript{18} See below for explanation of role of Presiding Officer.
\textsuperscript{19} Presiding Officer’s response, News release, National Assembly, 27 February 2015.
\textsuperscript{20} 23 new Assembly Members took a seat in the fourth Assembly. See M Korris, “Assembly Line? The Experiences and Development of new Assembly Members” \textit{Hansard Society}.
\textsuperscript{21} M Korris, “Assembly Line? The Experiences and Development of new Assembly Members” \textit{Hansard Society}.
\textsuperscript{22} M Korris, “Assembly Line? The Experiences and Development of new Assembly Members” \textit{Hansard Society}. 
Committees

3.17 The committees play an important role in the conduct of Assembly business and in particular in the scrutiny of Assembly Bills.23 The Assembly currently has twelve permanent committees including the Business Committee. Welsh Government subject responsibilities are dealt with by five policy committees and the Constitutional and Legislative Affairs Committee.24 Only the Public Accounts Committee is required to exist by statute. The policy committees have ten members each whilst other committees have as few as four. The committees, and their memberships are:

(1) Policy committees:

(a) Children, Young People and Education Committee (10 members);
(b) Communities, Equality and Local Government Committee (10 members);
(c) Enterprise and Business Committee (10 members);
(d) Environment and Sustainability Committee (10 members);
(e) Health and Social Care Committee (10 members).

(2) Other committees:

(a) Finance Committee (8 members);
(b) Public Accounts Committee (8 members);
(c) Constitutional and Legislative Affairs Committee (5 members);
(d) Scrutiny of the First Minister Committee (5 members);
(e) Business Committee (5 members);
(f) Petitions Committee (4 members);
(g) Standards of Conduct Committee (4 members).

3.18 The five policy committees must cover the twenty subjects that fall within the National Assembly’s legislative competence under Part 4 of and schedule 7 to the 2006 Act. Consequently each policy committee covers more than one Minister’s portfolio and they all have a broad remit.25 The policy committees have a dual function - they fulfil both a policy and a legislative scrutiny role. This combines the role of the Select Committees and Public Bill Committees as found in the House of Commons. The Assembly Commission commented on the dual function of committees:

23 Standing Orders of the National Assembly for Wales, Standing Order 17 (March 2015).
25 There are 5 policy committees covering 7 Minister’s portfolios.
The main driver for this design is to bring the policy expertise of Members to bear on the examination of policy and legislation in the round.26

3.19 Committees are busy and their work puts Members under a great deal of time pressure. The Assembly Commission noted:

The work of the committees, most of which meet every week, is currently undertaken by just 43 Members. Ten of those Members sit on three committees, a further 21 on two, and the remaining 12 on only one.27

3.20 Committees consider Welsh Government expenditure and policy, scrutinise Bills and hold inquiries. In order to scrutinise effectively, committees rely on written material such as briefings prepared by the research service and the explanatory memoranda that accompany Bills. The Assembly Commission noted that when performing the scrutiny role “reading time is a luxury” and that explanatory documents are very important.

**Officers and other bodies within the Assembly**

**The Presiding Officer and the Deputy Presiding Officer**

3.21 The 2006 Act requires the election of a presiding officer and deputy presiding officer for the National Assembly.28 They are elected by the Assembly from its members at the Assembly's first meeting following an election.29 The presiding officer is roughly equivalent to the Speaker of the House of Commons.

3.22 The functions of the presiding officer are:

1. to chair plenary meetings;
2. to determine questions as to the interpretation or application of Standing Orders;
3. to represent the Assembly in exchanges with any other bodies, whether within or outside the United Kingdom, in relation to matters affecting the Assembly; and
4. such other functions conferred by any enactment, by the Assembly or by these Standing Orders.30

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26 National Assembly for Wales, Assembly Commission, *The future of the Assembly: ensuring its capacity to deliver for Wales* (2015). The Assembly Commission is described below.


29 Government of Wales Act 2006, s 25(1). Also see Standing Orders of the National Assembly for Wales, Standing Order 6.1 (March 2015).

30 Standing Orders of the National Assembly for Wales, Standing Order 6.15 (March 2015).
In the presiding officer’s absence, or at her request, her duties are performed by the deputy presiding officer.\textsuperscript{31} Provision is made to ensure that only one of the two officers belongs to the political group that is in government.\textsuperscript{32}

\textit{The Assembly Commission and the Administration of the Assembly}

Provision is made in the 2006 Act for the creation of a corporate body called the “Assembly Commission” (the Commission) which must provide to the Assembly, or ensure that the Assembly is provided with, the necessary property, staff and services to perform its functions.\textsuperscript{33} In effect the Commission has responsibility for the proper administration of the Assembly. It performs this function by employing and overseeing the work of a staff, accountable to the Assembly’s Chief Executive who in turn reports to the Commission.\textsuperscript{34}

The Commission consists of the presiding officer and four Members, each of whom is nominated by one of the four political groups represented in the Assembly.\textsuperscript{35}

The Commission also takes a strategic interest in the effective administration of the Assembly, and in 2015 published a paper which examined and made recommendations about the Assembly’s future.\textsuperscript{36}

\textit{The Research Service}

The Research Service provides advice and support to members and committees in fulfilling their scrutiny, legislative and representative functions. It consists of:

1. four research teams providing specialist advice on specialist policy areas;
2. a research team providing finance and statistical information;
3. a research team providing advice on the Assembly, the constitution, UK and EU legislation, elections and referendums;
4. a library.\textsuperscript{37}

\textsuperscript{31} Government of Wales Act 2006, s 25(10) to (11). Also see Standing Orders of the National Assembly for Wales, Standing Order 6.18 (March 2015).
\textsuperscript{32} Government of Wales Act 2006, s 25(7) to (9). See also Standing Orders of the National Assembly for Wales, Standing Order 6.12- 6.14 (March 2015).
\textsuperscript{33} Government of Wales Act 2006, s 27(1) to (5).
\textsuperscript{34} The “Chief Executive and Clerk of the National Assembly” is a senior management role which encompasses the statutorily mandated position of the Clerk of the Assembly (see the Government of Wales Act 2006, s 26). The post does not necessarily demand expertise in constitutional matters or matters of legislative procedure, as has traditionally been the case with the clerks of, for example, the Houses of Parliament in the UK. Those functions are now carried out by Assembly staff who report to the Chief Executive.
\textsuperscript{35} Government of Wales Act 2006, s 27(4). See also Standing Orders of the National Assembly for Wales, Standing Order 7.2 to 7.5 (March 2015).
\textsuperscript{36} National Assembly for Wales, Assembly Commission, \textit{The future of the Assembly: ensuring its capacity to deliver for Wales} (2015).
The Research service also monitors, among other things, the progress of legislation; it publishes both that information and research papers on its website.

THE WELSH GOVERNMENT

The Welsh Government is the devolved Government of Wales. It consists of the First Minister, the other Welsh Ministers, Counsel General, Deputy Ministers and a supporting civil service. The First Minister and the Welsh Ministers form the Cabinet.

In very broad terms, the Welsh Government develops and implements policy in the devolved areas and is responsible for the delivery of services such as NHS Wales. As we discuss later, the Welsh Government formulates and publishes a legislative programme for the life of the Assembly shortly after it is elected. We will consider the legislative programme when we turn to possibilities for reform in chapter 8.

The First Minister and the Welsh Ministers

The National Assembly must nominate a First Minister within 28 days of an Assembly election, or when the previous First Minister needs for some reason to be replaced. Nominations are received by the presiding officer and if more than one nomination is made then the presiding officer must take a vote. The presiding officer must recommend to Her Majesty the appointment of the Member nominated by the Assembly to become the First Minister.

The First Minister is responsible, with the approval of the Queen, for appointing the Ministers and Deputy Ministers and for recommending appointment of the Counsel General to the Queen. The First Minister chairs cabinet meetings and, along with the Ministers, exercises the government’s executive functions.

The First Minister’s question time takes place once a week on the floor of the National Assembly. During a plenary session, Assembly Members may table oral questions for the First Minister about any matters that relate to his or her responsibilities. Assembly Members may also table questions for written answer by the First Minister.

In 2006, executive functions previously vested in the National Assembly, were transferred to the Welsh Ministers. Since 2006 further executive functions have been vested in the Welsh Ministers by subordinate legislation made under

40 Standing Orders of the National Assembly for Wales, Standing Order 8.2 (March 2015).
42 Standing Orders of the National Assembly for Wales, Standing Order 12.56 (March 2015).
43 Standing Orders of the National Assembly for Wales, Standing Order 12.54 (March 2015).
44 Standing Orders of the National Assembly for Wales, Standing Order 14 (March 2015).
45 See chapter 2; and Government of Wales Act 2006 sch 11 para 30.
Assembly Bills, Bills of the United Kingdom Parliament or Orders in Council.\textsuperscript{46} The functions of the Welsh Ministers are subject to committee scrutiny.\textsuperscript{47} Welsh Ministers have powers to promote well-being, support culture and make appropriate representations about any matter affecting Wales.\textsuperscript{48}

3.35 There are currently eight Welsh Ministers, including the First Minister.\textsuperscript{49} They are the:

(1) First Minister,
(2) Minister for Natural Resources,
(3) Minister for Communities and Tackling Poverty,
(4) Minister for Public Services,
(5) Minister for Finance and Government Business,
(6) Minister for Education and Skills,
(7) Minister for Economy, Science and Transport and
(8) Minister for Health and Social Services.

3.36 They, with the Counsel General who attends by invitation, form the cabinet.

3.37 As with the First Minister, the other Welsh Ministers may also receive oral or written questions from Assembly Members concerning any matter that relates to their responsibilities.\textsuperscript{50}

3.38 The First Minister may also appoint Deputy Ministers to assist the First Minister, a Welsh Minister or the Counsel General with their functions.\textsuperscript{51}

**The Counsel General**

3.39 The Counsel General is the law officer of the Welsh Government. His or her appointment and role are set out in the Government of Wales Act 2006. The primary role of the office is to act as the legal advisor to the Welsh Government and to act on its behalf in legal proceedings. The Counsel General has a particular constitutional role in respect of the devolution settlement. In particular,

\textsuperscript{46} Government of Wales Act 2006, s 58.
\textsuperscript{47} Standing Orders of the National Assembly for Wales, Standing Order 16.4 (March 2015).
\textsuperscript{48} Government of Wales Act 2006, ss 60 to 62.
\textsuperscript{49} Including deputy ministers but excluding the First Minister and the Counsel General, the number of Welsh Ministers cannot exceed 12: Government of Wales Act 2006, s 51.
\textsuperscript{50} Standing Orders of the National Assembly for Wales, Standing Order 12.54 and 14.1 (March 2015).
\textsuperscript{51} Government of Wales Act 2006, s 50.
the Counsel General can refer the question of whether an Assembly Bill is within the competence of the National Assembly to the Supreme Court.\(^{52}\)

3.40 Within the Welsh Government, as well as being the ultimate source of legal advice, the Counsel General is responsible at various points for ensuring the quality of draft legislation.

3.41 The constitutional responsibility of the Counsel General in respect of competence issues is mirrored in their obligations within the Governmental structure. The Counsel General will report on competence issues at key stages during the development of a Bill, as well as after it is introduced into the National Assembly. His view on competence is, of course, final within the Welsh Government (the presiding officer of the National Assembly is required to come to an independent view, and to publish a statement on competence on introduction).\(^{53}\)

3.42 In addition, the lawyers responsible, as part of the Bill team, for providing formal “instructions” to legislative counsel (specialist civil service lawyers who draft legislation) are required formally to report to the Counsel General when their instructions are passed to legislative counsel, when the Bill is ready to be translated and at each amending stage during the passage of the Bill through the National Assembly. Bill teams are instructed to inform the Counsel General where particularly sensitive issues arise, such as early commencement, retrospective effect, powers of arrest or entry, appeals, offences and penalties, codes of practice, or anything affecting human rights. The Counsel General also has a general responsibility to consider the justice of provisions, and would expect to be consulted if there was as concern about such a question within a Bill team.

3.43 Further, before a Bill is sent to the National Assembly’s Presiding Officer for introduction, it has to be formally cleared by the Counsel General (as well as the First Minister and the Minister holding the relevant portfolio).

3.44 Although the Counsel General is not a Minister, he or she will form part of the cabinet and may do anything under standing orders that can be done by a Welsh Minister.\(^{54}\) The Counsel General does not have to be an Assembly Member. A Counsel General who is not a Member may participate in Assembly proceedings but cannot vote.\(^{55}\)

3.45 Like the Welsh Ministers the Counsel General may make appropriate representations about matters affecting Wales.\(^{56}\)

3.46 The Counsel General may also defend or appear in any legal proceedings relating to matters with respect to which any functions of the Welsh Ministers, the

\(^{52}\) Government of Wales Act 2006, s 112. In considering whether to make a reference, the Welsh Government Ministerial Code provides that the Counsel General acts independently of the Welsh Government, see below.

\(^{53}\) Government of Wales Act 2006, s 110.

\(^{54}\) Standing Orders of the National Assembly for Wales, Standing Order 9.3 (March 2015).

\(^{55}\) Standing Orders of the National Assembly for Wales, Standing Order 9.4 (March 2015).

\(^{56}\) Government of Wales Act 2006, s 62.
First Minister or the Counsel General are exercisable where the Counsel General considers this appropriate for the promotion or protection of the public interest.  

3.47 As we have seen, the Counsel General has the power to refer to the Supreme Court the question of whether an Assembly Bill, or a provision of an Assembly Bill, is within its legislative competence to the Supreme Court. The Counsel General can also introduce Bills into the National Assembly.

**Staff of the Welsh Government**

3.48 The Welsh Government Civil Service consists of over 5000 civil servants working across Wales. In 2015-2016, £15.3 billion will be allocated to the Welsh Government Departments. This budget will go towards funding NHS Wales, social services and rail and air services in Wales, for example.

3.49 The Welsh Government is currently divided into six directorates general and the Permanent Secretary’s Department.

3.50 Within each directorate general reside a number of directorates and offices. We do not list all of the divisions and sub divisions of the Directorates General, but give examples which illustrate the relevant areas of responsibility, as follows:

1. The Local Government and Communities Directorate General includes the Housing and Regeneration and Local Government directorates.

2. The Natural Resources directorate general includes the Environment and Agriculture, Food and Marine directorates, and the office of the Chief Veterinary Officer for Wales.

3. The directorate general for Economy, Science and Transport includes the Operation and Infrastructure, Finance and Performance, Culture and Sport and Sectors and Business directorates, and the offices of Tourism and Marketing for Wales and of the Chief Scientific Advisor.

4. The directorate general for Health and Social Services (whose director general is also the Chief Executive of NHS Wales) includes the Health Policy Directorate, CAFCASS Cymru, and the office of the Chief Medical Officer.

5. The directorate general for Education and Skills includes the School Standards and Workforce and Skills, Higher Education and Lifelong Learning Directorates.


60 Welsh Government Annual Budget Motion 2015-16 laid in the National Assembly for Wales 2 December 2014.

61 The Permanent Secretary is the lead civil servant in the Welsh Government, accountable to the Welsh Assembly and responsible for the day to day running of the civil service.
The directorate general for Finance and Corporate Services includes the Treasury and the Welsh European Funding Office.

Under the current structure, the Permanent Secretary’s Department includes the Cabinet Division, the Office for Constitutional Affairs and Inter-governmental Relations, the Office of the Counsel General and the Office of the Legislative Counsel. The Legal Services Department provides legal support to the rest of the Welsh Government.

THE LEGISLATIVE PROCESS

For an Assembly Bill to become an Act it must in general pass through four stages as dictated by the National Assembly’s Standing Order 26 and section 111 of the 2006 Act. Each stage is designed to test the Bill and the Bill can fall at stage 1 or 4.

Introducing the Bill

For a Bill to be considered by the National Assembly it must be formally introduced by the Member in charge. The Member in charge must be either:

1. the First Minister;
2. a Welsh Minister;
3. a Deputy Welsh Minister;
4. the Counsel General; or
5. an Assembly Member.

To be introduced the Bill is laid with officials in the Table Office who will arrange for it to be published on the National Assembly website.

The majority of Bills are introduced by Welsh Ministers and are referred to as Government Bills. Bills can also be introduced by an Assembly Committee, an individual Member (if their name is picked in a ballot) or by the Assembly Commission. These are called Committee Bills, Member Bills or Commission Bills respectively.

Before or when the Bill is introduced the Member in charge must make a statement in Welsh and English of belief that the provisions in the Bill are within the legislative competence of the National Assembly. The Presiding Officer must

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62 Standing Orders of the National Assembly for Wales, Standing Order 24 (March 2015).
64 Standing Orders of the National Assembly for Wales, Standing Order 15 (March 2015).
65 Standing Orders of the National Assembly for Wales, Standing Order 24 and 26.80 to 26.94 and (March 2015).
also state that the provisions of the Bill are within the National Assembly’s powers.  

3.57 Bills introduced to the National Assembly must be available in English and in Welsh unless one of two exceptions is granted. An exception may be granted when:

(1) in respect of a government Bill, the Member in charge states in writing that, for specified reasons, it would not be appropriate in the circumstances or reasonably practicable for the Bill to be introduced in both languages; or

(2) introducing the Bill in one language is in accordance with determinations issued by the Presiding Officer under Standing Order 26.3.

3.58 The Member in charge is required to lay an Explanatory Memorandum with every Bill introduced to the National Assembly. Explanatory Memoranda outline the policy objectives of the Bill, provide estimates of the costs to which the proposed legislation will give rise and give details of any consultation already undertaken as well as other relevant information.

The four stages of scrutiny

3.59 Once a Bill has been introduced it faces a four stage process in which its content is scrutinised. The National Assembly conducts its scrutiny role through plenary sessions (of the whole Assembly) and committee sessions. Plenary sessions occur twice a week and include legislative scrutiny alongside other Assembly business. Committee sessions are conducted by the committee responsible for the Bill.

Stage 1 – Consideration of general principles

3.60 The Business Committee – a committee to facilitate the effective organisation of Assembly proceedings – decides whether to refer the Bill to one of the Assembly’s other committees (“the responsible Committee”) and if so sets a deadline for that committee to report. The responsible Committee will, during Stage 1, look at the aims and purposes of the Bill. There are no specific requirements in Standing Orders as to how the responsible committee should carry out its work; however, it is generally expected that the committee will consult with key stakeholders and representatives to inform its recommendations and conclusions.


67 Standing Orders of the National Assembly for Wales, Standing Order 26.5 (March 2015).

68 Standing Orders of the National Assembly for Wales, Standing Order 26.5 (March 2015).

69 Standing Orders of the National Assembly for Wales, Standing Order 26.6 (March 2015).

70 Standing Orders of the National Assembly for Wales, Standing Order 12 (March 2015).

71 See Standing Orders of the National Assembly for Wales, Standing Order 16.1 (March 2015 for “responsible committee”. See above also.

72 Standing Orders of the National Assembly for Wales, Standing Order 11 (March 2015).
3.61 By way of example, the responsible committee for the Well-being of Future Generations (Wales) Bill invited consultation responses from key stakeholders and received 178 written consultation responses and held 14 oral hearings before reporting on the Bill. The committee’s Stage 1 report stated:

There was unanimous support among Members of the Committee for the policy intent of the Bill and we believe the Welsh Government is to be commended for bringing forward legislation in this area. However, we agree with the views expressed by the majority of those who gave evidence that significant improvements are needed in order for the Bill to have any meaningful impact.73

3.62 Under Standing Order 21.7, the Constitutional and Legislative Affairs Committee may also consider and report on provisions of a Bill if those provisions confer powers on Welsh Ministers to make subordinate legislation. Under Standing Order 19.2, the Finance Committee may also consider and report on any documents laid before the National Assembly that contain proposals for the expenditure of resources.

3.63 The Business Committee may decide to bypass the process of sending the Bill to a responsible committee.74 Once the responsible committee has reported or if that process is bypassed, the Member in charge tables a motion that the Assembly agrees with the general principles of the Bill. The Assembly debates the general principles of the Bill in plenary session (“the Stage 1 debate”).75 If the Assembly does not agree with the general principles of the Bill, the Bill falls and does not proceed to Stage 2.76 If the Assembly agrees with the general principles of the Bill it will proceed to Stage 2 – detailed consideration.77

**Stage 2 – Detailed consideration in committee**

3.64 Stage 2 consists of scrutiny of a Bill line by line, together with amendments tabled by Assembly Members.

3.65 Where the National Assembly has agreed a Bill’s general principles (at the conclusion of Stage 1), the Business Committee must refer the Bill back to the responsible Committee, or refer the Bill to a responsible Committee if this stage was previously bypassed; alternatively, the Business Committee must propose a motion in plenary session that the Bill be considered by Commission of the Whole Assembly, chaired by the Presiding Officer.78

3.66 When referring a Bill to the responsible Committee the Business Committee must establish and publish a timetable for the Bill.79 For example, the Well-being of

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74 Standing Orders of the National Assembly for Wales, Standing Order 26.9 (March 2015).
75 Standing Orders of the National Assembly for Wales, Standing Order 26.11 (March 2015).
76 Standing Orders of the National Assembly for Wales, Standing Order 26.14 (March 2015).
77 Standing Orders of the National Assembly for Wales, Standing Order 26.18 (March 2015).
78 Standing Orders of the National Assembly for Wales, Standing Order 26.13 (March 2015).
79 Standing Orders of the National Assembly for Wales, Standing Order 26.7 (March 2015).
Future Generations (Wales) Bill was introduced to the National Assembly on 7 July 2014. On 17 June 2014 the Business Committee referred the Bill to the Environment and Sustainability Committee to consider general principles. On 24 June the Business Committee agreed that the responsible Committee should report on the general principles of the Bill by 21 November 2014. The Business Committee agreed that Stage 2 proceedings should be completed by 6 February 2015 provided that the general principles had been agreed.

3.67 Except in the case of emergency Bills, at least fifteen working days must elapse between the first day of Stage 2 and the first meeting of the responsible Committee where it considers amendments to the Bill. This is to ensure that Assembly Members are given enough time to consider the Bill and table any amendments before the first Stage 2 meeting.

3.68 Any Assembly Member can table amendments and there is no limit to the number of amendments that can be tabled. Assembly Members table amendments to the Bill through the Legislation Office. Amendments are given detailed consideration alongside the rest of the Bill by the responsible Committee. Only Committee members can vote on amendments. The Chair of the Committee puts the motion that the amendment be agreed; if a Committee Member objects, a vote is taken by a show of hands. Voting is by simple majority.

3.69 If a Bill is amended at Stage 2 proceedings, the Member in charge must provide a revised Explanatory Memorandum unless the responsible Committee decides that this is not necessary.

3.70 Once all proposed amendments have been considered the Bill proceeds to Stage 3.

**Stage 3 – Detailed Consideration by the Assembly**

3.71 During Stage 3 the Bill is scrutinised line by line, amended and given detailed consideration by the National Assembly in plenary session. At least fifteen days must elapse between the first day of Stage 3 and the first meeting of the Assembly, in order to ensure that Assembly Members are given enough time to consider the Bill and table any amendments before the first Stage 3 session.

3.72 Any Assembly Member can table an amendment with the Legislation Office, but the Presiding Officer decides which amendments will be considered by the
The Presiding Officer puts the motion that the amendment be agreed and, if an Assembly Member objects, a vote is taken by show of hands. Voting is again by simple majority.

**FURTHER STAGE 3 PROCEEDINGS**

3.73 It may be possible to revisit Stage 3 under Standing Order 26.40 in limited circumstances. The Member in charge of the Bill, or any Member of the Government, may without notice move that the Bill have a further amendment stage. If the motion is agreed the Bill will be subjected to a further round of scrutiny in plenary session. The grounds for an extended Stage 3 are circumscribed by Standing Order 26.41, which provides:

> Amendments under Standing Order 26.40 are only admissible if, in addition to the criteria in Standing Order 26.61, they are for the purpose of clarifying a provision of a Bill (including ensuring consistency between the English and Welsh texts) or giving effect to commitments given at the earlier Stage 3 proceedings.

3.74 Stage 3 is complete once the last proposed amendment has been disposed of, or the last section or schedule deemed to be agreed. If there are no amendments tabled the section or schedule is deemed to be agreed.

**REPORT STAGE AND FURTHER REPORT STAGE**

3.75 Once Stage 3 is complete the Member in charge may, without notice, move that the National Assembly consider amendments at Report Stage. The Assembly may decide whether it wishes to consider amendments at Report Stage. As is the case with stage 3 proceedings, the Member in charge of the Bill, or any Member of the Government, may without notice move that the Bill have a further amendment stage after the report stage has closed. If the motion is agreed the Bill will be subject to further scrutiny at what is termed a “further report” stage. This provides an opportunity for Members to subject amendments to further scrutiny:

> Report stage provides additional flexibility to the scrutiny process so that the Assembly is able to return to certain issues in relation to a piece of legislation if it so wishes. It also strengthens the scrutiny process by ensuring that, if necessary, the Assembly has access to an additional amending stage, particularly where substantial or significant changes, such as the insertion into a Bill of a new Part or Chapter, has been agreed at stage 3.

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89 Standing Orders of the National Assembly for Wales, Standing Order 26.34 (March 2015).
90 Standing Orders of the National Assembly for Wales, Standing Order 26.41 (March 2015).
91 Standing Orders of the National Assembly for Wales, Standing Order 26.44 (March 2015).
92 Standing Orders of the National Assembly for Wales, Standing Order 26.43 (March 2015).
93 Standing Orders of the National Assembly for Wales, Standing Order 26.45 (March 2015).
94 Standing Orders of the National Assembly for Wales, Standing Order 26.46 (March 2015).
95 National Assembly for Wales, Assembly Business, Guide to the Stages of Public Bills and Acts (December 2014) para 77.
3.76 If a Bill is amended at Stage 3 and the National Assembly agree to a Report Stage, the Member in charge must prepare a revised Explanatory Memorandum unless the Assembly agrees that this is not necessary.

**Stage 4 – The Final Stage**

3.77 Stage 4 is the final stage. After Stage 3 (or Report Stage) a motion may be moved that the Bill be passed. The motion cannot be considered until at least five days have passed since the end of Stage 3 or the end of Report Stage unless the Presiding Officer has agreed that the motion can be considered immediately and the Bill is available in both Welsh and English. Once the Bill has been passed by the Assembly the Assembly’s Clerk submits the Bill for Royal Assent.

**Assessing the quality of scrutiny in the legislative process**

3.78 In this section, we have outlined how scrutiny is undertaken in the current legislative process. The Assembly Commission has highlighted how effective scrutiny will become a difficult task for the Assembly:

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

3.79 In later chapters we will look at how processes for legislative scrutiny might be improved, but we are not making any assessment of the quality of scrutiny in the National Assembly. We will take into account evidence submitted to the Constitutional and Legislative Affairs Committee inquiry ‘Making Laws in the Fourth Assembly’ about scrutiny and we will note recommendations made by the inquiry when it reports.

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

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96 Standing Orders of the National Assembly for Wales, Standing Order 26.47 (March 2015), Standing Orders of the National Assembly for Wales, Standing Order 26.48 (March 2015) and Standing Orders of the National Assembly for Wales, Standing Order 26.50 (March 2015).

SPECIAL PROCEDURES FOR LAW REFORM BILLS

3.80 A number of special procedures have grown up in the Westminster Parliament and the Scottish Parliament. We deal with some of them below. The governing idea behind all of them is that Bills which are technical in nature may require less scrutiny than ordinary Bills, or scrutiny of a more specialised kind, or should be to some extent protected from usual Parliamentary politics. For example, a consolidation Bill which simply re-enacts the law, making no significant changes to its substance, will require a different sort of scrutiny from a Bill which implements a radical policy agenda in a politically controversial area. The special procedures are designed to reduce the amount of time a technical Bill spends on the floor of the House, and where necessary to allow scrutiny by Parliamentarians with knowledge of or interest in the area. With Parliamentary time at a premium, the practical advantages are evident.

3.81 Currently the National Assembly has no special procedures to facilitate the passage of technical Bills aimed at legislative reform through the Assembly. This matter is being considered in detail by the Constitutional and Legislative Affairs Committee in its inquiry into 'Making Laws in the Fourth Assembly'.

3.82 We consider consolidation in chapter 7. Here, we look at the existing special procedures for the passage of other types of technical and non-controversial legislation.

The Law Commission special procedure for non-controversial Bills

3.83 There exist in both Westminster and the Scottish parliament special procedures for Bills which implement Law Commission recommendations which make substantive changes to the law ("Law Commission Bills" and "Scottish Law Commission Bills"). Both recognise that a Bill which springs from the recommendations of either Law Commission (and which will in general have been drafted by Parliamentary drafters seconded to the Commission) will have undergone an unusually rigorous and thorough process of policy formulation and legislative design before being introduced.

Procedures at Westminster

3.84 In Westminster Law Commission Bills are introduced in the House of Lords. To benefit from the procedure, it must be previously agreed by both sides of the House that the proposed Bill is "non-controversial".

3.85 The second reading debate is heard in a "second reading committee" which, all being well, commits the Bill to a special public Bill Committee where the majority of the serious scrutiny of the Bill takes place. Once the Committee has completed its examination, in theory the Bill proceeds as with any other public Bill. In practice Peers and MPs understand that the Bill can be handled with a lighter touch than usual.

98 There are some special legislative procedures in the United Kingdom Parliament that we are not discussing here, such as the streamlined procedure for Bills produced by the Tax Law Re-write Project, see http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/rewrite/index.htm (last visited 1 July 2015), or the procedures available in the United Kingdom Parliament for separate consideration of Bills relating only to Scotland or Northern Ireland.
3.86 The special procedure has been used with some success since it was trialled in the 2007-8 session. Seven Acts have been passed using it. It is restricted, of course, to “non-controversial” Bills. The limits of the expression are not clearly laid out:

There is, unhelpfully for a Minister, no precise definition of what does and does not constitute controversy for the purposes of a Law Commission Bill. If the Bill were to include matters that are clearly controversial, as this is, the question [for the Minister to decide] is whether they could reasonably be expected to prejudice its passage through either your Lordships’ House or the House of Commons.100

Procedures in Holyrood

3.87 The equivalent procedure in the Scottish Parliament was first used in 2014. The Delegated Powers and Law Reform Committee, which has a specific remit in relation to law reform, takes the lead on Scottish Law Commission Bills. For a Scottish Law Commission Bill to be eligible for the procedure:

1) there must be a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;

2) it must not relate directly to criminal law reform;

3) it must not have significant financial implications;

4) it must not have significant European Convention on Human Rights implications; and

5) the Scottish Government must not be planning wider work in that particular subject area.

3.88 The benefits of a streamlined procedure for non-controversial Bills in improving efficiency are clear. Without streamlined procedures, the limited space in legislature timetables risks denying the opportunity for some non-controversial Bills to become law.

Statute Law Repeals Bills

3.89 These are Bills prepared by one or both of the Law Commissions to promote the reform of statute law by the repeal, in accordance with Law Commission recommendations, of certain enactments which (except in so far as their effect is


101 The Legal Writings (Counterparts and Delivery) (Scotland) Act was introduced in May 2014 and received royal assent in April 2015.

102 As to the Committee see the Standing Orders of the Scottish Parliament, rule 10.2; as to the special procedure see the Standing Orders of the Scottish Parliament rule 9.17A.
preserved) are no longer of practical utility, whether or not they make other provision in connection with the repeal of those enactments, together with any Law Commission report on any such Bill.

3.90 These “Statute Law (Repeals) Bills” list statutes or parts of statutes to be repealed. The lists are produced by a small team of specialists at the Law Commissions, who seek to guarantee that all of the Acts or parts of Acts they recommend for repeal are obsolete, superseded or otherwise without practical utility. They are, in effect, dead law. Statute Law (Repeals) Bills are introduced first in the House of Lords. They are given a brief first and second reading and then referred to the Joint Committee on Consolidation etc Bills for detailed consideration. If the Joint Committee is content with the Bill, the other parliamentary stages are largely formal.103

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

CONCLUSION

3.91 The National Assembly’s role has changed quite dramatically since its establishment in 1999, yet some of its key features remain the same. The National Assembly is now dealing with a heavy legislative programme, as will be explored in chapter 5.

3.92 As legislative counsel for Wales have said:

The National Assembly for Wales has only recently embarked on the enterprise of subjecting human conduct to rules. The difficulties faced by all law-making institutions in ensuring that laws are accessible are now faced by the fledgling law makers of Wales – along with some problems peculiar to the Welsh journey towards self-governance that are of particular concern.104

103 House of Commons Standing Orders 58; House of Lords Standing Order 51.
CHAPTER 4
DRAFTING AND INTERPRETING LEGISLATION

INTRODUCTION

4.1 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.¹ This is particularly important in Wales, where the statute book comprises legislation from an array of sources. How legislation is drafted (written) is fundamental to its accessibility.

4.2 Excessive complexity impairs the accessibility of legislation. Only some of the causes of complexity lie within the control of the person who writes the legislation (the “drafter”). For example, complexity may be caused by imprecise policy objectives devised by policy makers, a superficial assessment of the legal framework or rushed and inaccurate instructions to drafters.²

4.3 Most primary legislation is written by professional drafters and drafters carry a heavy responsibility for the health of the statute book overall.

4.4 Poor drafting can certainly contribute to the complexity of legislation. In Wales, drafters have adopted practices which are intended to improve clarity in legislation. Moreover, the guidelines for drafters in Wales urge the drafter to think beyond mere mechanical casting of policy in legislative form:

In all cases the drafter has a role in being an advocate within government for approaches to legislative projects that better promote clear law.³

4.5 In this chapter, we consider the specialist nature and practice of legislative drafting. We look in some detail at the Legislative Drafting Guidelines issued by the Office of the Legislative Council (“OLC”) in 2012 and ask how far the Welsh Government’s drafting practices achieve clarity.⁴ In chapter 11, we consider bilingual drafting in Welsh and English.

4.6 We also consider whether Wales needs its own Interpretation Act in order to aid better understanding of Welsh legislation.

² Office of the Parliamentary Counsel, When laws become too complex (13 April 2013). In chapter 9, we will look at other models for developing control mechanisms for legislative design where the role of the Office of the Legislative Counsel might change.
⁴ Welsh Government, Office of the Legislative Counsel, Legislative Drafting Guidelines (January 2012). These guidelines are not published on the Welsh Government’s website, but may be found in an attachment to papers presented before the Constitutional and Legislative Affairs Committee in the inquiry: “Making Laws in the Fourth Assembly”.
THE LEGISLATIVE DRAFTING PROCESS

4.7 Legislative drafting is the process by which policy is put into words. Good legislative drafting thus hinges on its effectiveness in bringing the intended policy into effect, and presenting it clearly.

4.8 Draft legislation may originate from any number of persons, but in the context of legislation proposed by the executive, it is initially produced by Parliamentary Counsel in London or drafters from the Office of the Legislative Counsel in Wales. This chapter focuses on legislative drafting as a governmental process, but it is important to bear in mind that in Wales a higher proportion of legislation emanates from Assembly Members, not from the Government, so that the first draft of the legislation is not necessarily written by professional drafters.

The approach to drafting in the United Kingdom

4.9 The conventional model of government-produced legislative drafting has specialist drafters acting on the instruction of policy-holders. Policy direction is decided by the government department headed by a minister. The policy-holder then instructs the drafter, who uses specialist legal drafting skills to produce legislation that clearly and efficiently achieves the policy aim.

The Office of the Parliamentary Counsel (“OPC”)

4.10 Centralised drafting arrangements have long existed in the United Kingdom. Established in 1869, the OPC houses a team of about 50 specialist lawyers – Parliamentary Counsel – who draft government Bills before they are introduced into Parliament. The OPC advises departmental ministers on Bills they sponsor, and the Minister responsible for the Government’s legislative programme (at present the Leader of the House of Commons).

4.11 The OPC is funded by the Cabinet Office and its other client departments, but counsel act as independent advisers to their clients. The drafter in charge of a Bill has a responsibility to brief the Law Officers (the Attorney General and Solicitor General) and members of the Public Bill Committee on matters of legal policy to which a Bill may give rise, including matters involving the rule of law, retrospectivity and matters involving fundamental rights and freedoms including those arising under the European Convention on Human Rights. This can cause tensions between the instructing department and counsel drafting the Bill.5

4.12 Although Parliamentary Counsel do not usually draft secondary legislation, they may check it informally, or read through and advise on secondary legislation which amends primary legislation. Secondary legislation is generally drafted by government lawyers who work within a government department. The lawyers are instructed by policy officers within the department. Similar approaches are taken within statutory corporations who have powers to make regulations.

The Office of the Legislative Counsel (“OLC”)

4.13 The model of institutional responsibility for drafting legislation in Wales mirrors the centralised United Kingdom structure. The OLC is currently part of the

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5 Office of the Parliamentary Counsel, Working with Parliamentary Counsel (December 2011) p 15.
Permanent Secretary’s Department, the Welsh equivalent of the United Kingdom government’s Cabinet Office. The OLC was established in 2007 to draft primary legislation in Wales. We described the role of the Counsel General earlier in chapter 3.

4.14 All Assembly Bills promoted by the Welsh Government are drafted by the OLC. This includes all government amendments to Bills, even if the Bill is not a government Bill. There are currently 14 legislative counsel.

4.15 Secondary legislation is not usually drafted by the OLC. Most secondary legislation is drafted by lawyers in the Welsh government’s Legal Services Department, working with government departments. It is then checked by OLC. However, the Welsh government’s procedures require Welsh statutory instrument provisions which amend primary legislation to be checked by the OLC. The OLC may be instructed to draft statutory instruments that amend primary legislation.

What is the role of legislative drafters?

4.16 The process of preparing legislation does not simply involve drafting the provisions of a particular Bill, but extends to translating policy into laws which are as “clear, effective and readable as possible”. The Cabinet Office and the OPC’s Good Law Project defines the key responsibility of legislative drafters as subjecting policy ideas to a rigorous intellectual and legal analysis, and to clarify and express legislative propositions. The drafting stage is often the first at which the policy as a whole is subjected to meticulous scrutiny.

4.17 An important part of the drafter’s role is to test the government policy as regards its capacity to be encapsulated clearly in legislation. Drafting, in practice, is an iterative process, involving ongoing discussions between drafters and policy-holders, with drafts, questions and answers being passed back and forth as they develop. It requires well thought out policy and lawyers with specialist drafting skills and knowledge of the relevant area of law. Time is therefore an essential commodity: time to prepare the policy, and to refine its expression in drafts discussed between those responsible for the policy and the drafter.

4.18 More broadly, legislative drafters have an understanding of, and an eye on, the health of the law and the impact of law reform in one area on the law as a whole. As the OPC states:

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The need to preserve a stable constitutional relationship between Parliament and the courts means that Counsel will always have an eye on a Bill’s long-term consequences for the health of the statute book, and the appropriate distinction between the legislative function of Parliament and the interpretative role of the courts. It is a responsibility of Counsel to protect the integrity of the legislative process, so that the judiciary’s settled understanding of the process and this distinction are not disturbed.\(^8\)

**DRAFTING GOOD LEGISLATION IN WALES**

4.19 The OLC published *Legislative Drafting Guidelines* in 2012.\(^9\) The guidelines prescribe best practice for legislative counsel drafting legislation in Wales. The guidelines explain that the overarching objective for legislative drafters is clarity, stressing that clarity should not merely be instrumental to attaining effective legislation. They place accessibility of legislation for readers at the centre of drafting practice, aspiring to ensure that readers of legislation are able easily to understand what the legislation says. The guidelines go on to give concrete and practical advice on how to achieve clarity. They are detailed and nuanced, highlighting the causes of complexity that arise from the drafting itself, and prescribing ways of reducing complexity in legislation. The guidelines borrow some best practice from the OPC’s guidelines as well as guidance specific to Wales.\(^10\)

4.20 In Wales, the drafting process must ensure that the English and Welsh texts are equivalent, as both have equal status. We discuss bilingual drafting in chapter 11.

**What does clarity mean?**

4.21 The OLC explains that clarity requires a combination of simplicity and precision, and that there may need to be compromise between the two:

> What is simple will often be precise and what is precise will often be simple, but one does not follow from the other. Too much emphasis on simplicity can lead to imprecision and doubt about the effect of the law. While a law drafted in “blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity.”\(^11\)

4.22 The guidelines suggest that where there is a tension between simplicity and precision, it is a matter of judgement for legislative counsel as to how to resolve it. The appropriate solution will depend partly on the context.

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\(^10\) The current edition is Office of the Parliamentary Counsel, *Drafting Guidance* (March 2014).

Achieving clarity in legislation

Plain language

4.23 The OLC guidelines stipulate rules and practice for drafting in plain language to a fairly high degree of specificity.¹²

4.24 The New Zealand Law Commission defined plain language as follows:

There is no mystery to plain language. Plain language is ordinary language, expressed directly and clearly. It is intended to simplify (to the extent possible), but not be simplistic; to enhance style, rather than be stylistically bland. In legislation its use is intended to remove the barriers to communication, and in this way make the law more accessible.¹³

4.25 The Law Reform Commission of Victoria explained that plain language

conveys its meaning as clearly and as simply as possible, without unnecessary pretension or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience.¹⁴

4.26 Plain language should strike a balance between precision and simplicity in legislative drafting, and thereby help to make legislation more understandable and navigable. In 1986, the New South Wales Parliamentary Counsel’s Office was one of the first Australian drafting offices to make a formal commitment to plain language. The New South Wales drafting policy on plain language stresses that plain language “is not simplistic English. It does not involve any loss of precision”.¹⁵

USING PLAIN WORDS

4.27 Some of the terminology in legislation can be confusing for readers. The use of technical legal terms, such as ‘repudiatory breach’, makes legislation difficult for non-lawyers to understand. However, these terms may have settled meanings in the common law. Departing from them could render a piece of legislation vulnerable to misinterpretation. This is a legacy of our common law tradition. Providing a definition of such terms within the statute or summarising their meaning in explanatory notes could help mitigate the risk of the legislation being difficult to understand. There may be some technical terms that can be smoothly translated into plainer language. The New Zealand Commission suggests, for example, that the “phrase “bequeath and devise” can be replaced with “give”, and

agree and covenant reduced to “agree”.16

4.28 Lawyers have a tendency to use language which is archaic and not in common usage, such as “hereafter” and “therein”, which can render a legislative provision less intelligible. Latin is used by lawyers, both where the Latin phrase represents the technical legal term, and also where it is does not. The reasons given for a decision made by a court is still usually called the ratio decidendi, for example. Lord Woolf’s report Access to Justice started the process of moving the legal practice towards the use of plain English.17 The rules governing procedure in the civil courts were re-written in plain English. Archaic words that are no longer in common usage were replaced with more modern equivalents. Latin terms were removed wherever possible.18 Terminology such as “ad hoc” can be easily replaced with phrases such as “on an individual basis” or “on a case by case basis”. Such changes can make the language used in the legislation more readable.

4.29 The OLC guidelines establish a number of hard rules aimed at improving the choice of words in legislation. For example, drafters are instructed not to use any jargon, foreign or archaic words. The OLC guidelines provide examples of archaic words, and include “comprise”, “hereafter” and “therein”. The guidelines also advise drafters to avoid ambiguous words wherever possible, suggesting that “any” should be avoided as being too ambiguous where the indefinite article “a” would be appropriately used instead.

4.30 Phrases in legislation that are commonly understood to mean certain things by drafters, but may be ambiguous to readers, are also discouraged. For example, “in particular” is used to indicate that a subsequent list of things is not exhaustive. The guidelines observe that there have been examples of members of the National Assembly not understanding the meaning of this phrase whilst scrutinising legislation. Instead, the guidelines recommend that the phrase be avoided and the expression “includes, but is not limited to” is used instead. The phrase “provided that” is to be avoided because it is also deemed to be too ambiguous. There are several examples given of ambiguous words and phrases, and the OLC guidance provides alternative phrasing to improve both precision and simplicity.

WRITING CLEAR SENTENCES

4.31 If a sentence is structured in a convoluted and unwieldy way, the information it is intended to convey will be obscured. There are a number of common complaints about the way that sentences are structured in legislation. The first is that legislation tends to be long-winded. For example, the first two parts of the Road Traffic Act 1972 have an average sentence length of 79.25 words, and the longest sentence is 740 words. Tiersma, an American academic, points out that, by contrast, scientific prose has a mean sentence length of 27.6 words according

to one study. Long sentences are not necessarily problematic. However, the more pieces of information a single sentence contains, the less easy it is for the reader to follow.

4.32 It is a feature of the common law tradition that legislation is drafted so as to be exhaustive and detailed. However, precision may risk undermining how understandable and navigable a particular piece of legislation is. If a provision is comprehensively drafted but expressed in a convoluted way, this can negate the value of exhaustive drafting, and still leave the legislation open to misinterpretation.

4.33 The OLC guidelines advise drafters on how to ensure that the words are arranged in the simplest and most precise way. Rather than stating broad practice, such as encouraging shorter sentences, the guidance stipulates that drafters should avoid putting too many ideas into “sense bites”:

> Information should be presented to the reader in short bites: each of those short bites may be contained in a separate phrase or paragraph which grammatically amount together to a single (longer) sentence.\(^{20}\)

4.34 The aim of this advice is to avoid long and complex unbroken text which is, as the OLC guidelines point out, “often the subject of caricature and criticism”.\(^{21}\)

4.35 The OLC guidelines also give guidance on how these sense bites should be drafted, avoiding, for example, the use of “unnecessary words”.\(^{22}\) Drafters are advised to avoid turning verbs into nouns; nouns so created are superfluous and obscure what is meant by the sentence. For example, “a local authority must give consideration” should be written instead as “a local authority must consider”.\(^{23}\) This reduces the word count, but it also helps to clarify the meaning of the text.

**Structure and organisation of legislation**

4.36 The way a piece of legislation is structured and organised can determine whether that legislation is easily understandable and navigable or inaccessible. The OLC guidelines set out broad and detailed advice on how to improve the structure and organisation of legislation, including how to order content and the use of headings and numbering.

4.37 The guidelines also stipulate the kinds of specific structuring that drafters should avoid. For example, drafters are told to avoid, where possible, cross-referencing

\(^{18}\) Civil Procedure Rules.


to a provision that appears later on in the legislation, where awareness of the later provision is necessary to understand the earlier provision. However, this is a relatively common practice. For example, in the Social Services and Wellbeing Act (Wales) 2014, there are relatively frequent cross references between sections.  

4.38 Making so-called “global cross references” to other pieces of legislation is also generally discouraged, such as “subject to the provisions of the Human Rights Act 1998”. The OLC guidelines suggest that, where such references are unavoidable, the specific relevant provisions should be provided in order to help the user to navigate between the two pieces of legislation.

4.39 These kinds of drafting practices can help to ensure that the legislation itself is clear, in addition to helping to make the statute book more navigable.

Amending and repealing legislation

4.40 Where legislation is amended without consolidation, it becomes less accessible. Successive amendments without consolidation can create a convoluted and obscure web of statutes, all of which readers may need to get to grips with before they can understand the law which applies to them. This is a UK-wide problem, compounded in Wales by the different types of legislation and the path along which devolution has developed. We will see examples of these problems in chapter 5 and then look at solutions in chapters 6, 7, 8 and 9.

4.41 Where a policy decision has been made to amend without consolidation, the OLC guidelines advise legislative drafters on how to do so in the clearest way possible.

DRAFTING AMENDMENTS AND REPEALS

4.42 A piece of legislation may be amended or repealed by another piece of legislation expressly or impliedly. An express amendment or repeal is stated explicitly in the amending or repealing legislation. Lord Justice Laws explained how an implied repeal operates in Thoburn v Sunderland City Council:

If Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later.

4.43 Implied amendments and repeals are inherently invisible to the reader. We consider below how express amendments and repeals are drafted.

Distinguishing between textual amendments and non-textual modifications

4.44 A textual amendment is a provision altering the words of an earlier enactment by inserting, substituting or omitting text. For example, paragraph 2 of the schedule to the Education (Wales) Measure 2009 textually amends the Education Act 1996 as follows:

See, for example ss 13 and 34.

See Chapter 1.

In section 326(4) (appeal against contents of the statement)—

(a) in paragraph (b), omit the full stop and after “school” insert “, or”

4.45 This means that when section 326(4)(b) of the Education Act 1996 is reprinted in its updated form, it should include the changes made by the Education (Wales) Measure 2009. Commercial legal publishers have for many years printed volumes of legislation in which the text of an Act is printed as amended by any later amending statutes. Nowadays, the texts are also available on subscription websites and, to some extent, on free-to-view websites. Without access to the amended text in paper or electronic form, readers must obtain the original and amending Acts and work out the effect of the amendments for themselves.

4.46 A non-textual modification changes the effect of a legislative provision without altering its wording. Examples of this are sections 41A and 45 of the Wildlife and Countryside Act 1981, the National Assembly for Wales (Transfer of Functions) Order 1999 and schedule 11 to the Government of Wales Act 2006. These altered the effect of various pieces of legislation. For example, the text of section 45 of the Wildlife and Countryside Act 1981 (which we discussed in chapter 1), was left unchanged and the reader would have to be aware of those other pieces of legislation – two of which were outside the 1981 Act itself – in order to know who in Wales had the functions that, on the face of section 45, belonged to the Secretary of State and Natural England.

4.47 The technique of non-textual modification avoids the need to draft amending clauses altering the text of the modified provision; it can sometimes convey the changed effect of the modified provision more simply than a textual amendment; and it can sometimes avoid the need to identify all the modified provisions in the modifying provision. However, it increases the risk of the modifying provision escaping the attention of the reader of the modified provision, since even a text of an Act that incorporates textual amendments made by later Acts will not disclose the existence of the non-textual modification, though commercial publishers of legislation may refer to its existence in notes to the legislation.

KEELING SCHEDULES

4.48 In a debate in the House of Commons in 1938, Mr (later Sir) Edward Keeling MP asked Prime Minister Neville Chamberlain a question about a memorandum on the “evils of legislation” that he had submitted to the Prime Minister. Chamberlain explained in his response that

the suggestion made [by the memorandum] is, in effect, that a Bill amending or applying an existing enactment by reference should contain a Schedule setting out the enactment as it will read when amended by the Bill and showing by typographical devices the Amendments proposed.

27 We discuss online sources of legislation in chapter 6.
28 The memorandum was also contributed to by Mr Justice Croom-Johnson.
29 Hansard (HC), 26 July 1938, vol 338, cols 2919 to 2920W.
4.49 Such a schedule became known as a Keeling schedule. A Keeling schedule is a schedule to an amending Bill that becomes a schedule to the amending Act when the Bill is enacted.  

4.50 Keeling schedules are not universally popular with legislators and parliamentary counsel. The Fourteenth Report of the House of Lords Select Committee on the Constitution cited objections to them voiced by the Leader of the House of Commons, Peter Hain MP, and by Sir Geoffrey Bowman, former First Parliamentary Counsel, on grounds of their demands upon Parliamentary resources, the considerable additional work of amending the schedule when a Bill was amended during its passage and the risk of inconsistency between the clauses and the schedule.

4.51 The Select Committee’s recommendation was for an “informal Keeling-type schedule” rather than for a formal schedule that would become a schedule to the amending Act once an amending Bill was enacted. They concluded that “in principle, members of both Houses should have the opportunity to see exactly how a Bill amends an earlier Act” and recommended that

where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and that this should be included in the Explanatory Notes to the bill.  

4.52 United Kingdom Government Bills are sometimes accompanied by a document produced by the sponsoring department setting out the text of existing legislation as it would stand after amendment by the Bill, and such documents are sometimes referred to (inaccurately) as Keeling schedules. Amendments in schedules of this type are typically presented as follows:

(1) This section applies to any person who or body which exercises any function –

(a) ...

(b) under Part 2 of this Act in relation to local development documents;

(c) under Part 6 of this Act in relation to the Wales Spatial Plan National Development Framework for Wales, a strategic development plan or a local development plan.  

4.53 The text that is to be omitted is indicated by a strikethrough, and the text which is to be introduced is underlined. The amending provision of the Planning (Wales

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30 See the speech of Lord Brightman moving (unsuccessfully) for the inclusion of a Keeling schedule in the Sexual Offences (Amendment) Bill. See Hansard (HL), 13 Nov 2000, cols 117 to 119.


In section 39 (sustainable development), in subsection (1)(c), for “Wales Spatial Plan” substitute “National Development Framework for Wales, a strategic development plan”.

4.54 We currently see value in Keeling schedules. When produced in the form just described, they can enable a reader to see how the amendments change the text by viewing the original and updated versions in one place.

4.55 Keeling schedules take time and resources to produce. A Keeling schedule which is attached to the Bill itself adds to the length of a Bill and can result in it becoming unwieldy. It creates more work for parliamentary counsel if it has to be amended to reflect amendments to the Bill. However, the work involved can save time and effort at a later stage when a consolidated version of the statute is prepared for publication on legislation databases.

4.56 The Good Law Project piloted a Keeling text version of the Charities Act 2011, reflecting amendments made by the Charities (Protection and Social Investment) Bill published in October 2014. The Keeling text version was created in collaboration with the National Archives, and the draft is available on legislation.gov.uk. On the website, the text that is added to the Charities Act 2011 by the Protection of Charities Bill is displayed in green, and amendments to existing text are displayed in red. It clearly demonstrates how the Charities Act 2011 would be amended, and does so in a user-friendly hyperlinked format.

4.57 Our provisional view is that further development of online Keeling text versions of statutes would be desirable. We seek consultees’ views on this and on whether they should be limited to being “informal Keeling Schedules” as recommended by the House of Lords Select Committee or should be formal schedules to an amending Bill that will become law when the Bill is enacted.

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

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

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

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

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

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33 Planning (Wales) Act 2015.
Consultation question 4-6: What features would consultees like to see in Keeling schedules, or other documents showing amendments, to make the changes as clear as possible?

Particular features of Welsh legislation

4.58 We discuss bilingual drafting and the interpretation of bilingual legislation in chapter 11. Here we discuss two other features which are developing in Welsh legislation: statutory overviews and aspirational clauses.

Overviews

4.59 An emerging practice of Welsh legislative drafters is to set out an overview of the structure and purpose of a piece of legislation either at its beginning or at the beginning of parts of the legislation.

4.60 For example, the Education (Wales) Act 2014 explains what each part of the Act does in general terms. For example, section 1(3) states:

Part 3 makes provision about —

(a) the fixing of term and holiday dates for schools in Wales;
(b) the times of school sessions.34

4.61 Overview provisions do not prescribe rules or principles, but are intended to describe the scope of the statute and set out the policy objectives of legislation. If they are not intended to form part of the law, and cannot be relied upon to interpret the law, it could be argued that they are more appropriately placed in the explanatory notes than the statute. There is a risk that the overview could be used to interpret the legislation and obscure the meaning of a statute.

4.62 However, the Welsh Government gave evidence to the Constitutional and Legislative Affairs Committee’s inquiry that many people find it preferable to have a basic explanation in the statute itself.35

4.63 The role of online contents pages overlaps with the purpose of overviews, namely to provide users with an adequate tool to navigate legislation. Contents pages will direct users to the titles of parts or sections, but they provide only headings. Overviews can be more informative, providing a description of the content of a particular provision. For example, the overview to part 4 of the Higher Education (Wales) Act 2015 reads:

Part 4 makes provision about the preparation and publication of a code relating to the organisation and management of the financial affairs of institutions that have a fee and access plan, including provision about—

(a) compliance with the code;

34 Education (Wales) Act 2014, s 1.
35 Welsh government response to the Constitutional and Legislative Affairs Committee inquiry into ‘Making Laws in the Fourth Assembly’ (June 2014) at para 48.
(b) powers available for the purposes of monitoring compliance with the code, and in the case of failure to comply with the code.36

4.64 This succinctly and clearly states what part 4 makes provision about, whilst the contents page references the title of part 4, “Financial Affairs of Regulated Institutions”, and lists the 10 sections in that part.

4.65 In addition, having an overview may make navigating the legislation easier for the reader. This is especially the case for non-legally trained people who may not otherwise know where to find what they are looking for within legislation.

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

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

Aspirational or “purpose” clauses

4.66 Aspirational clauses tend to impose a duty or obligation to work towards a goal which is an aspiration, rather than a measurable target for which the duty-holder could be held accountable. For example, section 5 of the Social Services and Wellbeing (Wales) Act 2014 imposes a duty on persons exercising functions under the Act to promote the well-being of people who need care and support, and carers who need support. Such a clause expresses the broad purpose of the legislation. Aspirational clauses may specifically state the purpose of legislation without necessarily framing this as a duty. For example, the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 states as follows:

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.37

4.67 Aspirational clauses can be very difficult to enforce. Aspirational drafting is often criticised for failing to make any contribution to hard law and has been accused of being mere window dressing. Aspirational clauses have also been criticised as making it difficult to be certain of the rights and obligations the legislation confers. Furthermore, some users of legislation have found that aspirational drafting can

36 Higher Education (Wales) Act 2015, s 1(5).

37 Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015, s 1(1).
make it difficult to navigate around the legislation.38

4.68 However, aspirational drafting can have benefits. Aspirational clauses provide a clear expression of the underlying policy of the legislation. This can aid users of the legislation to understand what other provisions in the legislation are aiming to do. Aspirational drafting may also enshrine in legislation acknowledged legal principles that are not applied consistently.

4.69 Furthermore, aspirational clauses should change practice. Even where enforcement action might fail, public bodies are still under an obligation to seek to operate the law and the aspirational provisions may have a practical effect.

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

AN INTERPRETATION ACT FOR WALES?

The Interpretation Act 1978

4.70 The Interpretation Act 1978 was enacted by the United Kingdom Parliament following a recommendation made in the report of the Committee on the Preparation of Legislation (the "Renton Committee").39

4.71 The Renton Committee’s report followed a joint report of the Law Commissions on the Interpretation Act 1889 and certain other enactments relating to the construction and operation of Acts of Parliament and other instruments.40 It noted the following:

A general Interpretation Act can help to shorten and simplify particular Acts of Parliament, to clarify their effects by enacting rules of construction, and to standardise common-form provisions.41

4.72 The report recommended that a new Interpretation Act should be enacted and the Interpretation Act 1978 shortly followed. The Interpretation Act 1978 consolidated the Interpretation Act 1889 Act and certain other enactments relating to the construction and operation of Acts of Parliament and other instruments.42

4.73 Daniel Greenberg in Craies on Legislation describes the Act as follows:

40 The Interpretation of Statutes (1969) Law Commission Consultation Paper No 21; Scottish Law Commission No 11.
42 Interpretation Act 1978, long title.
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.

4.74 One of the main purposes of the Interpretation Act 1978 is to shorten other legislation by providing “labelling definitions”. This is a list of fixed definitions for numerous words and expressions. Providing a central list of definitions avoids the need for repetition of them in other legislation and ensures consistency of meaning. The 1978 Act has been referred to as a “drafting convenience”. For example, “land” is defined as including “buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”. Although this provides a standard definition of land, anyone accessing the law will also need to have regard to any other statutory interpretation provisions that may apply. Schedule 1 to the Interpretation Act 1978 also refers to various other Acts which establish fixed definitions for words and expressions. Words and expressions listed in Schedule 1 to the Act are to be construed in accordance with that Schedule unless the contrary intention appears in an Act. In other words, a specific interpretation clause in legislation would override the 1978 Act and the meaning provided for by the 1978 Act would be displaced. The 1978 Act provides for circumstances where no specific interpretation clauses are provided in other legislation.

4.75 The 1978 Act also contains provisions about the enactment and operation of legislation, including provisions for when legislation refers to genders or number. For example, section 6 of the Act provides:

In any Act, unless the contrary intention appears,-

(a) words importing the masculine gender include the feminine;
(b) words importing the feminine gender include the masculine;
(c) words in the singular include the plural and words in the plural include the singular.

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44 Blue Metal Industries Ltd v R W Dilley [1970] AC 827, 848.


46 For example, “land” is separately defined for the purposes of the Town and Country Planning Act 1990. In section 336(1) of the 1990 Act, “land” is defined as “any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land”.

47 Interpretation Act 1978, s 5.
4.76 Such a provision is less important now that drafters tend to draft in a gender-neutral style, although it remains essential for interpreting earlier legislation. 48

4.77 The Interpretation Act 1978 was amended by paragraph 11 of schedule 10 to the Government of Wales Act 2006 to apply to law emanating from Wales. 49 The 1978 Act now applies to all Measures and Acts of the National Assembly and all instruments made under those Measures and Acts. 50

An Interpretation Act for Scotland


4.79 Scotland has a legal system distinct from the rest of the UK. The Scotland Act 1998 established the Scottish Parliament, empowered to make primary legislation based on a reserved powers model. 54 Scotland has devolved competence for most of the criminal and civil law and operates a different system of courts and, to a large extent, of tribunals. 55 In 1999 a transitional Order made provision for the interpretation and operation of Acts of the Scottish Parliament. The Order contained general definitions (such as “High Court” meaning the “High Court of the Justiciary”) which were different from the definition found in the Interpretation Act 1978. 57 However, the Order was largely based on the provisions of the 1978 Act.

48 See the Written Ministerial Statement by the Leader of the House of Commons on the announcement by Government to use gender-neutral drafting. Hansard (HC), 8 March 2007, col 146WS. For an example, see Modern Slavery Act 2015, s 1 and use of “person”.

49 Interpretation Act 1978 s 23B.

50 Scotland Act 1998, s 23.

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

52 Interpretation Act 1978, 23A

53 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.

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

55 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.


4.80 The Interpretation and Legislative Reform (Scotland) Act 2010 broadly reproduced the transitional Order with one or two exceptions.\(^{58}\) The 2010 Act therefore remains very similar to the 1978 Act, and legislation made by the Scottish Parliament is interpreted in a similar way to legislation made by the United Kingdom Parliament.

4.81 In the Scottish Government consultation paper on the Interpretation and Legislative Reform (Scotland) Bill, it was stated:

> After 10 years of devolution, the Scottish Government now feels that it is time that the Parliament took ownership of these matters and made its own provision for them. Consequently, the Scottish Government proposes to introduce a Bill that will replace the Order(s).\(^{59}\)

4.82 This view was supported by all thirteen of the consultation responses on the proposed legislation.\(^{60}\) However, the Scottish Law Commission commented:

> We consider that it would be of more utility to the user of the Statute Book if the rules of interpretation for Acts of the Scottish Parliament were to the same effect as those for Acts of the United Kingdom Parliament. We would be concerned if the result of this exercise were to establish a second set of interpretative rules, inconsistent with, and perhaps even contradictory of, those in the Interpretation Act 1978.\(^{61}\)

The Scottish Law Commission argued that Scotland should take responsibility for its own legislation, but also that standardised interpretations should not differ in Scotland from England and Wales, wherever possible.\(^{62}\)

**Should there be an Interpretation Act for Wales?**

4.83 Wales does not currently have its own Interpretation Act. The Learned Society of Wales has suggested that technical terms that follow a standard form could feature in an Interpretation Act and therefore be removed from other statutes if Wales had its own Interpretation Act. The Society also considered how an Interpretation Act for Wales could facilitate the use of modern technology.\(^{63}\)

4.84 There is one further important distinction which is relevant only to Wales: the

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58 For example, see Interpretation and Legislative Reform (Scotland) Act 2010, s 20.


60 Scottish Government, *Interpretation and Legislative Reform (Scotland) Bill: Consultation response analysis* (June 2009).


62 See paragraph 2 of Scottish Law Commission response to Scottish Government consultation on Interpretation and Legislative Reform (Scotland) Bill (link above).

63 See page 7 of the Learned Society of Wales’ response to the Constitutional and Legislative Affairs Committee inquiry in to ‘Making Laws in the Fourth Assembly’.
equal status of English and Welsh as languages of legislation. In chapter 10, we will explore Welsh as a legal language. 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.

4.85 Currently the National Assembly’s Research Service produces glossaries of Welsh translations of technical terms and phrases used in Assembly Bills. These glossaries can provide clarification for those reading the Bill and ensure consistency as they form a bank of technical translations that can be referred to. However, these glossaries have no legally binding effect and do not provide a standard definition of a term. Some Acts also contain schedules which provide an index of defined words and expressions in English and the Welsh language equivalent.64 There is no fixed list of definitions provided for in a single statute for Welsh words and expressions.

Conclusion

4.86 Enacting an Interpretation Act for Wales has risks. Even small differences to the current rules on interpretation applying in England and Wales could cause confusion and error, in particular for lawyers and other professionals who operate on both sides of the border.

4.87 The Interpretation Act 1978 continues to apply to Wales. So far as English legal terminology is concerned, we are not aware of any need to supplement its provisions for the purposes of Wales. If that is so, re-enacting it as an Assembly Act would serve no practical purpose.

4.88 We 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 welcome consultees’ views on all these issues.

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

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

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

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64 See, for example, Education (Wales) Act 2014, sch 4.
CHAPTER 5
THE CONDITION OF LEGISLATION IN WALES: CASE STUDIES

INTRODUCTION

5.1 In chapter 3, we discussed the current structure of the National Assembly and how law is made, the role of the Welsh Government and the procedures and practices of the National Assembly. We noted the challenges for the Welsh Government and National Assembly in finding the time to consider the detailed policy to be enacted in legislation and the wider impact of the legislation, and the difficulties in finding time to scrutinise a very full programme of legislation.

5.2 In this chapter we will take a ‘snap shot’ of some aspects of the primary and secondary legislation as it currently stands. This legislation is the legacy of an incremental approach to devolution and a newly empowered National Assembly exercising its lawmaking functions. We look at five case studies, each of which considers a different devolved area of law and which, taken together, illustrate some of the issues which the Welsh Government faces when it comes to reform. They provide evidence of the incentives and disincentives to be considered when developing proposals for a legislative system for the future.

5.3 These case studies provide introductory outlines of the issues raised in pre-consultation in these areas of law and the information given is at a high level of generality with little detail.

5.4 In the following two chapters, we will go on to consider the widespread demand for consolidation of legislation, either in the form of a pure consolidation exercise, without changing the essence of the law, or by codification of an area of law, to include reform, modernisation, simplification and consolidation.

5.5 These examples come from five distinct areas of the law within which the National Assembly has legislative competence. All suffer from a fractured and much-amended legislative framework, but in three of these areas there has as yet been little attempt at consolidation. These case studies indicate a seemingly obvious, but important, truth. The composition of the law within each devolved subject varies. In some the law as it applies in England and to Wales is increasingly divergent. As we shall see, in education and planning law the Welsh Government has employed the National Assembly’s legislative competence to pursue its own policy agenda.

5.6 In some devolved areas, the law remains very much the same in both countries. Law reform is carried out jointly by Westminster and Cardiff. In waste regulation, for example, much of the legislative content in both Wales and England is dictated by European Union law.

CASE STUDY 1: EDUCATION

5.7 Education is a policy area in which the law as it applies in Wales and in England is diverging. ‘Education and training’ was one of the devolved fields set out in Schedule 2 to the Government of Wales Act 1998, and order and regulation-
making powers under various Acts of the United Kingdom Parliament were duly transferred to the National Assembly.\(^1\) Primary lawmaking powers relating to education were conferred under Parts 3 and 4 of the Government of Wales Act 2006, and the National Assembly has legislated in the area consistently.\(^2\)


5.9 The United Kingdom Parliament has, meanwhile, continued to pass legislation relating to education in parallel with the National Assembly. This has included, in some recent instances, legislation applicable to Wales, made on the basis of a legislative consent motion. Since the National Assembly has gained primary legislative powers, the presumption is that it should legislate for Wales on devolved matters.\(^3\) However, there are circumstances when it is practicable and convenient to include devolved provisions in Parliamentary legislation. Where, for example, a Bill is in progress in Westminster it may be more convenient and a better use of resources, to include Welsh law reform in that Bill. Examples of legislation made by the United Kingdom Parliament with a legislative consent motion from the National Assembly include the following.

(1) The Education and Skills Act 2008 amended admission arrangements for sixth form colleges and schools in Wales as well as England.\(^4\)

(2) The Education Act 2011 made amendments
   (a) in relation to the provision of information in connection with schools and funded education (otherwise than at school);
   (b) in relation to charges at boarding academies; and
   (c) in relation to amendments sections 32A and 32B of the Education Act 1997, regulating qualifications in Wales and sections 151 and 152 of the Apprenticeships, Skills, Children and Learning Act 2009, which sets out the equivalent powers for Ofqual in

2. For the legislative programme for the Fourth Assembly, see the First Minister’s announcement, National Assembly for Wales, Record of Proceedings, 11 July 2011 and the updated statement by the First Minister on the legislative programme on 16 July 2013.
3. See chapter 2 for discussion on the convention that exists between the United Kingdom Government and the Welsh Government where a Legislative Consent Motion is laid in the National Assembly if the United Kingdom Parliament wishes to legislate on a devolved subject.
The Deregulation Act 2015 made provision

(a) in relation to Apprenticeships; abolition of Office of the Chief Executive of Skills Funding; measures applying to England and Wales in relation to Further and Higher Education: reduction of burdens); and

(b) in relation to the School Standards and Framework Act 1998 - Home School Agreement.6

The Small Business, Enterprise and Employment Act 2015 made provision

(a) in relation to education and training; and

(b) in relation to the recovery of public sector exit payments.7

This has left a patchwork of legislation that suffers from all of the usual problems of law in a politically active field which has not recently benefitted from consolidation. To this can be added the further complexity of devolved legislation.

Education law in Wales is contained in numerous different pieces of legislation. This includes, depending on how widely ‘education’ is defined, anything from 17 to as many as 40 Acts of the United Kingdom Parliament, 7 Measures, 5 Acts of the National Assembly, and hundreds of statutory instruments.8

Relevant Acts of the United Kingdom Parliament which apply in both England and Wales contain parallel and increasingly divergent systems applicable in England and Wales which the discerning reader must unpick. A reader interested in the Education Act 1996 in its application to Wales only, for example, faces a formidable task. C F Huws’ description of the application of Part I of that Act –

5 National Assembly for Wales, Record of Proceedings 1 November 2011, Item 6: LCM agreed; Education Act 2011.

6 National Assembly for Wales, Record of Proceedings 7 October 2014, Item 8: LCM agreed; Deregulation Act 2015.

7 National Assembly for Wales, Record of Proceedings 13 January 2015; Small Business, Enterprise and Employment Act 2015.

which makes vital general provision for education - is illuminating.

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

…later legislation … has amended the Education Act 1996, and this has meant that some sections have been repealed in relation to England, with amendments inserted, while other sections have been repealed in relation to Wales, with different amendments introduced. Furthermore, a large body of subordinate legislation created pursuant to the Act has resulted in further distinctions emerging between the law in England and the law in Wales. 9

5.13 The relevant statutes can also be unclear or even misleading on their face, requiring considerable legal expertise to understand their application to Wales.

5.14 An example raising several common problems was provided by Keith Bush QC to the National Assembly’s Constitutional and Legislative Affairs Committee’s inquiry into Making Laws in the Fourth Assembly.10

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

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

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

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

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

(2C) Paragraphs 33 to 35 of Schedule 11 to the Government of Wales Act 2006 make provision about the National Assembly for Wales procedures that apply to any statutory instrument containing regulations or an order made in exercise of functions conferred upon


the Secretary of State or the National Assembly for Wales by this Act that have been transferred to the Welsh Ministers by virtue of paragraph 30 of that Schedule.”.

(3) (Repealed)

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

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

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

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

(1) subsections (1), (4), (5) and (6) apply in relation to both England and Wales (although the effect of subsection (6) in relation to Wales is unclear);

(2) subsections (2) and (2A) now apply only in relation to England; and

(3) subsections (2B) and (2C) only apply in relation to Wales.

5.17 Education legislation needs to be understood by local education authorities, but also by head teachers and other providers of education, and a wide range of professionals working with children, as well as by parents and carers. Over the last few years the reform of education in Wales and England has left a morass of legislation.

5.18 The problem is by no means restricted to non-professionals. Ministers and officials can struggle to get a clear sense of the law and their powers under it, making it challenging to manage both day to day business and to contemplate further reform on a principled basis.

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

5.20 In addition, there is a constant stream of new secondary legislation, in which the detailed application of the primary legislation is set out. Some of these contain provisions liable to change from time to time, such as fees; others contain more
detailed policy and procedure that do not warrant primary legislative scrutiny.11

CASE STUDY 2: SOCIAL CARE

5.21 The position so far as the law relating to social care in Wales is concerned is different. As with education, this is an area over which the National Assembly has had some form of legislative competence since 1998.12 Even before the Government of Wales Act 1998, Welsh social care policy was starting to diverge from the position in England. In March 1999, the United Kingdom Government published a white paper, seeking to take “a radical look at the way in which local services are planned and delivered for the people in Wales” and preparing for demographic changes affecting the future of social services in response to an ageing population.13 The National Assembly for Wales then published Improving Health in Wales – A Plan for the National Health Service and its Partners, under which a series of papers were published, planning changes in the organisation and delivery of health and social care in Wales.14

5.22 In recent years there has been increasing divergence in social care law between England and Wales.15 Last year, major Acts were passed in both England and Wales, establishing different legislation governing social care for each country.16 Exercising its powers under Part 4 of the 2006 Act, the National Assembly has strongly asserted its legislative independence, bringing into force an Act designed to “fully establish - without the need to look elsewhere – the law as it applies in Wales.”17

5.23 The Welsh Government responded positively to recommendations made by the Law Commission for England and Wales’ in 2011 in the report on Adult Social Care.18 The report included recommendations for law reform, together with the consolidation of existing law. The Welsh Government announced its intention to create more sustainable social services and

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

11 An example of more detailed procedure may be found in the Education (Induction Arrangements for School Teachers (Wales) Regulations 2015, SI 2015 No 484 (W.41).
14 National Assembly for Wales, Improving Health in Wales – A plan for the National Health Service and its partners (2001).
16 The United Kingdom Parliament has enacted the Care Act 2014 in relation to England.
18 Adult Social Care (2011) Law Com No 326.
understandable to those who need them. This Bill will give people a strong voice and real control. It will cover social care services for both children and adults, and will, as far as it is possible and appropriate, integrate the arrangements for both of these groups so that social care services are provided on the basis of need and not of age.  

5.24 The Social Services and Well-Being (Wales) Act 2014 was the result. It goes beyond the Law Commission’s recommendations (and beyond the Care Act in England). It consolidates the legal framework for children’s services as well as those provided to adults. The Act also – like the English Act – takes significant steps towards encouraging greater integration of health and social care services in Wales. It is a large Act and was a large Bill, 151 pages long as introduced into the National Assembly. A very large number of amendments were proposed during its passage. The social care team and policy officials had the challenging task of extricating the Welsh law from the England and Wales legislation whilst consolidating existing Welsh law and introducing wide-ranging reforms. At the same time, the National Assembly struggled to keep up with the sheer number of amendments, some from the Government as policy was refined, and some from Assembly Members in response to the Bill.

5.25 The Act received Royal Assent on 1 May 2014. It is not proposed to bring the Act into force until 2016 to allow time for the drafting of the necessary subordinate legislation and for guidance to be reviewed or written afresh.

5.26 In some areas, the Act consolidates and restates the current legal position. In other areas, the Act provides for changes in law but not in practice, such as with adult safeguarding. In other areas, the Act will radically reform social care law by introducing reforms that are new in policy and practice.

5.27 The benefits to the Welsh Government and to all those who will be operating under the new legislation are of course not yet clear, but the Welsh Government predicted that significant savings would result from the reforms. The new Act is comprehensive and presents a fresh start from which policy and practice may develop.

5.28 It has not escaped criticism, however. Professor Luke Clements has suggested that “if the aim was comprehensibility, it fails: it is often opaque and frequently

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

20 120 amendments were proposed. See http://www.senedd.assembly.wales/mgDecisionDetails.aspx?Id=5664&Opt=1 (last visited 1 July 2015).

5.29 Professor John Williams of Aberystwyth University gave this Act as an example of the complexity resulting from the substantive law being spread across numerous pieces of legislation. As he pointed out, this makes it difficult for practitioners and the public to find out what the law is.

The Children Act 1989 contains much of the public and private law of children. Subject to Welsh regulations, it applied to England and Wales. Part III provides for children who are in need, as defined by s.17. The Welsh Assembly’s Social Services and Well-being (Wales) Act 2014 repealed Part III of the 1989 Act within Wales. Welsh practitioners must now consult the 2014 Welsh Assembly Act to find the duties of local authorities and others towards children in need of care and support. The 1989 Act uses ‘welfare of the child’. The 2014 Act uses “well-being” as defined by s.2, which lists factors used to determine well-being. Under s.2 (3) of the 2014 Act, well-being of children includes ‘welfare’ as ‘interpreted for the purposes of the Children Act 1989’. Not easy reading. A child ‘in need’ may become a child at risk of harm and abuse. The support provisions may lead to action under Parts IV and V of the 1989 Act. Parts IV and V remain applicable in Wales. A practitioner will therefore need to switch from one piece of legislation to another. In addition, he or she will need to consider the Rights of Children and Young Persons (Wales) Measure 2011, Children’s Commissioner for Wales Act 2001, and any secondary legislation under the Westminster or Welsh Assembly legislation.

5.30 Williams goes on to call for codification and consolidation of Welsh law in order to improve accessibility and consistency.

5.31 Producing the Act has been a significant draw on the resources available to the Welsh Government and the National Assembly. It has taken up considerable time in the National Assembly, in addition to the work required of ministers, policy officials, lawyers and legislative counsel.

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

5.32 The National Assembly has competence to legislate in relation to “prevention, reduction, collection, management, treatment and disposal of waste”.\(^{25}\)

5.33 Much of the law relating to waste which applies in Wales and England emanates from the European Union. The relevant legislation therefore frequently does no more than transpose EU Directives.\(^{26}\) In effect, both legislatures operate within the same system, which limits the freedom of successive governments to pursue separate policy agendas. Moreover, as a matter of practice, the Welsh Government works closely with and benefits from work carried out at the UK-wide Department for Food and Rural Affairs (Defra). Defra is a much larger operation and has resources which it would not be practical for the Welsh Government’s Natural Resources Directorate to deploy.

5.34 Some argue that there is, in fact, very little divergence between Welsh and English law in this area, although there are exceptions, particularly in subordinate legislation. There are plausible positive reasons for maintaining the similarity. The waste industry works across both countries and there are no persuasive incentives to create cross-border differences which could increase costs for those operating in the waste industry.

5.35 The legislation is fragmented and the European Union legislation can be complicated and difficult to understand. Provisions are spread across numerous Acts, such as Part 2 of the Environmental Protection Act 1990, the Control of Pollution (Amendment) Act 1989 and the Waste and Emissions Trading Act 2003, with numerous statutory instruments made under those Acts and under the European Communities Act 1972. Statutory instruments include non-textual amendments to the primary legislation.

5.36 We have heard from stakeholders that much of the legislation relating to waste has been in place for years, and is well understood by the industry and regulatory authorities. Consolidation or restatement could cause unnecessary cost and confusion, as it would necessitate retraining staff, the drafting and publication of new guidance, and revising administrative practices where the law is not really changing. Nor is the current law, however complex it may be, necessarily inaccessible to those operating in the industry. Given that much of the complexity springs from European Union law, it would in any event need to be reproduced in any consolidation, and the key players appear to have a good understanding of the legislation as it stands.

5.37 There might, however, be benefit in consolidating and simplifying the whole of the environmental legislation applicable in Wales and reviewing the substantive law at the same time, thereby providing a complete overhaul. It might be that this exercise would avoid some of the difficulties that piecemeal restatement could cause or exacerbate. Equally, the benefits that an exercise on this scale could bring might be enough to offset the disadvantages noted above. Indeed, the Law


Commission was asked to consider including a project relating to environmental law in Wales as part of its twelfth programme of law reform. In the event, the project did not receive the Lord Chancellor’s approval as required by section 3(1)(c) of the Law Commissions Act 1965 and was therefore not included.27

CASE STUDY 4: TOWN AND COUNTRY PLANNING

Devolution of town and country planning

5.38 Until the 1990s planning legislation and planning policy was identical in its form and substance for England and Wales.28 However, a more distinctive approach to the planning system in Wales began to emerge in the early 1990s. This was due to the differences in the organisation of local government in the two countries, and the issue of some planning policy documents by the Welsh Office which applied solely to Wales.

5.39 “Town and Country Planning” was included in schedule 2 to the Government of Wales Act 1998 as one of the fields in which functions were to be transferred by the first Order in Council. Functions under public general acts and statutory instruments were transferred by the National Assembly for Wales (Transfer of Functions) Order 1999.29

5.40 As explained in chapter 2 above, when Part 3 of the Government of Wales Act 2006 was in force, the National Assembly only had the power to legislate on a “matter” if it was added to a “field” either by Act of the United Kingdom Parliament or through a Legislative Competence Order (a form of Order in Council). The National Assembly was empowered to pass Measures within the field of “town and country planning”, by section 202 of the Planning Act 2008, which added three matters to the field. When Part 4 of the 2006 Act came into force, “Town and Country Planning” was included in schedule 7 to the Act, giving the National Assembly power to make primary legislation in the area.

5.41 In recent years the Planning Directorate in the Welsh Government has been active in promoting a specific planning system for Wales. Wales has its own national planning policy, Planning Policy Wales, which is supplemented by Technical Advice Notes. Planning Policy Wales is considerably longer and more detailed than its English equivalent.30 The Planning Directorate has also commissioned a number of extensive research reports into the planning system in Wales. These reports have made numerous recommendations for changes to the Welsh planning system, some of which have been taken forward.31

5.42 A significant piece of legislation by the Welsh Government in relation to town and

27 Twelfth Programme of Law Reform (HC 364) p 10.
29 National Assembly for Wales (Transfer of Functions) Order SI 1999 No 672.
30 The National Planning Policy Framework, which is supplemented by Planning Practice Guidance.
31 See, for example, the Planning (Wales) Bill and Positive Planning consultation, run by the Welsh Government from 4 December 2013 to 26 February 2014. The consultation documents and report may be found at: http://gov.wales/consultations/planning/draft-planning-wales-bill/?lang=en (last visited 1 July 2015).
country planning is the Planning (Wales) Act 2015, which is the first piece of primary legislation on town and country planning by the Welsh Government.

**Source of confusion in town and country planning in Wales**

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

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

5.45 Parts of the planning systems in England and Wales are very different. An example of this divergence can be seen in the system of development plans created by the Planning and Compulsory Purchase Act 2004. Further changes were introduced, largely in England only, by the Planning Act 2008, the Localism Act 2011, Growth and Infrastructure Act 2013 and Infrastructure Act 2015. In Wales, local authorities use development plans as the main basis for deciding planning applications. England’s system is based on the principle of “localism” and only has local plans (which are prepared by the local authority) and neighbourhood plans (which are prepared by the community). However, the Welsh system is more centralised, and the intention seems to be to continue that trend. The Planning (Wales) Act 2015 proposes a national development framework which is prepared by the Government) and strategic development plans (prepared by strategic planning panels) and local development plans (which are prepared by local authorities).

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

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

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

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

33 “Neighbourhood plans” were introduced in England by the Localism Act 2011. These enable local communities to create a development plan which directs development in their area. These operate on a tier below the “local plans” which are created by the local planning authority.
provisions will continue to be mixed in with English provisions for some time at least.

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

The future

5.50 There are good reasons why it might be thought appropriate for Wales to have a different planning system from England. England has a population of 56 million and 340 planning authorities, with a scale of development to match. It may be that different legal structures would be appropriate for a country of 3 million people with 25 planning authorities. The Planning (Wales) Act 2015 is the first stage of creating a more specific planning system for Wales. At the request of the Welsh Government the Law Commission is undertaking a project on “Planning and development management in Wales” as part of its twelfth programme of reform. This project is intended to review the development management system in Wales, and the relationship between development management and plan-making.

5.51 In 2013, the First Minister announced to the National Assembly that the Welsh Government intended to bring forward a “further planning consolidation Bill [that] will bring together all existing Acts and further streamline the planning process”.

5.52 No timetable has yet been announced for this work.

CASE STUDY 5: LOCAL GOVERNMENT

5.53 The Welsh Government has advocated joint working between public bodies in general and collaboration between local authorities since the publication of its paper Making the Connections in 2004. There are currently 22 local authorities in Wales. Funding pressures contributed to a commitment to changing the structure of local government in Wales to reduce the number of local authorities so as to avoid duplication of services and create economies of scale. This process involves first passing a paving Bill to enable reorganisation to be designed, then legislation to implement the precise reorganisation arrangement.

34 C Mynors, Simplifying Planning Law: a More Radical Approach (not published).
35 22 local authorities and 3 National Parks.
36 For more information, see http://lawcom.gov.uk/ (last visited 1 July 2015).
38 The Welsh Assembly Government vision for public services, Making the Connections: Delivering Better Services for Wales (October 2004).
The most significant legislation in this field has been heavily amended, is old and uses language that is outdated. When trying to restate the meaning of Part 4 of the Local Government Act 1972 in the Local Government (Democracy) Wales Act 2013, drafters struggled to understand what the 1972 Act had intended.\(^{39}\)

The language of the 1972 Act is archaic and there has been a substantial amount of amending legislation since then.\(^{40}\)

**CONCLUSION**

It seems clear that devolution has added an extra dimension of complexity to an already complex situation. Those accessing the law that applies to Wales will often have to negotiate a patchwork of law emanating from Cardiff and Westminster, and understand how those laws inter-relate. The case studies we have considered above provide some insights, but we expect that consultees will have many more examples of difficulties they have encountered.

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

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

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

\(^{39}\) For an example, see Local Government Act 1972, s 55.

PART 2
DEVELOPING SOLUTIONS

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

INTRODUCTION
6.1 Ensuring that legislation is available to the public is crucial. This is best achieved by providing free and up to date legislation online in an easily navigable way. Additionally, accurate and up to date secondary materials, such as guidance and textbooks, may provide a useful tool to help citizens understand the law. In our view, access to law applicable in Wales is currently deficient, though progress is being made. In the following sections we consider how this situation could be improved.

PUBLISHING STATUTE LAW

Responsibility for publishing statute law
6.2 The United Kingdom government is responsible for ensuring that United Kingdom statute law is available to the public. This was acknowledged in 1991 by the Lord Chancellor, who recognised

a responsibility, on behalf of the Government, to ensure that satisfactory arrangements are made for the publication of the statute book.1

6.3 The legal responsibility to publish legislation as enacted, resides in the Queen’s Printer on behalf of the Crown. This duty extends to the publication of Welsh primary and subordinate legislation. 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 1947.2 However, the Queen’s Printer for the United Kingdom does not have legal responsibility for the publication of all devolved legislation. For example, the Scotland Act 1998 established a Queen’s Printer for Scotland with responsibility for the publication of Scottish primary and secondary legislation.3 The Offices of Queen’s Printer, Queen’s Printer for Scotland and Government Printer (in Northern Ireland) are held by the same person.

6.4 The publication arrangements for legislation for England and Wales were reviewed during the passage of the Government of Wales Act 2006. The United Kingdom Government was in favour of retaining the current arrangements, as this would mean legislation would be found in “a consistent form and from a single

1 Hansard (HC), 13 June 1991, vol 529, cols 613-614.
2 SI 1948 No 1.
3 Scotland Act 1998, s 92.
location”. It is beyond the scope of this project to consider where the ultimate institutional responsibility for the publication of Welsh legislation should lie.

The official versions of legislation

6.5 Online legislation in the United Kingdom is not strictly official. The only authoritative and official version of an Act of Parliament is that presented to the House of Lords on the passing of an Act. Under section 19(1)(c) of the Interpretation Act 1978, 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 (unless the referring Act otherwise specifies).

6.6 This establishes that the default, and therefore authoritative, version of any statute is the Queen Printer’s version. It is these versions that are published on the United Kingdom’s legislation database, legislation.gov.uk, although there is no statutory obligation to publish legislation electronically. Recourse to the Queen’s Printer’s versions will suffice in most circumstances, except perhaps where “it is necessary to establish beyond doubt the original text of an Act no longer available in ordinarily printed form.”

A modern approach to publication

6.7 By contrast, in New Zealand, the Legislation Act 2012 obliges the Parliamentary Counsel Office to publish legislation electronically as well as in printed form. In addition, the Parliamentary Counsel Office can issue official versions of legislation in electronic and printed form, and such versions are presumed to be correct. The 2012 Act also requires that electronic versions of legislation are:

as far as practical ... at all times able to be accessed at, or downloaded from, an Internet site maintained by or on behalf of the New Zealand Government.

6.8 The 2012 Act further specifies that legislation on this site must be available free of charge. The 2012 Act was published following recommendations made by the New Zealand Law Commission, and the New Zealand Government stated that the intention behind it was:

... to modernise and improve the law relating to the publication, availability, reprinting, revision, and official versions of legislation and

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4 Hansard (HL) 6 June 2006, cols 1220 and 1221.
5 For further explanation, see D Greenberg, Craies on Legislation (12th ed 2010), para 9.2.5.
6 The publishing arm of Her Majesty’s Stationery Office has since been privatised, and rebranded as The Stationery Office. The National Archives and The Stationary Office created legislation.gov.uk in partnership.
8 Legislation Act 2012, s 6(2).
10 Legislation Act 2012, s 9(1).
11 Legislation Act 2012, s 9(2).
to bring this law together in a single piece of legislation.¹²

6.9 In this way, the New Zealand Government is subject to a statutory duty to make legislation available to the public, free of charge, through electronic publication.

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

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

CURRENT ONLINE LEGISLATION SERVICES

6.10 There are several services currently available which provide access to legislation online. Some are free and some are available only on subscription. These services show the text of the legislation, and provide printable versions of the statute or statutory instrument. The following is a brief outline of the different services that currently provide access to statute law. The benefits and disadvantages of these services will then be considered in relation to the different aims or features of an online service for Wales.

Public services

Legislation.gov.uk

6.11 The United Kingdom’s public statute law database, 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 aims to cater for non-legal trained members of the public.¹³ It replaced three previous services: www.opsi.gov.uk, www.statutelaw.gov.uk, and www.oqps.gov.uk. Legislation.gov.uk provides access to all United Kingdom, Welsh, Scottish and Northern Irish legislation enacted from 1988 onwards, and most legislation made prior to 1988. It aims to publish legislation within 24 hours of enactment. Most legislation on the database incorporates later amendments made up to 2002, and according to the National Archives, approximately half of the legislation available on the database incorporates all subsequent amendments. Progress is being made in revising the remainder, with a target for completion of the end of 2015. The database has a specific Wales area on its website, including the Welsh language versions of Assembly Acts and statutory instruments made by the Welsh Ministers.

Defralex – subject matter limitations

6.12 The Department for Environment, Food and Rural Affairs (”Defra”) has established a database of its legislation which is intended to be updated as legislation is introduced or repealed. It is located within legislation.gov.uk, and named “Defralex”. A unique feature of the database is that it enables users to search legislation by subject matter. For example, if a user needs to locate legislation concerning powers of entry, the “powers of entry” link will provide the

¹² Explanatory Note to the Legislation Bill 2012.

¹³ National Archives, Evidence to Constitutional and Legislative Affairs Committee, Inquiry into Making Laws in the Fourth Assembly (January 2015).
user with all the relevant legislation. In addition, Defra also publishes detailed guidance on the law within its remit.

_Bailii_

6.13 The British and Irish Legal Information Institute (BAILII) is a charitable trust, which has built and operates an online legal database which provides access to United Kingdom legislation and case law. It also contains reports and consultation papers from the Law Commission of England and Wales, the Scottish Law Commission, and the Irish Law Commission. The legislation available on BAILII is usually as passed, and is not updated so as to incorporate subsequent amendments.

_Wales Legislation Online_

6.14 Until relatively recently, there was a free online database which provided access to Welsh legislation. Funded by the Welsh Government, “Wales Legislation Online” was established by Cardiff Law School in 1999 in order to help identify the areas of devolved executive competence following the Government of Wales Act 1998. Wales Legislation Online set out the transferred functions by subject headings, and provided access to Welsh legislation in chronological order. The database experienced a low number of users, and it was discontinued in early 2012.

_A new service for Wales_

6.15 The Welsh Government, in partnership with Westlaw UK, is currently in the process of designing a new online service for Wales, to be called _Cyfraith Cymru/Law Wales_. The aim of the site will be to provide a guide to the law applicable in Wales, organised by reference to, although not necessarily in strict accordance with, devolved subject fields. It will provide overviews of relevant areas of the law, together with relevant links to legislation on legislation.gov.uk, and articles provided by Westlaw UK. The site will be launched as a work in progress in July 2015.

_Commercial services_

6.16 There are several commercial services that provide online United Kingdom statute law databases on a subscription basis. For example, Westlaw UK contains fully consolidated full text versions of Acts since 1267 and Statutory Instruments since 1948.¹⁴ LexisNexis, via its online service “LexisLibrary”, provides fully consolidated and annotated United Kingdom legislation consisting of over 86,000 enactments dating back to 1266.¹⁵ LexisNexis also publishes Halsbury’s Statutes of England and Wales, which is a complete collection of primary legislation applicable to England and Wales organised by subject matter, and is extensively annotated and cross-referenced. The statutory annotations which appear in Halsbury’s Statutes are available online. These commercial services do not have Welsh language versions of their websites, and do not provide Welsh legislation in the Welsh language.

¹⁴ Westlaw UK internal help web pages.

WHAT SHOULD A LEGISLATION DATABASE FOR WALES LOOK LIKE?

6.17 We turn to consider the essential features of an online resource for legislation in Wales. Although there is significant public demand for access to legislation, the price of commercial services generally renders them inaccessible for the public. We invite consultees’ views on an accessible online resource for legislation that is available free of charge.

Keeping legislation up to date

6.18 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. Providing access to legislation which is out of date can be misleading and does not meet the need to provide access to the law. Moreover, the fact that a database is known to be not up to date in all regards inevitably reduces confidence in it and undermines its utility. The presence of out of date legislation on websites can lead to serious injustice, as is demonstrated by *R v Chambers*.16

Up to date legislation in Wales

6.19 There are particular difficulties in accessing up to date Welsh law. This is partly due to the nature of the devolution settlement itself. Both the Welsh Government and United Kingdom Government may have amended Westminster statutes in ways that affect how the legislation applies in Wales. It can sometimes be necessary, therefore, to consider two streams of amendment, piecing together primary and secondary legislation from two sources, in order to arrive at the applicable legislation.

6.20 For example, regulation 7 of the Use of Invalid Carriages on Highways Regulations 1988 was amended by the Use of Invalid Carriages on Highways (Amendment) (England and Scotland) Regulations 2015 and the Use of Invalid Carriages on Highways (Amendment) (Wales) Regulations 2015.17 Neither amendment appears in the legislation.gov.uk version of the 1988 Regulations. Furthermore, only the amendment made by the United Kingdom Government’s statutory instrument, which applies exclusively to England and Scotland, is updated in Westlaw UK.18 This means that a person reading regulation 7 of the 1988 Regulations online would not be accessing the law applicable in Wales.

6.21 The difficulties in accessing the law applicable in Wales are also partly due to the piecemeal development of the Welsh devolution settlement. In particular, primary United Kingdom legislation may not accurately reflect the latest executive and legislative framework. A database might provide details of a transfer of functions order transferring functions from the United Kingdom government to the National Assembly for Wales, but without reflecting the fact that executive decision making power has shifted to the Welsh Ministers, following changes in devolution since 1998.

16 [2008] EWCA Crim 2467, discussed above in Chapter 1.
17 SI 1988 No 2268; SI 2015 No 59; and SI 2015 No 779.
18 As of 1 May 2015. The Use of Invalid Carriages on Highways (Amendment) (Wales) Regulations 2015 were laid before the National Assembly for Wales on 19 March 15, and came into force on 9 April 2015.
6.22 For example, section 98 of the Agriculture Act 1947 on both Westlaw UK and LexisLibrary provides that the relevant power is held by the now defunct Minister for Agriculture, Fisheries and Food. In the notes to the section, there is a reference to the National Assembly for Wales (Transfer of Functions) Order 1999 which transfers powers to the National Assembly.\(^{19}\) However, the effect of the Government of Wales Act 2006 (which further transfers powers to the Welsh Ministers) is not expressly mentioned on the statute’s page, such that the Welsh Ministers are not the decision-makers for Wales according to this version.\(^{20}\) This means that, on the face of the statute, the devolution settlement under the Government of Wales Act 1998 is reflected but that the settlement under the Government of Wales Act 2006 is not.\(^{21}\)

**Accessing up to date legislation on current services**

6.23 Access to up to date legislation is provided by commercial services, but is not comprehensively available on public databases. This is unsatisfactory because large numbers the public who use public databases cannot afford to pay for commercial databases, and should not be expected to. The following is a consideration of the availability of up to date legislation online.

**LEGISLATION.GOV.UK**

6.24 Currently, the United Kingdom’s public statute law database is not comprehensively up to date. Research undertaken by the National Archives indicates that people accessing legislation online assume that the legislation they are viewing is current and in force. Legislation.gov.uk informs the user that the legislation they are viewing is not up to date by providing a banner on the relevant document indicating whether there are outstanding amendments to be updated. However, the specific outstanding amendments are not identified, so the banner is of limited assistance only.

6.25 It is unsatisfactory that updated legislation is not available free of charge. The National Archives have acknowledged this, and have provided some background as to why legislation.gov.uk is not comprehensively up to date as regards amendments:

> In recent times, complex amendments, with variations in extent and commencement, some Acts having dozens of commencement orders, sometimes amending previous commencements, have increased the difficulty of the task. In 2009, when the responsibilities transferred, The National Archives inherited both a large debt of unapplied amendments and an operating “deficit”, with more

\(^{19}\) SI 1999 No 672.

\(^{20}\) On LexisLibrary, the annotations to the Act do refer the website user to an introductory note which explains the effect of the Government of Wales Act 2006. However, this information has to be accessed separately and may be missed.

\(^{21}\) This is attributable to the fact that the transfer of regulation-making powers from the National Assembly to the Welsh Ministers was effected by the way of a non-textual modification of the existing legislation contained in schedule 11 to the Government of Wales Act 2006, as to which see chapter 1 and 4. It has been suggested to us that that the retention of obsolete references to functions of the Assembly on the face of pre-2006 legislation adds to confusion in Wales about the difference between the executive and the legislature.
amendments being made each year than could be processed by the in-house editorial team.22

6.26 However, the National Archives have recently made considerable progress and are aiming to bring the primary legislation on legislation.gov.uk up to date by the end of 2015, before turning to do the same to statutory instruments. The National Archives have operated an “expert participation” programme which has incorporated external expert assistance (including from the Office of the Legislative Counsel), in addition to collaborating with the Office of Parliamentary Counsel. The National Archives have also increased the efficiency with which they update legislation.23 It is to be hoped that the version of statutory instruments can be completed expeditiously.

CYFRAITH CYMRU/LAW WALES

6.27 Cyfraith Cymru/Law Wales will link to the legislation available on legislation.gov.uk, once the latter is up to date with incorporation of amendments. It will be some time before the Welsh content on legislation.gov.uk is entirely up to date. In the meantime Cyfraith Cymru/Law Wales will offer access to legislation from Westlaw UK, but this will be behind a pay wall.

6.28 Although it is acknowledged that it is resource intensive to keep a statute law database up to date, it is nonetheless a necessary feature of an online legislation resource. In addition to learning from the National Archives experience regarding heightening efficiency in the updating of legislation, we also consider additional means of keeping a statute database for Wales up to date by expert participation below.

Understanding the territorial application of legislation

6.29 In chapter 1, we explained the difference between the extent of legislation and its applicability. In order to secure accessibility to the law in Wales, it is necessary to ensure that the territorial applicability of legislation is clear. An online database for Wales should only provide access to legislation that applies to Wales, and must be comprehensive. As outlined above, understanding what the law is in Wales, in both devolved and in non-devolved areas, involves a consideration of primary and secondary legislation enacted in Westminster and Cardiff. In order to assist individuals undertaking this convoluted and confusing process, it is essential that online legislation databases make clear which United Kingdom legislation applies to Wales.

Current means of identifying law that applies to Wales

6.30 The way that services identify the jurisdictional extent of legislative provisions varies. However, there is no conclusive source of the law that specifically applies to Wales, which includes Westminster legislation that applies to Wales only, United Kingdom legislation that applies to Wales and England, and National Assembly legislation. Wales-only provisions in United Kingdom statutes are not

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22 National Archives, Evidence to Constitutional and Legislative Affairs Committee Inquiry into Law Making in the Fourth Assembly (January 2015).

23 National Archives, Evidence to Constitutional and Legislative Affairs Committee Inquiry into Law Making in the Fourth Assembly (January 2015).
decoupled from their parent statute or statutory instrument, and so it is necessary to find the relevant provisions in United Kingdom legislation.

**LEGISLATION.GOV.UK**

6.31 Legislation.gov.uk provides users with the ability to search for legislation by jurisdictional extent. Users can use this tool to identify legislation that applies to Wales (see figure 6.1 below).

**Browse Legislation: Wales**

![Figure 6.1](image)

6.32 This feature is helpful insofar as it provides straightforward access to legislation that applies exclusively or primarily to Wales. However, it does not enable users to access easily the relevant Wales-only provisions in United Kingdom primary and secondary legislation, or to determine which United Kingdom legislation applies to England and Wales. Indeed, the second category of legislation under the search is “may contain legislation that applies to Wales”. If, for example, a user was to click “UK Public General Acts” under this heading the user would simply be provided with a list of United Kingdom primary legislation, including Acts that have no application to Wales whatsoever, such as the Corporation Tax (Northern Ireland) Act 2015. This fails to provide users, particularly those with no legal training or experience, with an easily accessible Welsh statute book. Welsh legislation remains intertwined with other legislation.

**Defralex**

6.33 Defralex provides the user with an indication of the extent of United Kingdom primary and secondary legislation, through an advanced “extent” feature. This refers to jurisdictional extent, outlined above, and not application. This feature enables users to browse legislation by extent (see figure 6.2 below). This is desirable as it assists users in Wales to find relevant legislation. An advanced feature available on some pieces of legislation on the legislation.gov.uk website also enables users to view whether a specific provision within an act or
instrument extends to England and Wales (see figure 6.3 below). An “E+W” next to the particular provision indicates its jurisdictional extent as being England and Wales.

<table>
<thead>
<tr>
<th>Legislation by Extent</th>
<th>The Control of Waste (Dealing with Seized Property) (England and Wales) Regulations 2015</th>
<th>UK Statutory Instruments</th>
<th>Year Linked Data URI</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK (727)</td>
<td>2015/425</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England, Scotland and Wales (204)</td>
<td>2015/430</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England and Northern Ireland (5)</td>
<td>2015/441</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England and Scotland (6)</td>
<td>2015/446</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England and Wales (53)</td>
<td>2015/445</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England, Wales and Northern Ireland (6)</td>
<td>2015/470</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England (177)</td>
<td>2015/470</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 6.2

![Advanced Features](Image)

Figure 6.3

6.34 However, this fails to enable users to easily access provisions in United Kingdom primary or secondary legislation that apply in relation to Wales. If one clicks on England and Wales, one may view England-only legislation that does not have any application to Wales. Furthermore, some individual provisions that have the “E+W” displayed have no relevance to Wales. For example, in figure 11.3 above, an “E+W” correctly indicates that section 1 of the Norfolk and Suffolk Broads Act 1988 extends to Wales. However, this section does not have any practical application to Wales.

6.35 Although it is obvious in this particular example that a section providing for a Broads Authority in Norfolk and Suffolk has no relevance to Wales, other pieces of legislation, or sections within legislation, may not be so clearly inapplicable to Wales on their face. There is a risk that users could be misled to thinking that a particular section applies to England and Wales where, in fact, it only applies to England. This risk could be mitigated if the sections stated their application in the drafting, such as by including text which states that “this section applies to local authorities in England only”. This is not uncommon practice in recent legislation.24 Equally, where Welsh legislation amends United Kingdom legislation in so far as it applies to Wales, the amendments could clearly stipulate on their face that the amendment is only applicable to Wales.25 Nonetheless, the “extent” which

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24 See, for example, the Deregulation Act 2015 which makes clear in the text of sections whether they apply to England only or England and Wales.

25 See, for example, section 55(3) of the Local Government (Wales) Measure 2011, which repeals section 18(4) of the Local Government Act 2000’s application to Wales by inserting “in England”, clearly specifying that the section is amended so as to no longer apply to Wales. This is more desirable than simply stating that section 18(4) “ceases to have effect” or “is repealed”.

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informs the user of the jurisdiction in which the legislation is made (“England and Wales”) is significantly less useful than knowing the actual “application” of legislation.

**Cyfraith Cymru /Law Wales**

6.36 *Cyfraith Cymru/Law Wales* will provide users with links only to legislation that applies to Wales. However, within pieces of Westminster legislation that are not exclusively relevant to Wales, the sections applicable to Wales will not be specifically identified as such.

**COMMERCIAL SERVICES**

6.37 Some commercial services are no clearer than public services in informing the user of the jurisdictional extent or application of legislation. For example, LexisLibrary does not provide a browse Welsh legislation function on its legislation search homepage that would enable users to view legislation which applies to Wales, passed in Westminster or Cardiff.

**United Kingdom legislation for Wales on Westlaw UK**

6.38 Westlaw UK has a similar functionality to legislation.gov.uk as it enables users to browse Welsh primary and secondary legislation. It also provides a link to United Kingdom legislation that applies to Wales. The legislation available in this part of the site is predominantly United Kingdom primary or secondary legislation that applies exclusively to Wales. There is also legislation that applies predominantly to Wales only, or that contains a significant number of Wales-only provisions, such as the Care Standards Act 2010 which regulates the Care Commissioner for Wales, or the Countryside Act 1968 which established a natural resources body for Wales. This is a helpful way of presenting legislation passed in the United Kingdom that applies exclusively or predominantly to Wales. However, it is still not significantly clearer than legislation.gov.uk.

**Does this law apply in Wales?**

6.39 Welsh law is intertwined with United Kingdom law. Wales-only provisions may be scattered in United Kingdom legislation between provisions that apply to England, or other jurisdictions in the United Kingdom. In addition, areas of Welsh law, both within and outside Welsh legislative competence, may be governed by a combination of United Kingdom legislation and Welsh legislation. The inherent complexity of the devolution settlement, as outlined above, has also hindered the accessibility of the Welsh statute book. It is therefore important that an online Welsh statute book assists users as far as possible to understand what parts of United Kingdom legislation apply to Wales.

**“APPLICATION” FUNCTION**

6.40 It seems to be essential that an online legislation resource for Wales clearly identify provisions of United Kingdom primary and secondary legislation that apply to Wales.

6.41 First, the legislation itself must be identified as applying to Wales. Westminster legislation is only relevant for present purposes in so far as it applies in Wales. Therefore, it should only be available on a Welsh online legislation database if so.
Secondly, where United Kingdom legislation applies to England and Wales, or indeed to any other parts of the United Kingdom, this should be evident on the face of the provisions. Making this evident can be achieved in a number of ways. Labelling provisions with “E+W” or “W” or “E, W + S” could inform users of where a particular section applies, rather than its jurisdictional extent (as on legislation.gov.uk in figure 6.3).26 Alternatively, colour coding could be used to demonstrate clearly what aspects of the legislation apply where.

6.42 Another option is to enable users to view a statute or statutory instrument “as it applies in Wales”. This would provide users with a version of the legislation that omitted sections that do not apply to Wales and indicated to users that parts of the legislation were absent. For example, schedule 1 to the Deregulation Act 2015 does not apply to Wales at all and could be completely omitted, as could other provisions in the Act which apply to England only or Northern Ireland only. Users would be presented with a cleaner and more readily understandable view of the Welsh statute book.

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

Search engine optimisation

6.43 There are two important questions regarding search engine optimisation and accessibility to Welsh law that will be considered in this chapter. The first is: “Can I find the legislation I am looking for on a web search engine?” This is important because of the public audience that an online legislation database for Wales will need to cater for. The second is: “Can I find the legislation I need through the database’s internal search engine?” It is essential that legislation can be easily found when using a database’s search engine.

Can I find the legislation I am looking for on a web search engine?

6.44 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 states that an average of 60% of visits to legislation on the legislation.gov.uk website originate from a general web search.27 It is therefore important that Welsh legislation be easily found on a search engine.

SEARCHING FOR SPECIFIC LEGISLATION

Legislation.gov.uk

6.45 Legislation on legislation.gov.uk is usually returned on a search engine as the first or second result. The National Archives have explained that this is because the site has been optimised for search engines, primarily in two ways. First, the National Archives make “extensive use of the sitemaps protocol to aid both indexing and prioritisation of similar pages from the website by the search

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26 The National Archives are developing a feature allowing users to see only the provisions applicable in a particular part of the UK.

27 National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015).
A sitemap is a guide for search engines to a particular website, created by the manager of that site, which provides particular information about each webpage and helps search engines to search the website efficiently. Secondly, legislation.gov.uk is widely cited and linked externally by a high number of websites. This helps to make legislation on the legislation.gov.uk website amongst the first results returned in a general web search.

**SEARCHING FOR LEGISLATION RELEVANT TO A PARTICULAR SUBJECT**

It may be the case that a member of the public could be searching for legislation concerning a particular topic without knowing exactly what statute or statutory instrument they need to look at. For example, a search for legislation governing conservation of the environment in Wales does not return any legislation in its results, but instead provides links to a range of relevant and irrelevant guidance on a number of different websites (including from the third sector and government). Legislative competence for nature conservation is devolved under the Government of Wales Act 2006. However, one must consider EU legislation, United Kingdom legislation and Welsh legislation in order to know what the law is in Wales. This is not easily accessible through a search engine for someone who does not know the title of the legislation he is looking for. The benefits of organising legislation by subject matter will be considered in more detail below. It is important that consideration be given to whether search engine optimisation might improve access to the law.

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

*Can I find the legislation I need through the database’s internal search engine?*  

Legislation can generally be searched by name, type (such as an Act of Parliament or Welsh statutory instrument) or year. Furthermore, advanced search features on legislation.gov.uk and most commercial services enable users to search for particular words that occur throughout legislation. Users may also then search for those words across different pieces of legislation, which is beneficial in tying different statutes and statutory instruments together. However, this falls short of enabling a user to search by subject matter within the database.

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

**Welsh language legislation online**

As we discuss later in chapter 10, the English and Welsh language versions of primary and secondary legislation enacted or made in both languages are, for all

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29 For more information, please see http://www.sitemaps.org/ (last visited 5 June 2015).


purposes, equally authoritative.\textsuperscript{32} The law is to be found in both language versions.\textsuperscript{33} It is therefore imperative that access to Welsh language legislation be equal to English language legislation. Furthermore, the databases, which are essentially the tools that enable users to access the legislation, should be available in the Welsh language.

**Availability of Welsh language legislation on current services**

6.49 At the time of writing, the market leading commercial legal databases (LexisLibrary and Westlaw UK) do not provide Welsh language versions of their websites or Welsh language versions of Welsh legislation. This is problematic because it means, as C F Huws has pointed out, that the Welsh law provided on commercial databases is “incomplete”.\textsuperscript{34} We will therefore consider public sources of Welsh language legislation.

LEGISLATION.GOV.UK

6.50 Legislation.gov.uk provides access to Welsh language versions of Welsh primary and secondary legislation. These are presented in separate documents. According to National Archives statistics, during the period October 2014 to December 2014, 19\% of users who accessed Welsh primary legislation on legislation.gov.uk, that is measures or Acts of the National Assembly, used the Welsh language versions. In addition, 9\% of users who accessed Welsh secondary legislation used the Welsh language versions.\textsuperscript{35} Securing access to the Welsh language legislation on a public database has been successful.

6.51 However, as legislation on legislation.gov.uk is not yet fully up to date, this means that the Welsh language legislation available on the website it is not necessarily in force or correct. This is problematic, for the reasons outlined above. There is an additional issue caused by the lack of access to up to date Welsh-language legislation. This is that 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. This is likely to deter users from consulting the Welsh language versions of legislation, hampering the development of Welsh as a legal language.

6.52 Legislation.gov.uk also provides a Welsh language version of its website. However legislation that is published solely in English, even if it applies solely or predominantly to Wales, such as the Welsh Language Act 1993, is not translated. The National Archives have explained that:

To make it clear to users where there is and is not Welsh language legislation, the English only content has not been translated into

\textsuperscript{32} Government of Wales Act 2006, s 156.

\textsuperscript{33} The interpretation of bilingual legislation is considered in Chapter 12.


\textsuperscript{35} National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015).
Welsh, unless it has been made as law.\textsuperscript{36}

6.53 Consequently, only a limited amount of law applicable in Wales is available online in the Welsh language.

\textit{Improving availability of Welsh language legislation}

6.54 We see scope for improving the 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 have 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”.\textsuperscript{37} The National Archives have indicated an interest in developing this further, and have noted that it was popular with users. We would be interested in consultees’ views on the value of this.

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

Provisional conclusions

6.55 In order to secure access to legislation online in Wales, it is essential that legislation available online be up to date and easily searchable on general web searches. It is also necessary that legislation made by the United Kingdom Parliament that applies to Wales be clearly identified. Welsh legislation, and legislation databases, should also be available in the Welsh language.

\textbf{PRESENTING LEGISLATION ONLINE IN AN ACCESSIBLE WAY}

6.56 Even up to date, clearly identifiable, searchable legislation that is available in Welsh may not be optimally accessible. There are additional ways of promoting access to legislation in Wales. The following is an assessment of ways of organising legislation online.

Legislation by subject matter

6.57 Legislation is usually presented online by type (Act of the United Kingdom Parliament or statutory instrument), year or title. This is common to commercial services and legislation.gov.uk. 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.

\textsuperscript{36} National Archives, \textit{Evidence to Constitutional and Legislative Affairs Committee} (January 2015).

\textsuperscript{37} National Archives, \textit{Evidence to Constitutional and Legislative Affairs Committee} (January 2015).
Some commercial services have subject matter taxonomies. For example, Westlaw UK has labelled legislation with “principal subjects” and “associated subjects” in order to help users navigate legislation. Halsbury’s Laws of England and Wales is an encyclopaedia of law organised by subject matter, and as discussed above, Halsbury’s Statutes is an annotated collection of all of the primary legislation applicable in England and Wales, also organised by subject matter. LexisNexis provides access to Halsbury’s Laws, and Halsbury’s Statutes annotations online. Halsbury’s Laws translates legislation into a “narrative” text and provides commentary. LexisLibrary provides access to legislation which is relevant to a particular “practice area”. The interface is user-friendly, and enables users to locate the specific subject area they are looking for within sub-headings. As is common in searchable databases, it also allows users to search for legislation using subject specific key words.

Defra has established a tool within the Defralex section of the legislation.gov.uk website that enables users to view legislation by subject matter. The subject matter is arranged in a number of different ways. First, users can view legislation by broadly defined chapters, such as “Agriculture and Rural Development” or “Environment”. By viewing the legislation within a particular chapter, a user is then able further to refine his or her browsing by selecting a heading. For example, headings under “Environment” include “Access to Countryside” and “Climate Change”. Secondly, users may browse legislation by “key legislative content” such as legislation governing powers of entry or licences. Users are able to browse for such content within the narrower chapters or headings. So, for example, a user could search for “criminal offences” (a key legislative content category), within the heading of “Climate Change”, or the broader overarching chapter “Environment”. United Kingdom statutory instruments generally are also able to be browsed by subject. Subjects are arranged alphabetically, and indicate where the subject, such as “Damages” applies to England and Wales, or Wales only.

This strikes us as more beneficial than a subject matter index, which is essentially an alphabetically organised list of subject matters. There are also examples of subject matter indexes in other jurisdictions, such as the South Australian Library’s subject matter index of legislation, which provides users with the opportunity to browse alphabetically organised subjects, which are defined in a relatively specific way. For example, within “A” there are separate divisions for “Adelaide Festival Centre” and the “Adelaide Festival Centre Trust”. The result is a relatively long and unwieldy list of issues that are overly narrow, which whilst helpful, is not as user-friendly as the Defralex model.

We welcome consultees’ views on the usefulness of the ability to browse and search legislation by content, at different levels of specificity. It seems to us that it

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38 Defralex is available at www.legislation.gov.uk/defralex (last visited 1 July 2015).

assists users, especially those users who are not legally trained, to find the legislation that applies to them in particular areas. Members of the public may be searching for legislation without knowing what the exact legislation is titled, when it was passed or what kind of legislation it is. It may also be beneficial where legislation governing a particular issue is not in a single statute, but a combination of statute and statutory instruments originating from both Cardiff and Westminster.

BENEFITS FOR DATABASE MANAGERS

6.62 We also seek views on whether there could be benefits to database managers in a database organised by subject matter. It might facilitate dividing responsibility for management of the legislation between Government departments.

6.63 It seems to us that such a division of labour could help to create a more efficient system of management, giving those with the expertise in a particular area the responsibility for the database’s presentation of that area of the law. Secondly, the process of organising legislation in categories and sub-categories could provide some insight as to the areas of law that particularly need consolidation or codification. These areas may be governed by an excessive amount of legislation, and managing the database could assist in identifying redundant pieces of legislation. Gaps and overlaps would also be likely to be identified. Whilst administrative decisions will need to be made about the management of overlapping pieces of legislation, it would be helpful to identify these overlaps in order for policy makers to understand how they occur.

Cyfraith Cymru/Law Wales

6.64 Cyfraith Cymru/Law Wales will contain information about legislation divided by subject matter, under five headings with sub-headings under each. The overarching headings will be constitutional and government, public services, economy and development, environment, and culture. These headings are broader than the 20 subjects in schedule 7 to the Government of Wales Act 2006, so as to make it simpler at the point of entry into the database to browse for relevant legislation. The website will contain lists of legislation organised under each heading, with links to the version of that legislation available on legislation.gov.uk.

6.65 It is not clear to us whether the links to legislation will be further sub-divided. There may be benefit in adopting a structure which draws on the Defralex model. The site might be more useful to users if the links to legislation were further broken down and categorised. We understand that Cyfraith Cymru/Law Wales is currently being managed centrally by the Office of the Legislative Counsel. As discussed above, following the example of Defra’s management of Defralex, there could be merit in allowing relevant directorates in Wales to take responsibility for managing the lists of legislation which will be kept under each heading, under OLC’s overall supervision. This responsibility could amount to both organising the legislation accessible on Cyfraith Cymru/Law Wales into appropriate categories and sub-categories, and keeping the contents of the categories up to date. This would afford officials the opportunity to assess the legislation which falls within the responsibility of each directorate, bring subject-specific expertise to bear, and spread out the burden of populating the website and keeping it up to date.
6.66 Alternatively, the same approach could be adopted under the auspices of legislation.gov.uk, with appropriate input from officials and lawyers in the Welsh Government. There is already a section of that website dealing with the law in Wales that could also be organised in a manner similar to Defralex.

Consultation question 6-7: Do consultees agree that a database of legislation applicable in Wales should be organised by subject matter, following the Defralex model structure, with clear and detailed subdivisions? 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?

Open source editing

6.67 A challenge facing the implementation of a successful online legislation database is ensuring the availability of resources to complete and maintain it. Changes to legislation occur at a reasonably swift pace, and it may be difficult for a single team to keep legislation and additional materials accurate and up to date. Enabling the legislation or additional materials to be updated by legal experts, in addition to the managers of the database, would assist in increasing the efficiency with which legislation is edited.

6.68 Legal practitioners or academics could be granted permission to update legislation or guidance by the editorial board responsible for the legislation. There could be a process of verification in order to determine whether someone has the necessary legal expertise to make edits. Their edits would then be subject to verification by the editorial board prior to the updated legislation or guidance being made publically available. The advantage to facilitating external editing is that it helps to share the burden of updating legislation and guidance.

6.69 However, there are a number of potential drawbacks to this process. First, it may be the case that there would not be sufficient incentives for legal experts to spend the time necessary to edit the legislation. Secondly, open source editing may increase the risk of inaccuracies in the legislation or guidance. However, if providing the facility is straightforward, the potential advantages could be worth the resources in establishing it. If an editorial board is in place, and the verification and permission process permitting experts the opportunity to edit are sufficiently robust, this should mitigate this risk. Furthermore, there is already a precedent for legal experts to contribute to a legal database, as they are able to submit a commentary article to Westlaw UK’s insight on a Welsh issue.

6.70 We therefore seek consultees’ views on whether a system of open source editing, howsoever implemented, would be suitable for Wales.

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

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

6.71 Big data is a term that refers to large data sets that can be analysed in order to reveal trends, associations and patterns. Big data can be used to research innovative ways of improving access to legislation.

The National Archives’ “Big Data for Law Project”

6.72 In February 2015, the National Archives announced its “Big Data for Law” project. The project aims to improve the tools for research into “the architecture and content of law, the language used in legislation and how, through interpretation by the courts, it is given effect”.

6.73 The National Archives are proposing to ensure that researchers have as much data available to them as possible, by undertaking what John Sheridan of the National Archives has referred to as a “census of the statute book”. The kinds of information that could be captured by such a census are varied. For example, it is possible to work out what areas of the law are subject to the highest frequency of amendments, and then to assess whether there is a correlation between legislation challenged in the courts, and the number of amendments to that legislation. Various patterns and trends may be revealed by the census. These patterns could reveal an enormous amount about our statute book, and will enable both user interfaces and the process of legislating to be improved.

Big data in infancy

6.74 The Big Data for Law project has exciting potential to improve access to the law across the United Kingdom. Data would enable database managers to better understand users’ needs, and identify patterns in browsing, as well as in the statute book. For example, it could be possible to determine that persons who view Act A and Act B also commonly view Act Y and Act Z and thereby to suggest legislation to users who may find it difficult to navigate to the legislation they need.

6.75 As the project develops, the possibilities will become increasingly more concrete. It is important that a legislation database for Wales takes advantage of the opportunities to improve access to legislation that big data can provide.

ACCESSING SECONDARY MATERIALS

Aiding understanding through the provision of additional materials

6.76 Access to additional materials can aid understanding of legislation. Commercial services, such as Westlaw UK and LexisLibrary, generally provide readers of

40 Oxford English dictionary.
43 For a discussion as to how this can be determined, please see National Archives Legislation Database, http://www.legislation.gov.uk/projects/big-data-for-law (last accessed 1 July 2015).
legislation with comprehensive additional information such as the cases that have cited a particular provision, and statutory instruments that have been made under a particular Act. Government departments and non-governmental organisations often issue guidance or commentary about a particular legal issue or area of the law. There is also a wide range of books available that explain what the law is in England and, where there are no divergences, Wales. Some of these texts are aimed at law students and practitioners and others aimed at non-legally qualified members of the public.

6.77 In this section we will consider how the law applicable in Wales might be made easier to understand through the provision of substantive additional materials. We will specifically focus on substantive materials that generally share the aim of expanding on the meaning of legislation: explanatory notes, guidance and commentary. We will also consider how textbooks can be additional tools to help users of legislation identify the law applicable in Wales. The important overarching issue here is to ensure that any additional material is up to date, accurate and presented in a clear and coherent way.

**Explanatory notes**

6.78 Explanatory notes are published alongside Bills and Acts in order to explain the purpose and effect of their provisions. As such, explanatory notes can be a useful tool to aiding the accessibility of legislation. A survey carried out by the Office of Parliamentary Counsel has found that most people read explanatory notes alongside legislation in order to understand sections that are not self-evidently clear. Most Westminster Bills and Acts after 1999 have accompanying explanatory notes.

6.79 We seek consultees’ views on the utility of the explanatory notes provided with Westminster and National Assembly legislation, together with any suggestions for possible improvement.

**LEGISLATION.GOV.UK**

6.80 Legislation.gov.uk provides users with the option of viewing explanatory notes alongside the text of a particular section for some, but not all, pieces of legislation for which explanatory notes are available. This is useful because it enables users to view the legislation and the explanatory notes at the same time, which users in the Office of Parliamentary Counsel survey indicated was most desirable. It may also help prevent over-reliance on the explanatory notes as opposed to the text of the legislation, which is of course the exclusive authoritative source of the law.

**COMMERCIAL SERVICES**

6.81 Commercial services also provide access to explanatory notes. As with legislation.gov.uk, explanatory notes can be viewed alongside the text of legislation, in addition to being viewed independently.

**GOOD LAW PROJECT**

6.82 The Good Law Project, run by the Office of Parliamentary Counsel, has

conducted research into how explanatory notes can be improved. In addition to making proposals as to how explanatory notes should be drafted, the Good Law Project identifies ways in which access to explanatory notes online could be increased.

6.83 First, hyperlinks could be included in explanatory notes that link to other relevant material, such as Hansard debates or the impact assessment that accompanied the Bill. When explanatory notes are viewed separately from the legislation, hyperlinks to the relevant provisions in the legislation could also be included. Secondly, the interaction of the relevant piece of legislation with other Acts could be made clear in the explanatory notes, possibly through the use of hyperlinks between explanatory notes.

6.84 Thirdly, the Good Law Project further recommends that users be able to access the Contents page more easily, to get straight to the section of the Notes that interests them, and then to view the Notes side by side with the Bill text to which they relate”.45

6.85 This could be implemented through the use of links within the explanatory notes document.

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

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

Guidance

6.86 Guidance to legislation seeks to assist users to determine what the law is, in order to comply with its requirements. Guidance is promulgated from a variety of sources, including government, non-departmental public bodies (such as the Electoral Commission or Data Commissioner), non-governmental organisations, charities and private law firms. As noted in chapter 4, legislation is often drafted in a manner that is not easily accessible to the non- legally trained person. Guidance can be a useful tool to aid understanding of legislation, though that is not its primary function.

THE LEGAL EFFECT OF GUIDANCE

6.87 Legislation may impose an obligation on government departments or local authorities to produce a specific code of conduct, which is referred to as “statutory guidance”.46 Statutory guidance may impose mandatory rules with the force of law, and so it is obviously important that it is available. In certain circumstances, it may also be obligatory to follow non-statutory guidance, unless


46 See, for example, the School Standards and Framework Act 1998, s 84.
there are good reasons not to.\textsuperscript{47} In \textit{Mohammed Mohsan Ali v London Borough of Newham}, Mr Justice Parker held that whether or not guidance should be followed will depend upon its context. One of the issues in the case was whether the Council of the London Borough of Newham was required to follow national guidance produced by the Department of Transport, in conjunction with the Royal National Institute for Blind People and Guide Dogs for the Blind. On the facts, the relevant guidance was produced at a high level and involved those with considerable experience and expertise in the applicable area.\textsuperscript{48}

6.88 Consequently, Mr Justice Parker held that Newham was required to follow the national guidance unless it had good reasons to depart from it.

6.89 Therefore, given that guidance may have binding force, ensuring that it is accessible is extremely important.

THE IMPORTANCE OF ENSURING GUIDANCE IS ACCURATE

6.90 Even where guidance is not legally binding, inaccuracies nonetheless risk misleading individuals as to the state of the law and could have significant adverse consequences. For example, the Electoral Commission’s Welsh language guidance as to the rules governing disqualification in the 2011 National Assembly elections was based on outdated regulations. Successful Liberal Democrat Candidate Aled Roberts relied on the guidance, and as a result did not resign from a position he held prior to his nomination, which caused him to be disqualified. The up to date regulations were available online, and Aled Roberts would have been able to find out what the law was from the relevant legal databases.

6.91 Despite this, Gerard Elias QC, who was commissioned by the National Assembly to report on Aled Roberts’ disqualification, stated that “I consider it unreasonable to have expected any candidate to have carried out such a procedure (checking the legislation on online databases) when the Electoral Commission guidance was available.”\textsuperscript{49} Following the report, Aled Roberts was reinstated as an Assembly Member. This incident demonstrates that guidance may, in certain circumstances, be accepted as sufficiently authoritative to be relied upon by individuals for the purpose of determining what the law is. Therefore, it is crucial that guidance be accurate and up to date.

DEFRA GUIDANCE WEBSITE

6.92 A further problem with the promulgation of guidance is that where there are many sources of guidance, it can be complex and expensive to understand which are accurately describing legal obligations and which are merely stipulating best practice. Some Defra research found over 5,000 environmental guidance documents extending to over 100,000 pages; the feedback of users of the

\textsuperscript{47} \textit{Mohammed Mohsan Ali v London Borough of Newham} [2012] EWHC 2970 (Admin).


guidance is that it is time-consuming, costly and confusing to handle.\textsuperscript{50}

6.93 Defra has undertaken a “smarter guidance” initiative, which is aimed at providing a single and simple stream of guidance. Although the government is not itself publishing “best practice” guidance, Defra intends to provide guidance setting out the content of legal obligations, and is currently consulting on this scheme.\textsuperscript{51} This would be available on a separate website from legislation.gov.uk, and it is currently unclear what the relationship would be between the guidance website and legislation.gov.uk.

MAKING GUIDANCE ACCESSIBLE IN WALES

6.94 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.

6.95 However, it is important that guidance not usurp the authority of the primary source of the law: legislation. Furthermore, there is a risk that excessive quantities of guidance can be more detrimental than beneficial. We seek consultees’ views as to whether guidance should be accessible on an online legislation database.

6.96 If guidance is to be available on a legislation database it should, as far as possible, be in the form of a single stream of accurate and up to date guidance. We seek views on how the presentation of guidance online could be improved. Guidance could be available to read alongside legislation, in the same manner as explanatory notes. This may provide excessive information in one place, but could also help to clarify complex and convoluted sections. Furthermore, ensuring that guidance is properly interconnected with the legislation itself, through hyperlinks, would help users to access it more easily from the guidance, in the same way as explanatory notes.

Commentary

6.97 Commentary can provide users with a deeper understanding of how legislation will affect them. By “commentary”, we refer to unofficial commentary that does not emanate from government. In particular, commentary 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.

6.98 We need to consider what kinds of information should be presented on an online database. We therefore seek consultees’ views as to whether commentary

\textsuperscript{50} Defra, Smarter Guidance Website, http://guidanceanddata.defra.gov.uk/about/ (last visited 1 July 2015).

should be provided on an online legislation database.

ACCESS TO COMMENTARY ON CURRENT ONLINE SERVICES

6.99 There is currently no access to articles commenting on legislation on legislation.gov.uk. Commercial services have a range of different commentary available.

6.100 Westlaw UK provides access to articles on legislation through its “Insight” service. These articles are written by legal experts who are independent of Westlaw UK, and they generally consider a specific issue arising from the legislation. For example, a recent article on Westlaw UK’s “Insight” service considers how the competence of the National Assembly for Wales under the Government of Wales Act 2006 may be challenged. This is helpful for a user as the articles may consider how different Acts, statutory instruments and cases interact. Halsbury’s Laws provides detailed commentary on the law, organised by subject.

6.101 LexisLibrary and Westlaw UK also provide annotations alongside primary legislation, which generally provide a combination of guidance and extensive legal discussion. Annotations are available for whole Acts or particular provisions within a given statute. The annotations are designed to assist the reader to situate the Act they are reading within the statute book as a whole, and the particular provision within the Act.

WELSH LAW JOURNALS

6.102 There are a small number of academic journals that provide commentary on the law applicable in Wales. These include the following;

(1) The Welsh Legal History Society, which was formed in 1999 and has published 6 volumes of the Welsh Legal History Society Journal since 2001. The journal includes articles which consider Welsh legal history, as well as contemporary Welsh issues, such as the future of bilingual legislation.

(2) The Cambrian Law Journal is a Welsh journal published by the Committee of the Cambrian Law Review, on behalf of the Department of Law and Criminology of Aberystwyth University. The Cambrian Law Journal does not focus exclusively on Welsh law, but also addresses issues in international and United Kingdom domestic law.


6.103 There is not a substantial range of academic commentary available that addresses the law as it applies specifically to Wales.
ADDITIONAL MATERIAL ON CYFRAITH CYMRU/LAW WALES

6.104 Cyfraith Cymru/Law Wales will incorporate additional material. Under each subject heading, such as “culture”, there will be an overview of the law, which essentially provides broad guidance on the legislation. Each overview will incorporate articles from “Insight” on Westlaw UK. However, it is unclear how comprehensive the overviews will be, and to what extent the articles from “Insight” on Westlaw UK will fill any gaps.

6.105 We seek the views of consultees on the amount of material it is both desirable and feasible to include in an online legal resource covering the law applying in Wales.

MATERIAL IN WELSH

6.106 The availability of additional material in Welsh is not comprehensive. Explanatory notes for Welsh legislation are provided in Welsh on legislation.gov.uk, but not for Westminster legislation. Some guidance and commentary relating to Westminster legislation is available in Welsh, depending on the source of that guidance. For example, government guidance regarding the Equality Act is available in Welsh, and the Electoral Commission publishes guidance in Welsh. Additional materials provided through the Welsh government, including the Encyclopaedia of Welsh Law, will be provided in Welsh.

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

TEXTBOOKS ON THE LAW APPLICABLE IN WALES

6.107 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 will have the benefit of a choice of textbooks on areas that explain the law and its effects. Currently this is not a luxury available to their Welsh equivalents. As noted above, books that address the law of England and Wales do not commonly consider in detail the divergences in the law applicable to Wales.52

6.108 There are currently no comprehensive textbooks that look at the law in Wales only. As we observe in chapter 1, cases have arisen where advocates have incorrectly cited the English regulations rather than the Welsh regulations. The law applicable in England and that applicable in Wales continue to diverge, and there needs to be an examination of these developments so that those with an interest in Wales or indeed those who are governed by the law applicable in Wales have a comprehensive source of the law applicable in Wales. Furthermore, there is also a lack of books available in the Welsh language. These problems have been recognised by some publishers, who have begun to formulate plans to improve the situation.

52 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.
Current initiatives aimed to increase the availability of textbooks on the law applicable in Wales

**University of Wales Press**

6.109 University of Wales Press (UWP) was set up in 1922 to serve Wales and the international academic community. Since 1922, UWP has published over 3,500 titles and currently publishes around 70 books or journals every year. UWP is a not-for-profit press and is subsidised by the University of Wales. UWP has been responsible for works such as the University of Wales Press Dictionary of the Welsh Language.

6.110 To address the shortfall in literature exploring the law applicable in Wales, UWP formed an editorial board and commissioned the “Public law of Wales” series which included three books: The Administrative Court in Wales by David Gardner, Planning Law and Practice in Wales by Graham Walters, and Legislating for Wales by Daniel Greenberg and Thomas Glyn Watkin. When announcing the series, the UWP explained that:

> In the wake of the enhanced legislative powers acquired by the National Assembly for Wales, the law applicable in Wales on devolved subjects will become increasingly divergent from that applying in England. Lawyers and law students in Wales (and in England) will need to be able to identify and access the law as it applies in Wales. This series will provide, for the first time, much-needed books offering a comprehensive examination and presentation of the law as it applies in Wales: what that law is and how it differs from the law applicable in England, to meet the needs of lawyers and others working within the devolved environment, as well as students and teachers.

**Welsh language textbooks**

6.111 Bangor University Law School, with the assistance of a grant from the Coleg Cymraeg Cenedlaethol, are preparing to publish a series of textbooks on the law applicable to Wales in the Welsh language. The books are aimed at students, but Bangor University has announced that the books are intended to reach a wider audience, setting out “basic legal principles clear and accessible language”. The first in the series will focus on public law, and will be written by Keith Bush QC.

**Conclusion**

6.112 These recent initiatives will help to improve the lack of accessibility to textbooks on the law applicable to Wales. The overly complex state of legislation in Wales, and the inadequacy of access to legislation increase the need for a

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54 See, the University of Wales Press website, www.uwp.co.uk (last visited 1 July 2015).

55 See, chapter 11.

comprehensive range of books on the law applicable to Wales.

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

Consultation question 6-14: What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?
CHAPTER 7
CONSOLIDATION OF LEGISLATION

INTRODUCTION

7.1 There is considerable and widespread demand for the consolidation of legislation applicable to Wales. Indeed, it was one of the primary reasons for the Law Commission being asked to undertake this project. Pre-consultation discussions supported the view that consolidation is required, as part of a wider need for accessibility, simplification and modernisation.\(^1\)

7.2 In this chapter we look at what we mean by the ‘term’ consolidation and raise the question whether the National Assembly should adopt procedures for consolidation Bills so as to reduce the amount of Assembly time spent on such legislation without limiting opportunities for scrutiny where the law is being reformed. We explore some of the benefits and drawbacks of a consolidation programme. We then consider how to build a model of consolidation suitable for Wales. In doing so, we draw on lessons from other jurisdictions. In the following chapter we will go on to consider a codification process as one model for consolidation, where law reform and consolidation may be combined and greater stability and accessibility introduced into the form and structure of the legislation.

7.3 Consolidation lies at the heart of making the law more accessible. In order to develop better systems for the publication of legislation and its organisation and publication, that legislation will need to be consolidated and published in an up to date form, to include all changes made since the legislation was first passed. In order to codify the law, as discussed in the next chapter, it will be necessary to consolidate the existing legislation.

WHAT IS CONSOLIDATION?

7.4 It has been a longstanding practice in Westminster periodically to consolidate areas of the law which have become fractured and incoherent. The Welsh Government seeks to consolidate the law wherever practicable, when carrying out law reform.\(^2\)

7.5 Before looking at the benefits and problems associated with consolidation, we will seek to explain what consolidation means and the different processes of consolidation that exist in the Westminster Parliamentary system.

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


\(^2\) See, for example, National Assembly for Wales, Statement by Counsel General on Access to Welsh Laws and Developing a Welsh Statute (October 2011).
Consolidation is the restatement or re-enactment of the statutory law, the form and not the substance, in a single reorganised form, bringing all the scattered relevant statutory legislation together in one statute, in order “to consolidate and reproduce the law as it stood before the passing of that Act.”3 The long title says it is a consolidating statute. The principal purpose is to facilitate the user. Consolidation may be a prelude to reform; more commonly it is the consequence of reform, or at least change.4

7.7 Consolidation brings together the up to date version of all the relevant legislation in a single place to make it accessible to the reader. If this is all that is needed, could it be achieved by providing a publicly available online source of consolidated legislation, along the lines that National Archives is creating? When Lord Justice Toulson expressed his frustration in R v Chambers, a case discussed in chapter 1 above, where a criminal prosecution for a customs excise offence was conducted under the wrong regulations, he complained of the lack of a comprehensive statute law database where all the relevant legislation could be found.5 We discussed the problems and requirements of online services in chapter 6. Here we need to consider the differences between an online updated and edited version of the legislation and a consolidation exercise.

7.8 If the legislation simply needs co-ordinating into a single document, an online updated version can be adequate. However, where the legislation has become fragmented over the years, it can be very difficult to present a coherent picture of the law. There might, for example, be different terms used in different statutes for what appears to be the same thing. Drafting practices develop over time, reflecting changes in the use of English and in legal terminology. It would be possible to smooth out these changes, but even if a commercial or public provider was able to carry out the “inordinate amount of editorial refinement” such a task would require, it is questionable whether the result would reflect the law accurately.6

7.9 Consolidation requires more than pulling together all the provisions which are currently in force. A consolidation exercise is intended to preserve the law as it stands and repeal the various earlier pieces of legislation. However, there is usually scope for modernising language and removing the minor inconsistencies or ambiguities that can result both from successive Acts on the same subject and more general changes in the law. In addition, the legislation can be restructured and provisions relating to Wales can be separated from those relating to England.

7.10 We look at special Parliamentary procedures for consolidation legislation and at how consolidation is carried out.

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5 Toulson LJ’s judgment in R v Chambers [2008] EWCA Crim 2467 is discussed in chapter 1 above.
Special parliamentary procedures for consolidation

7.11 Since the nineteenth century there has been a Parliamentary procedure for the passage of a Bill which would reproduce the law without making any changes to its substance.7

Procedures at Westminster

7.12 There is a special Parliamentary procedure designed to give certain technical Bills “a fair wind, whilst protecting the system from abuse”8. The essential feature of the procedure is that Bills are introduced in the House of Lords and, after a second reading, referred to the Joint Committee on Consolidation etc Bills for detailed consideration. For an ordinary Bill second reading is where the principles or policy which inform the Bill are debated, before it is sent to a public Bill committee for line by line scrutiny.9 If the Joint Committee is content with the Bill, the other parliamentary stages are largely formal.10 The Joint Committee has jurisdiction over three main types of technical legislative reform Bill:

1. consolidation Bills, whether public or private, which are limited to re-enacting existing law;

2. Bills to consolidate any enactments with amendments to give effect to recommendations made by the Law Commission or the Scottish Law Commission or both of them, with any report containing such recommendations;11

3. Bills prepared by one or both of the Law Commissions to promote the reform of statute law by the repeal, in accordance with Law Commission recommendations, of certain enactments which (except in so far as their effect is preserved) are no longer of practical utility, whether or not they make other provision in connection with the repeal of those enactments, together with any Law Commission report on any such Bill.12

7.13 Numbers (1) and (2) above are properly understood as consolidation Bills, with (2) allowing a more flexible approach to the existing law.

7.14 A consolidation Bill will be intended to replace provisions in different Acts (and often statutory instruments) passed over a period of years. The drafter is also able to remove obsolete material, modernise language (now conventionally gender-neutral) and resolve many of the minor inconsistencies and ambiguities that creep in over the years. This enables the Bill to be scrutinised on a non-

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8 D Greenberg, Craies on Legislation (9th ed 2010) para 5.3.2.
9 Generally speaking, there is enormous flexibility and consequent variance from the usual within the Westminster system.
10 House of Commons Standing Orders 58; House of Lords Standing Order 51.
11 This sort of Bill is distinct from the special procedure for non-controversial Law Commission law reform bills, discussed in below.
12 House of Commons Standing Order 140(1); House of Lords Standing Order 52(5). The standing orders include two further, little used, types of Bill over which the Joint Committee has jurisdiction. Statute law repeal Bills are discussed briefly in chapter 3.
partisan basis without taking up much time on the floor of either House. This is the “straight” consolidation described in (1) above.

7.15 The special procedure cannot be used for a Bill that alters the substantive effect of the law, unless the change is recommended by one or both of the Law Commissions. A Bill containing amendments recommended by one or both of the Law Commissions falls into (2) above. The purpose of any such change must be limited to producing a satisfactory consolidated text. For example a change might be necessary to enable the Bill to address similar points in the same language, despite variations in the original legislation. But the procedure is not designed for making changes that do not relate to issues arising from the consolidation process itself.

Procedures in Holyrood

7.16 Similar procedures exist in the Scottish Parliament. Once introduced there, a consolidation Bill is referred to a Consolidation Committee which is established for the purpose. The Committee’s job is first to report on whether the Bill should proceed as a Consolidation Bill. Once it has survived the Committee’s attention, a consolidation Bill again benefits from expedited procedure.13

7.17 Very similar rules apply to statute law repeals Bills, statute law revision Bills, and, interestingly, codification Bills in Scotland. Codification Bills restate both statute law and common law.14 We will return to the idea of codification and what it might mean for Wales in chapter 8.

Procedures in Northern Ireland

7.18 There are no similar procedures in place for the Northern Ireland Assembly.

The Consolidation of Enactments (Procedure) Act 1949

7.19 Under the 1949 Act, the Lord Chancellor may lay before Parliament a memorandum of any “corrections and minor improvements” he thinks ought to be made as part of a consolidation Bill. The contents of the memorandum must first be published and provision made for representations to be made in response. A joint committee of both Houses of Parliament must then consider the Bill, the proposed corrections and amendments as set out in the Lord Chancellor’s memorandum and any representations. The Committee must be satisfied that the corrections and minor improvements do not effect changes in the existing law of such importance that they ought to be separately enacted by Parliament.15

7.20 The 1949 Act restricts amendments to those where

15 Consolidation of Enactments (Procedure) Act 1949, s 1.
the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not of substantial importance and amendments designed to facilitate improvement in the form and manner in which the law is stated …\textsuperscript{16}

7.21 This procedure is rarely used as the procedure for Law Commission consolidations allows greater latitude to make amendments and is a less cumbersome process.\textsuperscript{17}

**Law Commission consolidation procedure**

7.22 The functions of the Law Commissions are:

to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law, and for that purpose—

... to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister.\textsuperscript{18}

7.23 Consolidation is a core function of the Law Commission. The work is carried out by parliamentary counsel, usually on secondment to the Law Commission and without the support of a team of instructing lawyers or policy officials.

7.24 A Law Commission consolidation Bill is usually accompanied by:

(1) A Table of Origins (previously known as a Table of Derivations): this sets out where the provisions of the Bill have come from in the legislation being consolidated. Any text that does not originate in provisions repealed by the Bill will also be indicated, such as text implementing a Law Commission recommendation.

(2) A Table of Destinations: this sets out where the repealed provisions have ended up in the Bill. It will also identify existing text that is not reproduced in the Bill with a brief reason for its omission, for example because it is spent.

\textsuperscript{16} Consolidation of Enactments (Procedure) Act 1949, s 2.

\textsuperscript{17} In a rare example, the Radioactive Substances Act 1993 was passed with minor amendments using the 1949 Act procedure because of restrictions on changes that could be made to the law of Northern Ireland under the Law Commissions procedure.

\textsuperscript{18} Law Commissions Act 1965, s 3(1) and (d).
A Law Commission Report in support of the Bill will be made and submitted to Parliament if there are any Law Commission recommendations for changes to the law being consolidated. A report recommending changes affecting the law of Scotland will be made jointly with the Scottish Law Commission.

Under the Law Commissions Act 1965, the Law Commission and Scottish Law Commission may make recommendations for amendments as part of a consolidation Bill and redraft the Bill to include the recommended changes. The Joint Committee may accept, reject or vary the changes, within the terms of the Law Commission recommendations.

It has been suggested that such recommendations may be a little wider than the amendments which could be made under the 1949 Act, but must fall "short of significant change of policy or substance".  

There is a special Parliamentary procedure for Law Commission consolidation Bills. If the Bill is introduced in the House of Lords, the introduction and first reading are formal steps only with no debate. At the second reading, there will be a short debate on the floor of the House, but with a limited scope, followed by a formal motion for the second reading. The Bill then goes to the Joint Committee on Consolidation etc Bills. The Committee takes evidence from the drafter, that is parliamentary counsel who has drafted the Bill. The Committee also considers the documents submitted in support of the Bill, including the drafter's notes and any Law Commission recommendations for amendment. Unlike ordinary bills, no amendments are tabled. There is then a report stage, where, once again, no amendments are tabled, followed by a third reading, at which no amendments are tabled. A short debate may be held and the Bill is then invariably approved.

The Law Commission has been responsible for over 200 enacted consolidation Bills since it was established in 1965, but very few in recent years. The Co-operative and Community Benefit Societies Bill, which received Royal Assent on 14 May 2014 is the most recent example. Larger Law Commission consolidation exercises include the Education Act 1996 and the Highways Act 1980.

Pre-consolidation amendments

Primary legislation

It may be the case that amendments are required to existing legislation as well as consolidation. Where amendments will have substantial effects on an area of law, it may be appropriate to subject the amendments to full scrutiny. In such cases, it may be possible to consolidate by including the pre-consolidation amendments in a Bill in advance of the consolidation Bill. The Bill containing the pre-consolidation amendments would pass through the ordinary legislative procedure.

20 Drafter's notes give some background to the project, describe things the drafter has (or has not) done in consolidating the law and identify the more significant issues that have required the drafter to make a decision as to the best way of reproducing the law.
The potential disadvantage of this approach is that additional parliamentary time is required for a separate pre-consolidation amendments Bill, or alternatively, a suitable Bill in the legislative programme must be identified to carry the pre-consolidation amendments. This process involves having to determine what pre-consolidation amendments need to be made before actually preparing the consolidation. It is usually during preparation of the consolidation that the necessary pre-consolidation amendments are identified. This process is time consuming in comparison to other consolidation procedures explored.

**Secondary legislation**

A power to make pre-consolidation amendments by secondary legislation may also be included in primary legislation. For example, section 76 of the Charities Act 2006 provided the relevant Minister with the power to:

> Make such amendments of the enactments relating to charities as in his opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or part of those enactments.

This power was exercised in making the Charities (Pre-consolidation Amendments) Order 2011. This order made a number of amendments to charity legislation, prior to the passing of the consolidating Charities Act 2011. It saves Parliamentary time, but has some other disadvantages, as discussed above.

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

**WHY CONSOLIDATE?**

Modern methods of providing updated versions of legislation have reduced the pressure to consolidate simply to take account of amendments. There is still, however, a need for consolidation as a process. A good consolidation does much more than produce an updated text. It can, however, be difficult to remedy minor defects in legislation without altering its effect.

Consolidation can significantly improve the accessibility of legislation by simplifying and modernising it without changing the substantive effect of the law. Although a consolidation exercise involves a significant amount of work for the drafter, it takes less Parliamentary time than a law reform Bill and little departmental time for Government. Where several pieces of legislation have been passed in a particular area, it may be beneficial to consolidate in order to bring the legislation together. Consolidation can be combined with a law reform exercise so that the law is changed but also consolidated. If such an exercise is undertaken Parliament may wish to debate the consolidating clauses as well as the reforms.

Consolidation is also an integral part of other procedures for the creation of clear

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22 Amendments of existing statutes prior to consolidation.

23 Charities (Pre-consolidation Amendments) Order 2011, SI 2011 No 1396.
and accessible law, such as codification or even the creation of an online database of up to date legislation.

Amending legislation without consolidating

7.36 Amending legislation, without then consolidating it produces a complex result. It can create a convoluted and obscure web of statutes, all of which readers may need to get to grips with before they can understand the law which applies to them. For example, the now repealed section 53 of the Children and Young Persons Act 1933 (itself a consolidation Act), concerned the punishment of juvenile offenders for certain grave crimes. Academic David Thomas QC explains that, in order to properly construe this section, it is necessary to start with the Criminal Justice Act 1961, add in the amendments made by the Criminal Justice Act 1988, s.126, insert the additional words required by the Criminal Justice Act 1993, s.67(2), replace these as necessary in accordance with the Criminal Justice and Public Order Act 1994, s.16, and watch out for further amendments made by the Crime (Sentences) Act 1997.24

7.37 The process of ascertaining what exactly section 53 said involved a longwinded and complex foray through a number of different statutes. As Thomas points out, it is not obvious why this section was not simply consolidated in the Crime (Sentences) Act 1997.

7.38 For those with access to a commercially produced database of statutes, this problem is in general not a very severe one. Partly though, the cost is hidden, and even commercial publishers have expressed dissatisfaction at the way amendments are drafted in United Kingdom legislation. They have suggested that they spend a great deal of time and money unpicking amendments which are obscurely presented, before integrating them into the amended legislation. For example, section 21 of the Education (Wales) Measure 2009 amends Part 7 of the Education Act 2002 as follows;

(1) The Education Act 2002 (c. 32) is amended in accordance with this section.

(2) In section 97 (interpretation of Part 7)—

(a) in the definition of “assessment arrangements”, for “stage”, each time it appears, substitute “phase”;

(b) in the definition of “desirable outcomes”, for “foundation stage” substitute “foundation phase”;

(c) in the definition of “the foundation stage”, for “stage” substitute “phase”.

7.39 Following this section, a commercial publisher, or legislation.gov.uk, will have to go through each occurrence of “stage” in section 97 of the Education Act 2002.

and replace it with “phase”. This is a painstaking process. One means of avoiding these problems is to carry out a consolidation exercise.

CONSOLIDATION IN WALES

7.40 The Welsh Government is very much alive to the virtues of consolidating the legislation applicable to Wales. In addition to the usual benefits, a consolidating Act of the National Assembly would have the significant additional value of disentangling Welsh from United Kingdom legislation allowing easier access to Welsh, English and United Kingdom law. Theodore Huckle QC, Counsel General to the Welsh Government has said that:

A Welsh statute book is something that can and should be developed. But it can be developed only by legislating in order to create a substantial body of stand alone Welsh laws – which must then be published effectively.

To do this it would in my view be essential to develop a programme of consolidating legislation to run alongside the Welsh Government’s main legislative programme.\(^{25}\)

7.41 As we have seen elsewhere, however, the National Assembly’s legislative burden is heavy, and the Welsh Government is understandably inclined to prioritise its substantive policy aims, over what can seem mere ‘tidying up’ or good legislative practice. Rather than pursuing a focussed programme of consolidation, the Welsh Government has spent its time on law reform. Where practical, the Office of the Legislative Counsel will restate the law separately for Wales as it carries out reform.

7.42 The method has its limitations. It is necessarily restricted to those policy areas within which legislation is passed; this clearly means that the re-enactment of a Welsh statute book cannot be pursued systematically, and makes complete coverage a distant possibility.

DEVELOPING A MODEL FOR CONSOLIDATION

7.43 In order to develop an effective programme of consolidation, it will be necessary to explore different types of consolidation and also appropriate legislative procedures within the National Assembly to support the consolidation process.

7.44 Over the consultation period, we want to gather evidence on different types of consolidation exercise in order to learn lessons from those experiences and develop a model or models to suit a consolidation programme for Wales.

7.45 The Law Commission consolidation procedure provides one model for consolidation, where it is not intended to reform the law. Two other, quite

\(^{25}\) Counsel General, Speech on Access to legislation, given 26 September 2012 to the Association of Welsh District Judges. The First Minister has announced a commitment to consolidation. In his annual statement to the National Assembly on the legislative programme, in 2011 and again in 2013, he announced an intention to consolidate existing legislation to make the planning system more transparent and accessible. See National Assembly for Wales, Record of Proceedings, 12 July 2011.
different, consolidation models follow.

**Tax Law Rewrite**

7.46 The Tax Law Rewrite project has been described as “an awesome undertaking”.26 The aim of the project was to rewrite United Kingdom tax legislation in plain and simple English, but without changing the substance of the law. It was an enormous consolidation exercise, launched by the then Chancellor of the Exchequer, the Right Honourable Kenneth Clarke QC MP. The Inland Revenue, as it then was, now Her Majesty’s Revenue and Customs, was required by section 160 of the Finance Act 1995, to report to Treasury ministers of on tax simplification explore ways in which criticisms of the complexity of tax legislation might be countered. The Path to Tax Simplification (Tax Simplification Report) was published in 1996 and the resulting project ran until the Government of the day cancelled it in 2009.27 Seven Acts were passed as part of the Tax Law Rewrite project and used the special Parliamentary procedure created in order to facilitate their passage through Parliament without detailed scrutiny of the policy where the law was not, in essence, being reformed.28

7.47 The Tax Law Rewrite project was run by a project team, led by a director from the Inland Revenue (latterly HMRC), and consisted of some 40 people, divided into teams, each responsible for researching particular areas of tax law, concessions and practices, and then instructing parliamentary counsel. The Rewrite Bills were then scrutinised by a steering committee and a consultative committee.

7.48 Standing orders were amended to provide that Rewrite Bills could be introduced in the House of Commons and then be referred, on second reading, to a Joint Committee of both Houses, chaired by a member of the House of Commons.29 Following the Committee’s report, Bills were then passed without amendment or debate. This expedited procedure was justified by the extensive pre-Parliamentary scrutiny the Rewrite Bills were subjected to.

7.49 The steering committee consisted of Members of Parliament and Lords, judges, tax professionals, lawyers and business people. It was responsible for providing strategic guidance, monitoring and maintaining the quality of the work; and the overall progress and direction of the project; giving evidence as required during the Parliamentary process for scrutinising Tax Law Rewrite Bills, reporting back to Treasury Ministers and other functions.

7.50 The consultative committee provided the forum for consultation on the detail of

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27 A short announcement was made by the Financial Secretary to the Treasury, Stephen Timms to the House of Commons on 16 July 2009: *Hansard* (HC), 16 July 2009, vol 496, , col 39WS and 40WS.


proposed legislation and consisted mostly of tax practitioners.

7.51 The Joint Committee’s role was
to consider tax law rewrite bills, and in particular to consider whether each bill committed to it preserves the effect of the existing law, subject to any minor changes which may be desirable.30

7.52 Drafting principles and guidelines were developed for the Tax law rewrite, such as simple and clear expression, the use of modern English and short sentences. Many of the principles have since become part of the Office of Parliamentary Counsel's guidelines.31

Simplifying immigration law

7.53 In 2009, the Government of the day published a draft Bill, with the aim of simplifying immigration law. There had been a significant amount of primary legislation passed in this field, in addition to large numbers of statutory instruments and other subordinate legislation.32 The Government also took the view that the legislation should be reviewed in the light of judicial interpretation. The draft Immigration Simplification Bill was presented as

[A]n important opportunity for Parliament to take stock of what the law is and decide the path forward, bringing clarity to an increasingly difficult area of law.

7.54 Far from being an exercise in tidying up the statute book, the Minister for Borders and Immigration saw simplification as an important part of creating effective immigration law and border controls in practice.

The draft Bill we are publishing today is the next step in a continuing process to meet the object of a simpler legal framework – thereby providing a clear basis for the operation of our controls, and increasing our effectiveness in protecting our borders and removing those who do not have our permission to be here.33

7.55 The simplification exercise was also seen as part of a drive for a cost-effective system:

30 The detailed procedure for the Joint Committee was set out in Standing Orders of the House of Commons (2015), 152C.


32 The Immigration Rules (HC 251) were laid before Parliament, but were not statutory instruments. These Rules were frequently amended. Primary legislation since 1997 included.

Driving out unnecessary complexity means driving out unnecessary cost. It is more important than ever in current circumstances that we streamline the system as far as possible.\footnote{Secretary of State for the Home Department, Simplifying Immigration Law, The Draft Bill (November 2009) Cm 7730 p 5.}

7.56 The Government intended to create a "single, consistent and coherent framework of primary and subordinate legislation." This included:

1. Reviewing the primary legislation from the Immigration Act 1971 onwards;
2. Consolidating all amendments made to immigration legislation;
3. Simplifying and modernising the language and structure of the legislation;
4. Reforming the law where required by policy objectives;
5. Taking account of judicial interpretation in case law;
6. Reviewing and simplifying all subordinate legislation under the primary immigration statutes;
7. Reforming and redrafting the Immigration Rules;
8. Reforming and redrafting guidance and instructions to Immigration Officers and others performing roles under the immigration legislation.

7.57 This model of consolidation was radically different to the Tax Law Rewrite. It was intended to reform the law as well as to consolidate, simplify, modernise, take into account judicial interpretation and make the immigration system as a whole operate more efficiently. If the Bill had gone through Parliament, it would have been subjected to full scrutiny.

7.58 The Draft Bill published in 2009 represented only a part of the simplification project, which never came to fruition. Some commentators thought the project over-ambitious and the timetable allowed for it too short. In the end, no overarching simplifying immigration Act was passed and immigration law has continued to develop piecemeal.\footnote{For a discussion, see A Harvey, “Legislative Comment: The Borders, Citizenship and Immigration Act 2009” [2010] Journal of Immigration and Nationality Law 118.}

A consolidation model for Wales?

7.59 In order to develop a suitable model for the Welsh Government and National Assembly to follow, we need to consider:

1. How long consolidation takes;
2. Who should carry out the drafting work;
3. The nature of the consolidation exercise required: whether it is part of a full law reform exercise, simplification and modernisation with the aim of
maintaining the overarching policy goals of the original legislation, or a pure consolidation exercise;

(4) The advantages and disadvantages of each model;

(5) The relative costs of each type of consolidation;

(6) Appropriate levels of pre-legislative or legislative scrutiny by the National Assembly.

7.60 These are all issues we wish to explore with stakeholders during the consultation period. If, for example, a Bill before the National Assembly included some reforming the law, and other clauses which were pure consolidations bringing together existing law, could a procedure be created to enable the law reform clauses to be scrutinised, amended and debated in full, but allowing the consolidation clauses to pass through without amendment?

7.61 We go on to look at how these issues have been tackled in other jurisdictions in order to take account of their experiences.

LESSONS FROM OTHER JURISDICTIONS

7.62 Problems in accessing the law exist throughout the United Kingdom and in other common law jurisdictions. They occur with or without devolved legislatures, in federal jurisdictions and where different models of devolution have developed. Politicians, officials, lawyers and citizens in many jurisdictions have grappled with the need to consolidate legislation, and have adopted various techniques to facilitate this aim.

7.63 We look particularly at New Zealand as this common law jurisdiction has similar characteristics to Wales in terms of economy, including the rural and farming community, population size, and a unicameral legislature. In addition, New Zealand has explored consolidation and codification options and there are useful lessons we can learn from their experience for Wales.

New Zealand: The Legislation Act 2012

7.64 In the next chapter we will discuss the experiments carried out in New Zealand with a Legislative Design Committee and Legislative Advisory Committee. Here, we look briefly at New Zealand’s approach to consolidation.


The state has an obligation to make law accessible to citizens. People have to obey the law; ignorance of it is no excuse. So they need to be able to find it and understand it. They will not respect the law if they cannot. Moreover, law which is not accessible is expensive in terms of both time and money.36

7.66 In 2010, the New Zealand Government introduced the Legislation Bill into
Parliament, implementing the legislative recommendations made in the New Zealand Law Commission’s report. The Government wanted to modernise and improve the law relating to the publication, availability, reprinting, revision, and official versions of legislation and to bring this law together in a single piece of legislation.

7.67 The New Zealand Government intended the Bill to contribute towards regulatory reform, by reducing the need for technical remedial legislation as a consequence of enhanced reprinting powers; and innovation and business assistance, by improving access to old archaically expressed law through a programme of revision of old statutes.

7.68 The Legislation Act 2012 received Royal Assent on 11 December 2012 and all sections are now in force. The Act in effect creates statutory obligations with regard to the effective consolidation of legislation. What follows is a brief outline of the key provisions in the Act.

7.69 The Act requires the Attorney General to establish a three-year programme of consolidation. In addition, a special Parliamentary procedure has been agreed through amendment of the standing orders to enable consolidation Bills, known as ‘revision Bills’, to pass through Parliament efficiently and without amendment.

7.70 Setting the programme involves selecting statutes to be revised over a three-year period that coincides with a Parliamentary term. The draft programme must be made publicly available and submissions invited from “interested persons and members of the public”. After the consultation period finishes the programme must be approved by the Government and presented to Parliament. Consultation closed on the first three-year programme of revision work on 25 August 2014. The programme was presented to Parliament in December 2014. It recommends seven consolidation Bills, which will consolidate 18 existing Acts.

7.71 The Act also creates an alternative power under which the Office of the Parliamentary Counsel can recommend the repeal of obsolete or redundant enactments or provisions of enactments, if their repeal is not suitable for inclusion in a revision.

7.72 A revision Bill should substantially re-enact earlier law in a form that makes it more accessible. Unlike a reprint, a revision Bill will redraft the earlier law so that it is rationalised and arranged more logically, inconsistencies and overlaps are removed, obsolete and redundant provisions are repealed, and expression, style, and format are modernised and made consistent.

7.73 Part 2, sub-part 3 of the Act sets out the detailed requirements and powers of a revision. Section 31 provides that a revision Bill may

(a) revise the whole or part of one or more Acts, combine or divide Acts or parts of Acts;

(b) adopt a Title that is different from the Title or Titles of the Acts or parts of Acts revised;

(c) omit redundant and spent provisions;

(d) renumber and rearrange provisions from the Acts or parts of Acts revised;

(e) make changes in language, format, and punctuation to achieve a clear, consistent, gender-neutral, and modern style of expression, to achieve consistency with current drafting style and format, and generally to express better the spirit and meaning of the law;

(f) include new or additional purpose provisions, outline or overview provisions, examples, diagrams, graphics, flowcharts, readers’ notes, lists of defined terms, and other similar devices to aid accessibility and readability;

(g) include new or additional provisions alerting users of the revision to enactments that are not incorporated in the revision but are relevant to the subject matter of the revision;

(h) correct typographical, punctuation, and grammatical errors, and other similar errors;

(i) make minor amendments to clarify Parliament’s intent, or reconcile inconsistencies between provisions;

(j) update any monetary amount (other than an amount specified for the purpose of jurisdiction or an offence or penalty), having regard to movements in the Consumers Price Index over the relevant period, or provide for the amount to be prescribed by Order in Council;

(k) omit forms and schedules from the Acts or parts of Acts revised, and instead authorise the matters in those forms and schedules to be prescribed by or under regulations;

(l) make consequential amendments to enactments that are not incorporated, or are incorporated only in part, in the revision; and

(m) include any necessary repeals, savings, and transitional provisions.

7.74 A revision Bill must not change the effect of the law, except as authorised in the list of powers above.

**Australia: Consolidation in New South Wales**

7.75 As long ago as 1902, New South Wales commenced a significant consolidation exercise to modernise language, remove inaccuracies, and arrange legislation on a particular subject clearly in a single consolidating statute. Consolidation exercises also took place in 1937 and 1957. Consolidation happens routinely in New South Wales. There is a regular process of and consolidation both in its own right and as part of any legislative reform.
The New South Wales Government has a Statute Law Revision Program with a programme of revision Bills. Importantly, this includes the introduction of two “miscellaneous provision” Bills into Parliament every year for the purpose of modernising and remedying the statute book in the ways listed below. The expedited procedure applicable for these bills includes the suspension of the usual Parliamentary standing orders.

The New South Wales “miscellaneous provision” bills carry out a number of functions in various schedules. These include:

1. a schedule of repeals of obsolete Acts;
2. moving provisions of ongoing effect from amending Acts into the principal Act (enabling the repeal of an otherwise obsolete amending act),
3. making amendments correcting typographical errors or errors of grammar or syntax, and making amendments to omit unnecessary material or inserting missing material, and
4. making minor and non-controversial amendments.

The definition of “minor and non-controversial” amendments is more flexible than the definitions applicable to Law Commission consolidations or pure consolidations. The guidelines state that, “generally speaking”, the following “will not be included”:

1. amendments creating offences punishable by imprisonment on conviction;
2. amendments creating offences punishable by very high fines;
3. amendments increasing penalties by very high amounts;
4. amendments retrospectively imposing liabilities on any person;
5. amendments to Acts dealing with a controversial subject-matter;
6. amendments intruding on or prejudicing the rights of any person;
7. amendments that may be perceived as favouring a particular person;
8. amendments imposing or varying taxes;
9. amendments conferring jurisdiction on a court or tribunal;
10. amendments that might have an impact on a government agency other than that of the Minister proposing the amendment, or amendments that have been the subject of disputes between agencies;

38 See overview of Statute Law (Miscellaneous Provisions) Bill 2014 for example.
(11) lengthy or voluminous amendments;

(12) amendments proposed for inclusion in earlier Bills in the program and found to be inappropriate for them, amendments to Acts being amended (or proposed to be amended) in the same sittings of Parliament; or

(13) amendments requested after the closing date for a particular Bill.

Discussion

7.79 A rolling programme of consolidation has significant appeal if supported by appropriate procedures and standing orders in the National Assembly so that the time for Government and other legislation is not taken up excessively. If a rolling programme was to be drawn up, we would need to consider who could carry out the consolidation. The obvious candidate is the Office of the Legislative Counsel, but as currently resourced it is already very busy with a full legislative programme. Thought would also need to be given to how legislation should be prioritised for consolidation. For example, should consolidation happen at the same time as law reform in those fields where law reform is proposed? If so, this could radically increase the amount of time a Bill takes in the National Assembly.

7.80 Alternatively, consolidation could be limited to those areas where substantive law reform has been completed, or where the Government has no plans to pursue reform. This would allow for the relatively speedy passing of purely technical Bills. Another possibility would be a special procedure allowing for a mixed Bill, so that the parts of the Bill including law reform should undergo detailed scrutiny, but those parts where the law is being consolidated without substantive amendment should not. Some flexibility would be required, to allow the National Assembly to transfer a particular section from the faster, consolidation procedure into the full scrutiny procedure if the National Assembly takes the view that the section does indeed reform the law.

7.81 It is important to note that the role of the Law Commission in New Zealand is different from that in England and Wales. The Law Commission is invited to comment on legislation during its passage, often giving evidence to the Parliamentary Committees scrutinising Bills.\(^{39}\) We do not currently have a mandate to carry out such work save in the case of Bills which have their origin in the Law Commission or implement Law Commission recommendations.

CONSOLIDATION: ONLY A PARTIAL SOLUTION?

7.82 Consolidation is popular in principle, but can be problematic in practice. There are two central shortcomings, one wholly pragmatic the other related to limitations inherent in the process.

Practical restraints

7.83 There is a practical constraint on the capacity to consolidate. Although a ‘mere’ technical exercise, consolidation is an unusually labour-intensive process, requiring the time and attention of highly skilled legislative drafters. They must satisfy themselves that an exhaustive examination of the statute book has been

carried out, that all relevant provisions have been identified and then that the consolidating Act simply re-enacts the current law without alteration. Without this second assurance, of course, a consolidating Bill would not be entitled to benefit from the reduced scrutiny which the procedure for consolidation Bills allows.

7.84 Nor is it always easy to say clearly that the benefits of a consolidation outweigh the evident costs. It is hard to measure the benefits in economic terms.

7.85 During the consultation period, we shall be exploring the costs and benefits of consolidation in economic terms.

Limitations of consolidation procedure

7.86 More importantly, a consolidation conducted within strict parameters can, on occasion, be counterproductive. Without any scope for reform, problematic, outdated laws are simply re-enacted, and the contradictions or flaws within the legislative framework perpetuated rather than resolved. Under these circumstances it is even harder to demonstrate the savings that flow from the consolidation.

7.87 Even where there are no changes to the substantive effect of the law there are consequential costs where new legislation is enacted. Stakeholders operating under the law will still need to get to know the new provisions, guidance will have to be amended to refer to the new legislation, supporting forms and documentation may have to be revised and training may have to be carried out. However, these costs have to be weighed against the benefits of greater accessibility, which are real but difficult to quantify.

7.88 There are other issues. Consolidations can take years, and may during that time be overtaken by events. A consolidation started under one government might become wasted work if not completed before a new government comes into power with an ambitious reform agenda and the intention to legislate in the relevant policy area.

The precariousness of consolidation

7.89 Consolidation brings the legislation together to date, but the proliferation of further legislation after the passage of the consolidation Act can start the process of fragmentation and increasing inaccessibility again. For example, the Powers of Criminal Courts (Sentencing) Act 2000 consolidated sentencing legislation but was amended within a year, and by 2003 was just one of a number of pieces of sentencing legislation which applied in England and Wales.\(^{40}\)

7.90 So, from a practical point of view, in order to undertake a consolidation there ought to be at least some measure of expectation that the law will remain unchanged for long enough for the consolidation to take place. However, that is not an absolute requirement and sometimes it is possible to take account of further statutory changes which have taken place during the consolidation.

\(^{40}\) For example, the 2000 Act is amended by the Serious Crime Act 2007 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Law Commission is currently conducting a project on Sentencing Procedure. For more information, see http://lawcom.gov.uk/ (last visited 1 July 2015).
CONCLUSION

7.91 Despite these possible difficulties, we take the view that a programme of consolidation would be worthwhile. It would improve access to the law by making it easier to find, easier to navigate and easier to understand.

7.92 Therefore, we seek consultees’ views as to the sufficiency and viability of consolidation in Wales.

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

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

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

7.93 Consolidation is a valuable tool, but it is nonetheless only a partial answer to the problems described above. In the next chapter we consider a more radical alternative to consolidation, which we suggest may provide a better and more comprehensive solution for improving access to the law in Wales.
CHAPTER 8
CODIFICATION

INTRODUCTION

8.1 In the last chapter, we considered the nature and advantages of legislative consolidation. In this chapter, we take a step further, and make a case for “codification”. In particular we consider how reforming the structure of enacted legislation could require that the law be better set out and more accessible. Codification would not just rationalise the final presentation of *existing* legislation, but would introduce a more rational approach to *future* legislation, with the aim of securing clearer and more accessible law.

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

> In Wales, there is a huge advantage that Welsh legislation has but a short history. There is no reason, therefore, why it cannot develop its own innovative style...Furthermore, Wales can begin its own sensible organisation of Welsh law into a Code with chapters into which new laws can be inserted and old laws amended, much along the lines of what is done in most states. Westminster is burdened by history. It is therefore a model that does not have to be followed.¹

8.3 This chapter examines this proposal. Codification of law has a long history and, in recent times, a close connection with the Law Commission. In what follows, we consider first the different ways in which the concept of a code is used, in an effort to resolve some ambiguities. Secondly we briefly review the history of codification following the establishment of the Law Commission in 1965. We then consider the extent to which the reasons for the (apparent) failure of codification as a project over those years apply to current conditions in Wales. Finally, we suggest options the effect of which would be to establish a system of codified law applicable in Wales.

WHAT IS A CODE?

8.4 It is important to be clear what we mean by a “code”. The terms “code” and “codification” are used to describe a number of different processes; discussion may be hampered by a lack of clarity as to what sort of code is under discussion.

8.5 The most fundamental distinction is between common law jurisdictions, like England and Wales² and the many jurisdictions worldwide that have sprung from

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¹ Lord Thomas of Cwmgiedd, Legal Wales Conference (October 2013).
² Within the United Kingdom, Northern Ireland is a common law jurisdiction, while Scotland is described as having a mixed system, with elements of pre-code European law co-existing with common law features. It shares this status with South Africa, whose traditions derive from Dutch law and the law of England and Wales, and also with Quebec and Louisiana (with a legal system derived from France and England and Wales).
it, and jurisdictions based on civil law.\(^3\) The modern European tradition, usually dated to the creation of the Napoleonic French civil code in 1804, is for the law to be stated in codes intending to cover certain areas of law comprehensively, expressed in terms of broad principle.\(^4\) The task of the judges is to apply these principles to the facts of a case, but the system does not rely on the development of a structure of case-law precedents, as in common law countries.

8.6 In common law jurisdictions, such as England and Wales, the starting point is the common law. This is the law made and declared by judges in deciding individual cases. Parliament may then intervene by passing legislation, but it does so on the basis of the accumulated wisdom of the common law. Such legislation, as befits an intervention in the richly detailed flow of the common law, is itself detailed in style and seeks to cover every possible eventuality that occurs to the drafter, unlike the broad principles of the continental codes. And, once Parliament has legislated, judges will make decisions on the legislation, authoritatively explaining and interpreting what Parliament has done.

8.7 Both of these accounts are overstatements. Even within civil law countries, the nature of codes differs enormously. Judges have to fill the gaps and assimilate new developments to the codes, and in so doing they look at what other judges have done, even without the system of precedents that exists in common law jurisdictions. Further, the nature of legislation is not so different. In recent years, European legislatures have intervened to an extent that a process of “decodification”\(^5\) has been discerned by academic writers, rapidly followed by “recodification”.\(^6\)

8.8 Conversely, in England and Wales, in relation to large parts of the law, it is anachronistic to see statute law as a subordinate, late, intervention in a broadly judge-made structure. In many areas of the law, for all practical purposes, statute law is the starting point and answers most questions on its own, even if it is true that one must look to case-law to answer certain questions which arise.

8.9 These overstatements have, nonetheless, exerted a powerful influence on attitudes in England and Wales towards codification, as we suggest below.

8.10 In addition to the fundamental distinction between code jurisdictions and common law jurisdictions, there are two distinct forms of codification which have been

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\(^3\) Both “common law” and “civil law” are potentially ambiguous terms. “Common-law” can refer both to the nature of the jurisdiction, and to judge-made law as opposed to statute law within such a jurisdiction. We use the term “judge-made law” or “case-law” for the latter in the remainder of this discussion. “Civil law”, in addition to describing continental code jurisdictions, can refer to the law that is not criminal law within a common law jurisdiction, but we do not use the term in that sense.

\(^4\) In fact, codes had been established in some of the German states during the second half of the 18th century. The Roman law foundations of modern European law were themselves subject to codification by the Byzantine Emperor Justinian between 529 and 534: B Nichols and E Metzger, An Introduction to Roman Law (Oxford University Press 1975) p 38 to 42.


developed in the common law context. In practice, these are frequently seen operating together.

CODIFICATION

Codifying judge-made law

8.11 The first common law form of codification seeks to replace judge-made law with statute law, but without altering the relationship between judge-made law and statute law in a common law jurisdiction.

8.12 Historically there have been a number of codifying statutes of this sort, dating back to Victorian legal reforms. The Partnership Act 1890 put into statutory form the previous judge-made law in relation to partnerships, at a time when it was becoming increasingly important to distinguish them from companies, the then newly reformed law of which was itself a creature of statute. The Sale of Goods Act 1893 performed a similar role in relation to contracts of sale (and was updated, but in large measure preserved, in the Sale of Goods Act 1979), and the Marine Insurance Act 1906 became the code for all forms of insurance, not just maritime insurance. The drafter responsible for that Act, Sir Mackenzie Chalmers, also drafted the similarly long-lived codification in the Bills of Exchange Act 1882. Examples of a similar exercise in relation to criminal law are mentioned below.

8.13 This form of codification does not imply anything about the size or reach of the code. Whereas the continental codes encapsulate the law in one code or a very small number of codes, the process of rendering case-law into statute can apply to much smaller areas of the law. The courts may declare that a particular statute forms “a code” in respect of a really quite small part of the law, meaning that a new statutory regime is to be taken to include all of the law on that subject. The Court of Appeal might say that two sections of a statute are a “code” for the new law of loss of self-control in homicide, meaning that they are complete and self-contained, and there should be no recourse to previous cases.7

Codifying the legislation

8.14 The second form of common law codification involves bringing together the statutory law on a single subject into one instrument without substantially changing the boundaries between statute law and case law. Where this is done without any (or any significant) change in the substance of the law, it is mere consolidation, which we discussed in chapter 7 above. However, it important here for two reasons. First, it is associated with substantive law reform. Secondly, it can have implications for the form of the law on a continuing basis.

8.15 Law reform projects undertaken by the Law Commission or other law reform agencies often start with the perception that the law relating to a particular subject is scattered amongst a variety of different statutes. In such circumstances, reform rather than mere consolidation is often called for, because the law has developed, albeit in statutory form, over many years and represents the analytical understandings and policy preferences of the time when each statute was passed. The content of the law must therefore be reconsidered in

order to be modernised and simplified, rather than merely rearranging how law is organised.

8.16 Two examples are provided by law reform projects that have been, or are being implemented by legislation in Wales.

8.17 In May 2011 we published our report on adult social care, which has largely been implemented in Wales, along with other matters, in the Social Services and Well-Being (Wales) Act 2014. Adult social care law deals with the law relating to the care and support of adults by local authority social services. Most users of these services are elderly people and younger people with disabilities, those with mental health problems and others, and their carers.

8.18 In our scoping report, we said that the existing law remains a confusing patchwork of conflicting statutes enacted over a period of 60 years. Some of these statutes reflect the disparate and shifting philosophical, political and socio-economic concerns of various post-war governments. Other statutes were originally Private Members’ Bills and represent an altogether different agenda of civil rights for disabled people and their carers. The law has also developed with an inconsistent regard for previous legislation: some statutes amend or repeal previous legislation; others repeat or seek to augment previous law; and others can be categorised as stand alone or parallel Acts of Parliament.8

8.19 The result of the project was wholesale reform, completely recasting the legal structure. But the starting point was the seriously flawed nature of the relevant statute law. The result is effectively codification with reform of the relevant areas of the law.

8.20 A Bill largely based on recommendations in our report on Renting Homes9 is currently before the National Assembly.10 The area of law concerned is largely the private law relationship between what are now called landlords and tenants in shorter-term rented accommodation – that is, for terms up to 21 years.

8.21 In our scoping paper, we described the shear volume of housing law. The Encyclopaedia of Housing Law, which contains all the relevant statutes, regulations and government circulars, comprises six volumes that take up twenty-two inches on the bookshelf and weigh well over 10 kilos. The number of reported

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9 Renting Homes in Wales / Rhentu Cartrefi yng Nghymru (2013) Law Com No 337.

cases – much going back hundreds of years – is enormous. Recent legislation has added to the problem.

8.22 But the problem was not just quantitative:

Each set of legislative provisions has been designed to deal with particular issues, which have arisen at particular moments in our social history: control of rents, regulation of housing conditions, security of tenure, prevention of harassment and unlawful eviction. There has never been a fundamental reappraisal of the law, to explore what the scope for simplification and modernisation might be.11

8.23 Again, the result has been a codification with reform of this area of the law. In one of the earlier publications in the project, we said that “in the longer term, it is the hope of the Commission that this might be the first stage in the creation of a complete housing code”.12 By “housing code”, we meant a single piece of legislation covering both private and public law aspects of shorter term rental of accommodation.

8.24 Not all law reform, by any means, falls into this category. However, in recent years, the Law Commission has undertaken a number of such projects. In the last two programmes of law reform, they include electoral law, the electronic communications code, the regulation of taxis and private hire vehicles, the regulation of healthcare professionals, wildlife law, bills of sale, planning and development management in Wales, sentencing procedure and wills.13

Codification in the USA

8.25 In the USA, both at federal and state level, statute law is organised in the form of codes. Statutes are published individually when they are passed and in sessional volumes, but they are also organised into subject headings or “titles” to form a single code. If a single law passed by the legislature falls entirely within one subject title, it is located there. However, very many laws straddle multiple subject titles, and so when added to the code, they are split up among the relevant titles (although every provision only appears once in the code, even if it could be said to relate to more than one title).

8.26 At the federal level, the code was established in 1926. The Law Revision Counsel, a statutory office, is responsible for maintaining a code comprising 54 titles.14 Each title is further divided by a hierarchy of sub-headings. Twenty seven of the titles have been enacted so as to have the force of law. This has been done as part of a rolling programme. Statute provides that the others establish

13 Eleventh Programme of Law Reform (2011) Law Com No 330; Twelfth Programme of Law Reform (2014) Law Com No 354. The regulation of health care professionals project was a reference under Law Commissions Act 1965, s 3(1)(e) received from the Department of Health shortly before the commencement of the Eleventh Programme.
14 2 USC 285b, as the legislation is organised in the code.
the law *prima facie*. Every six years a complete copy of the code is published in hard copy, with supplements digesting each session of Congress in the intervening years. The website version is updated as soon as possible with new legislation.

8.27 In respect of the “positive law titles” (those that have been enacted), the organisational structure is set by Congress in the laws that enact the title (and subsequently amend them). For the other titles, editorial functions are performed by the House of Representatives Office of the Law Revision Counsel. For these sections, that Office renumbers sections so they fit in the relevant part of the title rather than retain the section number enacted by Congress. They also add or amend headings and introduce cross-references or “translate” them (that is, replace original Act cross-references with code cross-references). As a way of facilitating the maintenance of the Code, both positive and non-positive titles include some provisions as “statutory notes” rather than Code sections. Both types of provision have the same force.

8.28 A similar structure exists at state level, and in many states all provisions of the Code have the same status as positive code titles at the federal level: they are the law.

**The Canadian Criminal Code**

8.29 Existing codes can, of course, cross the boundary between codification in the sense of putting the common law into statutory form and codification as reorganisation of statute law. Perhaps the best known code in the common law world is the Canadian criminal code. In Canada, legislating on criminal law and procedure is reserved to the federal Parliament. In 1892 Canada enacted a criminal code, based on a draft originally produced by Sir James Stephen for enactment in England and Wales. Many of the offences in the code, therefore, originated in the legislation of England and Wales, including the series of

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15 1 USC 204. This means that although not having the force of law, they are to be taken as stating the law accurately unless they are shown not to do so.


17 A “positive law title” refers to one that has been enacted as law by Congress, whereas “non-positive law” titles are simply the Law Revision Counsel’s attempt to restate the law accurately and could be shown to be wrong. The positive law titles are conclusive as to what the law is. See, http://uscode.house.gov/codification/legislation.shtml (last visited 1 July 2015).


20 Constitution Act 1867, s 91(27).
consolidating statutes passed here in 1861. The code has been subject to formal revision several times since then, most recently in 1985 (as part of a general revision of Canadian federal statutes). It covers substantive criminal offences, procedure and sentencing. Some, but not all, common law defences were included. When the Canadian Parliament legislates to change offences, procedure or sentencing, it generally does so by way of amendment to the code. In 2001, for instance, a whole new part of the code was introduced, creating offences relating to terrorism. However, some important substantive offences exist outside the code, such as those relating to controlled drugs and firearms. The Canadian criminal code takes the form of an Act of the Canadian Parliament, rather than being simply an edited compilation of public Acts as is the case with the United States non-positive law titles.

8.30 Much of the Canadian criminal code has its origins in the reordering of pre-existing statutory provisions. But it also renders some common law defences into statutory form and it has replaced all common law offences with statutory ones. Offences like murder, manslaughter, kidnapping and conspiracy to defraud, which in England and Wales remain common law offences (in some cases subject to statutory intervention), are now code offences, or subsumed within code offences, in Canada.

Criminal evidence codes in Australia and New Zealand

8.31 Recently, the law of criminal evidence has been codified at both Commonwealth and state level in Australia and also in New Zealand. Much of the relevant law remained in case law, with some recent legislative additions, on a similar pattern to the development of the law in England and Wales. Australia and New Zealand employ both the forms of codification we are discussing here – a combination of putting case law into statutory form and bringing together existing statutory materials.

CODIFICATION AND THE LAW COMMISSION

8.32 The Law Commission from its inception has been charged to

keep under review all of the law ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the

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21 The Offences Against the Person Act 1861 (the only one remaining substantially in force), the Larceny Act 1861, the Malicious Damage Act 1861, the Forgery Act 1861, the Accessories and Abettors Act 1861 the Coinage Offences Act 1861 and the associated Criminal Statutes Repeal Act 1861.

22 Part II.1, introduced by the Anti-terrorism Act 2001.


24 Ss 229 to 232, 279 and 380 of Canadian criminal code.

25 For a full account of the Australian and New Zealand experience, see Ian Dennis “Codifying the Law of Criminal Evidence” (2014) 35 Statute Law Review 107. Professor Dennis argues in the article for a similar development in England and Wales.
8.33 In its first programme of law reform, the Commission saw both consolidation and codification as being means to the end of simplification, rather than being desirable in their own right. However, the approach was ambitious: the first programme included proposals to codify the law of contract, the law of landlord and tenant and family law.

8.34 What did the Law Commission mean by a “code”? The establishment of the Law Commission was preceded by and inspired by the book *Law Reform Now*, published in 1963, one of whose editors, Gerald Gardiner QC, became the Lord Chancellor responsible for the Law Commissions Act 1965. The chapter on “The Machinery of Law Reform” included a section on the necessity of codification:

> The unwieldiness of English law has reached a degree which raises one of the more agonising problems of democracy: the question whether the citizen is placed in a position to ascertain the law by which he lives without incurring unreasonable trouble and disproportionate expense. The answer, we fear, is in the negative.

8.35 They support this proposition by outlining the numbers both of reported cases and statutes. It would be difficult to argue that the sheer bulk of either has reduced since that time. There is, therefore, Gardiner and Martin suggested, an extremely strong case for the progressive codification of English law in the sense of reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject.

8.36 They concluded that, while codification was necessary, it should also be afforded a low priority, because of the need for substantive reform to precede codification.

8.37 The originators of the Law Commission were not very clear as to the model of consolidation they were advocating – a continental model with the implications for form – complexity or simplicity – that might result; enacting the common law in legislation; reform of existing statute law, or some combination of all three.

8.38 However, once the Commission was established, its first Chairman was able to promote a coherent vision of a form of codification suited to a common law jurisdiction. In a speech given in 1966, Sir Leslie (later Lord) Scarman defined codes as “a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law.” While this appears a broad, almost continental, concept of what a code is, Sir Leslie saw that the 1965 Act, at least, was not determinative of what sort of codification it promoted:

> [T]he Act therefore leaves us the choice to move by deliberate policy towards the gradual codification of the whole general law or to codify

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26 Law Commissions Act 1965, s 3(1).


only where reform or systemization is needed. It is too early to tell which course English legal development will take. If codified law succeeds in becoming more manageable and easier to understand than the law which it supersedes, the habit of codification will spread. If it fails, codes will become part of the useless lumber of our law: practitioners and judges will look through and beyond them to the judge-made law, seeking authority and guidance in the decisions of the courts. 29

8.39 The speech, taken as a whole, was a plea to match codification to the realities of the law of England and Wales and to modern social and economic conditions. Thus, although the subject is the relationship between the common law role of the judges and the continental style of codification, he doubted whether following codification,

the courts will find themselves much diminished in importance as makers of law, but I agree that their contribution will change. They will lose their priestly character as oracles drawing from within upon the experience of themselves and their predecessors in office to declare the law; they will stand forth as the authoritative interpreters of the code. For the code will ultimately mean what the judge says it means. Already our courts spend most of their time interpreting statute law.30

8.40 And the level of detail to be expected of a code should depend on the subject matter under consideration, not a doctrinaire attachment to continental principles. He closed optimistically, contrasting the current situation – in which there were only “rare occasions when Parliament is frightened, persuaded, cajoled or deceived into finding time for a subject so electorally unappealing” as codification – with a future in which Parliament would work with the Law Commission to produce a modern, and therefore codified, law.

8.41 This model was piecemeal. The law was to be reformed in a series of codes, of varying size and form. This was to be a continuous activity, the codes being effectively maintained by Parliament working with the Law Commission. to the model preserved the role of the judges, but as authoritative interpreters of the code, not oracles of the common law.

8.42 However, by 1980, the then Chairman of the Law Commission, Sir Michael Kerr, boldly announced “the failure of codification”. In a subsequently published speech he looked back on the Commission’s experience of attempted codification in the first 15 years of its existence.31 He explained that, after six years’ work up to 1972, it had become clear, first, that a code of contract law could not be agreed between the Law Commission for England and Wales and the Scottish Law Commission to operate in both jurisdictions, as had originally been planned. Secondly, it had proved impossible to produce a code even for this jurisdiction

29 The speech by Sir Leslie Scarman given at Birmingham University in October 1966, and published under the title “Codification and Judge-Made Law: A Problem of Coexistence” in 42 Indiana Law Journal 355, quotation at 357.


alone: “It was found that agreement could not be reached on the formulation of rules and propositions to replace the immense body of case law...In the result, this attempt had to be suspended indefinitely, and at present it has no prospect of realisation”.  

8.43 Similarly, although considerable work had been done to attempt to formulate a code of landlord and tenant law, it had become clear that a code, if attainable, would not have any prospect of implementation. As a result, the Commission would “compromise by concentrating on the statutory restatement of a number of aspects of the law where reform appears particularly desirable”.  

8.44 It is noticeable from Sir Michael’s descriptions that both of the codes he referred to were clearly being produced in a fully detailed form. The attempt at a contract code involved finding ways of producing all of the judge-made rules on contract in the form of legislation, amounting to some 500 articles or sections in the partial draft that was produced. In respect of landlord and tenant law, Sir Michael reported that it had been determined that a code would require about 880 propositions. A senior barrister, L A Blundell QC, was co-opted to assist the Commission, and had drafted in full about 650 propositions when he died. After that, the work was suspended indefinitely. In both areas, the law at the time was very largely judge-made, not statutory. This is much less true now, particularly in respect of residential landlord and tenant law.  

8.45 Since that time, the underlying objective of simplification of civil law has been pursued by law reform projects relating to specific areas of the law, resulting in simplified and modernised statutes.  

8.46 The Law Commission remained committed to the ultimate codification of the criminal law. This continues to be the case. We currently consider that, to make codification more achievable, it is necessary first to simplify and improve the law by the abolition, repeal, replacement or modification of offences that are unused in practice, or problematic in principle. The current simplification programme aims to achieve that. The outcome of the Commission’s current sentencing procedure project will effectively be a code for sentencing procedure.  

8.47 Why did the grand scheme of law reform codification initiated by Lord Scarman fail? Although neither theory nor practice appears to have mandated codification on a continental model, Sir Michael Kerr thought that

32 M Kerr “Law Reform in Changing Times” (1980) 96 Law Quarterly Review 515 at 528 to 529,  
35 Indeed, in 1989, the Commission published a draft criminal code (A Criminal Code for England and Wales (1989) Law Com No 177). This had been drawn up by a code team comprising Professors Sir John Smith CBE QC, Edward Griew and Ian Dennis. The Commission subsequently noted that this draft “was in many respects a statement of the existing law or of fairly recent proposals for reform which were open to criticism”, and accordingly embarked on a programme of specific reform as a preliminary to further attempts at codification.  
36 See the Law Commission website: http://www.lawcom.gov.uk/.
The reason stems from a basic and apparently ineradicable feature of our constitutional philosophy. All our legislation is based on the premise that Parliament is not merely concerned with the formulation of general principles to be applied by the courts, but that every statute must, so far as possible, seek to cover every foreseeable situation... However, codification in the Civil Law sense is something quite different. It involves the legislative formulation of a series of general rules...which are then left to the courts to work out...But such codes would be wholly alien to our traditional legislative practice.37

8.48 Similarly, a more or less contemporary Law Commissioner, Sir Peter North CBE QC FBA, discussed the failure of the Commission to produce codes “if, by codes, you take as your model the European codes such as those found in France and Germany, and elsewhere in the European civil law systems”. Like Sir Michael Kerr, Sir Peter North saw the failure as the outcome of a fundamental difference in cast of mind between “principled” civil lawyers and “pragmatic” common lawyers.38

8.49 In 1987, Professor Hein Kötz wrote of these (and other) arguments about the failure of codification that

What loomed large in the codification debate were arguments drawn from what were believed to be the main characteristics of codes in civil law countries...[T]he standard argument proceeded in three steps. First, it was assumed implicitly that codification in England would be more or less tantamount to what it is on the Continent. Secondly, Continental codes were described as being based on a number of distinctive and uniform characteristics. Thirdly, it was concluded that legislation in England following this pattern would be alien not only to English legislative practice but also to the spirit of the common law.39

8.50 If Kerr and North were both over-pessimistic in accepting the argument that a grand change in the entire orientation of the law of England and Wales was impractical and/or undesirable, they also both pointed to practical problems that beset attempts at codification, and law reform more generally. These problems were encountered in relation to the attempts that were made at codification during the early years of the Law Commission, which, as we have observed, were really attempts at one or other, or both, of the species of common law codification that we have identified above.

8.51 Those problems were, first, that there was inadequate interest within Government departments in codification, or law reform more generally. North refines this point, concluding that there was no adequate interlocutor for the Law Commission in the Government machine. The Lord Chancellor’s Department of his day was a very small organisation which nevertheless had custody of all of the law that was

not the responsibility of another Government department. And those departments were not “law departments”, and thus were less capable of committing themselves to formal law reform.

8.52 North contrasts this situation with what would obtain if there were a Ministry of Justice – a “large department of state with overall responsibility for the main corpus of the law”. Although we do now have a large Ministry of Justice, it is arguable that the same is still true. Although at its inception the Ministry of Justice took over responsibility for criminal law from the Home Office, in other areas each Whitehall department still has responsibility for its own law. There is still no department with overall responsibility for the shape and well-being of the law as a whole.40

8.53 Secondly, there was limited support outside the Law Commission for at least the grander schemes of codification. North notes, for instance, that in respect of contract law codification there appeared to be little real enthusiasm…outside the Commission. The legal profession could not see much value in restating well known and well understood general principles. Practitioners were reluctant to see the flexibility of the common law…abandoned in favour of a rigid statute whose amendment would be difficult to achieve.41

8.54 Finally, Parliament was ill-equipped to legislate for codes. Kerr referred to the “notorious problem of securing time in legislative programmes, which are usually greatly overcrowded”.42 That is no less true today. North, in particular, made the point that Parliamentary processes were ill adapted for large scale codes. As a cohesive whole, such a code had to be very much taken as a whole: tinker with one part, through amendment, and the repercussions would affect the rest. The present Parliamentary process…with endless opportunity for amendment, is just not devised for an interlocking instrument.43

8.55 In addition, a large scale codification would involve an unrealistic investment in terms of Parliamentary time.

8.56 When designing its Tenth Programme of Law Reform, the Law Commission took the opportunity to reappraise whether projects with codification as their principal outcome were “realistic and whether effort and resources should explicitly be given to achieving that outcome.” The Commission took the view that the


increasing complexity of the common law, the increased pace and layering of legislation, and the influence of European legislation, made codification even more difficult and reached the following conclusions:

The Law Commission continues to believe that codification is desirable, but considers that it needs to redefine its approach to make codification more achievable.

Accordingly the Commission has decided that:

(1) It will continue to use the definition of codification used by Gerald Gardiner in Law Reform Now, that is, “reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject”.

(2) Consistently with Gardiner’s concerns in 1964, the Commission’s main priority is first to reform an area of the law sufficiently to enable it to return and codify the law at a subsequent stage. If it can codify at the same time as reforming, it will do so.

8.57 In particular, it was decided not to include in the Tenth Programme of Law Reform a codification project in relation to criminal law. Instead, the Commission would seek to undertake projects to simplify the criminal law … as the necessary precursor to any attempts to codify the criminal law.44

8.58 There continues to be support from some quarters for codification as part of the Law Commission’s work. Ian Dennis, for example, recently wrote a paper arguing for the Law Commission to revive its “flagship project” to codify the criminal law, which had been “regrettably abandoned”.45

8.59 When the Law Commission was first created, there had been discussions of the possibility of some form of streamlined Parliamentary process for codifying acts. Lord Scarman suggested that, once a Joint Committee had certified that a bill was an accurate codifying measure, each House would vote on the principle of the bill but not consider amendments.46 But no such reform has come about. The two very valuable current special procedures for Law Commission law reform and consolidation bills in the House of Lords are only suitable for bills that are non-controversial, and reasonably small.47

46 L Scarman, “Codification and Judge-Made Law: a Problem of Co-existence” (1966) 42 Indiana Law Journal 355, 368. Such a procedure would only be appropriate in any even for the first variant of common law codification, the enstatuation of judge-made law.
CODIFICATION AND WALES

8.60 How far do these reasons for a lack of codification apply to Wales today? There are grounds for thinking circumstances much more favourable.

Devolution

8.61 The nature of the devolution settlements places a determinate limit on the areas of law that Welsh codification would need to tackle. As mentioned in Chapter 2, schedule 7 to the Government of Wales Act 2006 sets out 21 subjects in respect of which the National Assembly for Wales has legislative competence, subject to a large number of exceptions, both subject-specific and general. This is likely to change in the near future, in two ways. First, the list is liable to expand to include some areas within the broad subjects but currently expressly excluded.48 Secondly, the current “conferred powers” model, as exemplified in schedule 7, is likely to be replaced by a “reserved powers” model which, instead of enumerating the subjects that are devolved, will specify those that are not devolved.49 It is generally hoped that a reserved powers model will result in a clearer definition of the powers of the National Assembly (and the associated executive powers of Welsh Ministers).

8.62 This means that the range of law to be considered for codification in Wales is substantially less than that in England and Wales as a whole. Further, large areas of general civil law are not devolved, such as contract law, tort law, company and commercial law, land law, trusts, family law (with some exceptions) and employment law. These are all areas in which, to varying degrees, judge-made law remains of considerable importance (although in nearly all, the significance of statute law has increased since the debates of the 1960s and 1970s). Criminal law is not devolved.

8.63 A note of caution should be sounded here, as rules which are parts of all these generally non-devolved areas of law will be devolved if they also form part of the substance of one of the schedule 7 subjects in the Government of Wales Act 2006. A striking example is the Renting Homes (Wales) Bill, which radically reforms the current law of landlord and tenant insofar as it relates to short term renting, which is an aspect of land law, an area of law not generally devolved, but also properly constitutes part of the devolved subject 11, “housing”.

8.64 Nonetheless, the National Assembly and the Welsh Government will not have to concern themselves with the sort of thorough-going codification of large areas of general law that defeated the Law Commission in the late 1960s and early 1970s.

8.65 The subjects that are devolved are categories that the framers of the Act saw as defining “policy areas”. They reflect the division of policy world that came most naturally to policymakers. By the same token, that makes them the areas that have attracted the attention of policymakers, and have thus been the subject of more or less discrete bodies of statute law. Many of them, therefore, already have a high proportion of statute law compared to judge-made law. Thus they fall much more readily into the second category of common law codification identified


49 See chapter 2 for explanations of “reserved” and “conferred” powers models.
Further, the National Assembly has not been equally active in all areas. More than half of the 39 Measures and Acts passed by the Assembly are devoted to the three subject areas of education, social welfare and local government. While this is not an indicator of the volume of statute law requiring consideration as part of a codification process, it may be an indicator of priority.

The appetite for reform

Our perception is that there is a much greater receptiveness to reform of the form of the law in Wales than was reported by the writers and law reformers considered above.

First, the seriousness of the problems outlined in earlier chapters has itself propelled the issue up the agenda of policymakers. The fact that this project is being undertaken is further evidence of that.

Secondly, dissatisfaction with the form of the law in Wales extends not just to the legal professions and the judges, but also to politicians and policymakers and wider civil society stakeholders. An illustration of that is the enthusiasm for this project shown by our Welsh Advisory Committee. The Committee includes representatives of the judiciary, lawyers, legal academics, the Public Services Ombudsman for Wales, the Older People's Commissioner for Wales and also representatives from voluntary and advice sectors.

The possibility of legislative reform

Finally, the National Assembly is a new legislature. It has shown itself open to procedural innovation since its inauguration in 1999. It seems plausible to suggest that the National Assembly is more likely to accept some reform of legislative forms, and of procedure to facilitate such reform, than might have been the case at Westminster in the past, or indeed in the future.

The proposals in the White Paper Powers for a Purpose included the approval of earlier proposals in the second Silk report to give the Assembly greater freedom over its own constitution and operations. It may be that changes such as those we suggest below could be accomplished within that framework. Alternatively, UK legislation is to be expected towards the end of the extended Parliamentary session starting in May 2015 to implement the existing proposals to extend devolution. Such a bill might provide an opportunity for legislative change if it were necessary.

Indeed, we consider that the possibility of making legislation in new ways provides a real opportunity to create a novel and more embedded form for common law codification. Our proposals below seek to exploit these opportunities. In particular, we consider that codification may be more successful if the development and maintenance of codes could be seen to be effectively overseen by the National Assembly, rather than conceiving new procedural avenues as merely work-rounds to cope with legislative overload, as one might at

50 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (March 2014).
Westminster.

8.73 We note at this point the proposals in *Powers for a Purpose* to allow for an increase in the size of the Assembly beyond the current 60 Assembly Members. We are aware of concerns that the small size of the Assembly has limited its effectiveness in various ways. We do not comment on that debate. It may be, however, that those proposals which follow which would involve asking the Assembly to take on further functions would be impracticable given its present size.

REFORM PROPOSALS

8.74 In this section, we turn to setting out our tentative proposals for a system of codified law in Wales. Although these proposals together amount to, what we tentatively consider, would be a coherent system, we have posed them as consultation questions and have also indicated some alternative approaches as appropriate. There are no doubt many more alternatives that could be considered, and we invite consultees to advance them.

The Code Civil, or common law codes?

8.75 We should start by making clear that we are looking at common law types of code. We do not think that Wales should move towards a civil law system of codes of the type operating for example in France or Germany. We are suggesting instead a move towards codification to improve the accessibility of the law, to improve its certainty and to facilitate its updating. To accomplish that by overturning centuries of common law tradition would be hazarding a very great deal for a most uncertain prize. We are not aware of any common law jurisdiction which has attempted to transform itself in this way, whereas we can see common law codes operating successfully in jurisdictions all over the common law world.

8.76 Wales is joined with England in a single legal jurisdiction. The development of devolution has shown that the novel notion of a single jurisdiction with two legislatures can work. We very much doubt that a single jurisdiction could cope with two radically different forms of legislative drafting and adjudication. It is inconceivable that, in particular, the rules of precedent or even the approach to precedent could be different depending on whether the courts were considering Welsh Assembly or Westminster legislation.

8.77 The implications of this are that the Welsh codes we are considering, should bring the common law into statutory form, and/or reorganise statute law. We envisage that, for the most part, the codes we shall propose will be of the latter kind. The drafting of the code or codes should, therefore, continue to aim for a level of specificity appropriate to a common law jurisdiction, rather than attempt to draft in the less detailed style of continental codes. This does not mean that Welsh legislation should not continue to experiment with innovations like purpose and overview sections discussed in chapter 4. The current approach of the courts to the interpretation of statutory material should not be disturbed (except to the extent appropriate to the comprehensive and exhaustive nature of a common law code). And, of course, the rules of precedent, and the consequent possibility of the development of interpretive case law, should continue as now.
Consultation question 8-1: Do consultees agree that the objective of codification in Wales should be to bring the common law into statutory form, and/or reorganise statute law?

A code or codes?

8.78 If it be determined that codification should be of the common law type, the obvious implication is that there should be as many codes as are convenient to the user or appropriate to the subject matter. However, one common law model – that in the United States – reorganises all statute law into, formally, a single code. It may be that this is the model that the Lord Chief Justice had in mind, with his reference in the passage quoted above to organisation into chapters.

8.79 We provisionally reject the US model of a single code comprising numerous titles. It can readily be appreciated that it is a suitable, or even necessary, model in a jurisdiction where portmanteau legislation, covering multiple subject matters, is the norm. It is less obvious that it has significant advantages otherwise. Indeed, it is not clear that there is a significant difference between the “titles” of the US code, or the state equivalents of it, and a series of individual codes dealing with the same subjects. What the US model does is to fix the number and description of the titles in a way that may appear inflexible. Further, the interpretation of provisions drafted in the style used in this jurisdiction is likely to be harmed rather than assisted by a significant amount of pulling statutes apart, if that is what the construction of a single code of this kind requires.

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

8.80 How many codes? The list of areas of competence constituted by schedule 7 to the Government of Wales Act 2006 (or its replacement) provides at least a useful starting point. However, 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. To take one example, currently competence for “animals” is within the same paragraph as agriculture, forestry, plants and rural development. Clearly, it is likely to make sense that legislation relating to farm animals should be codified with agriculture. But it is more likely that the law relating to wild animals should be codified with “environmental protection”, which includes “nature conservation” and “protection of natural habitats”. That, in turn, will mean that the distinction between wild and domestic animals will be an important one that the drafting of the codes will have to establish in as clear and robust way as possible.51

8.81 The process of bringing the law into codes will be a substantial and lengthy one, as we outline below.

51 In this particular context, the law already is required to draw a distinction between wild and domestic animals as a result of EU legislation protecting wild animals – see the Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010 p 7 and the Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, Official Journal L 206 of 22.7.1992 p 7.
Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?

Must codification be universal?

8.82 The benefits of codification will be most apparent in respect of that which it is hardest to codify – the big subject-matters that have been subject to numerous statutory interventions over many years, such as education, social welfare and local government.

8.83 There is no inherent need for all of the statute law, let alone every common law rule for which the National Assembly has competence, to come under one of the codes. As it is, even substantial codification of the major areas will take a number of years to accomplish.

8.84 Our provisional view is that it is not necessary for all of the law for which the National Assembly has competence to be codified; and that decisions as to what to codify and in what order should be made as part of the programme of codification we discuss below.

Acts and codes

8.85 In most of the common law world there is no formal distinction between an ordinary Act of the legislature and an Act which in effect constitutes a code. This is certainly true of the Victorian codifications in England and Wales, as well as modern law reform codification.

8.86 We consider, however, that there would be advantages in identifying a distinct instrument as a code rather than an Act, because this would enable the introduction of procedural innovations applying to codes to facilitate their adoption and maintenance. We outline the possible substance of these below.

8.87 The distinction between Acts and codes could be established by the National Assembly adopting a distinct structure for each in its Standing Orders. However, it may be more satisfactory if the distinction were enshrined in primary legislation in any future legislation that extends devolved competences. Legislation extending competences would necessarily emanate from Westminster, and the UK government would be responsible for ensuring the National Assembly has sufficiently wide powers to create codes. This is particularly so if the characteristics of a code that we propose below are adopted. However, that does not mean that all of those characteristics need to be spelled out in the legislation itself (although the fundamental relationship between codes and other legislation should be). Indeed, it would be desirable in general to maintain flexibility in the operation of the system so as to allow improvements to be made without further Westminster legislation. This could be achieved by locating the more detailed rules in Standing Orders.

8.88 The point of distinguishing between Acts and codes is to allow greater freedom for technical amendment and re-presentation of codes than would be appropriate in respect of normal Acts. The purpose of a code is to continue to provide a comprehensive and exclusive source of the law on the relevant subject. If that status is to be maintained, then it is important that, over time, as the law and
policy develops, the code is amended, rather than the law being found in free-standing Acts.

8.89 This method can be enforced if there is a rule that, where a relevant code is in place, new legislation can only take effect by way of amending the code. This rule would, we suggest, be most appropriately contained in primary legislation. Provision would, however, have to be made to allow a Bill to proceed in the Assembly where the intention was that there should be some re-ordering of the structure of codes. It might be, for instance, that as a bill intended to be a code was developed, it became apparent that a part of an existing code would be better placed in the new code. This kind of re-ordering would need to be an exception to the rule that new legislation can only take effect by way of amending the code.

Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?

8.90 It is to be hoped that it will take some time for the sort of modernisation and overhauling implied by a power to review to be necessary for Welsh codes, but needed they will be at some time, and it therefore seems advisable to ensure that they are built in at the outset.

8.91 Secondly, the recognition of codes as a distinct form of instrument may facilitate the substantive, but routine, amendment of the law. At present, to secure a place in the legislative programme, a bill must, in the ordinary way, advance a major policy to which the Welsh Government is committed, often as a result of a manifesto commitment at an election. The programme has certainly been sufficiently flexible to accommodate law reform, such as that contained in the Social Services and Well-Being Wales Act and the Renting Homes (Wales) Bill, but both of those were nonetheless major departures from, and improvements on, the pre-existing law. It is to be hoped that, where some defect is found in a code which is beyond the technical upkeeping powers to remedy, but would not itself justify an Act of its own, it can be noted and an amendment to the code passed by the Assembly by assembling a number of such measures in a Code Reform (Miscellaneous Provisions) bill, and/or by some special procedure.

Oversight of codes

8.92 How should the Welsh code system be overseen? The approach we have outlined requires, or at least implies, the following functions:

(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) identification of more substantive, defects in the codes and provide for the amendment of the code to correct them; and
(5) publication of the code.

8.93 Our provisional view is that all of these functions could be undertaken by the National Assembly. Taking our cue from Sir Geoffrey Palmer’s proposal referred to in Chapter 9, below, we consider that the National Assembly could set up a distinct office or department to support the development and maintenance of Welsh codes. It would provide an appropriate focus for what would be an important new suite of functions for the Assembly. It would cement the sense of ownership of the Code in the Assembly. Careful consideration will need to be given to the staff roles within the Code Office.

Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?

8.94 Taking the functions we have isolated above in turn, we go on to ask more detailed consultation questions below.

Recognition as a Code

8.95 It is a natural consequence of our characterisation of common law codes that the drafting style of a code will be essentially the same as of an Act. The difference will be that the code constitutes a comprehensive and exclusive statement of the law in respect of a subject matter of appropriate breadth.

8.96 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, we think it would be preferable for enactment to take place first, and then for a separate recognition process to occur.

8.97 We suggest this for two reasons. One is that, 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 (indeed, we will suggest that it is the case) that already enacted or shortly to be enacted provisions are capable of standing as codes. In such a case, recognition is necessarily distinct from enactment.

8.98 Therefore we consider 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. It will also be necessary to allow for the possibility of a formal motion removing code status from an enactment.

8.99 In whose name should the motions stand? The obvious choice would be the member in charge of the Bill, which will usually be a Welsh Minister. However, there is a case for asserting the Assembly’s ownership of the codification ideal by making provision for the motion to stand in the name of the Presiding Officer. If that course were taken, then it would clearly have to be done with the agreement of the member in charge.

8.100 We ask consultees whether a motion that an enactment stand as a code should be in the name of the member in charge of the bill, or both of that member and of
the Presiding Officer.

Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?

Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?

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

8.101 We envisage that where a bill comes within the remit of a code, then it will only be able to take effect by amending the code, with a view to the amended code being republished in the manner we discuss next. A Bill may be mixed. Some parts of it might deal with code material (and thus have to take effect by way of amending the code), while others dealt with distinct but related matters that required free-standing legislation. It will need to be authoritatively declared whether each provision of a bill does, in fact, come within the remit of a code.

8.102 We consider that the Presiding Officer could determine whether a Bill falls within the subject area of a code, in whole or in part. The Presiding Officer is already charged with declaring whether a bill is within the competence of the National Assembly.52

8.103 As noted above, there will need to be provision to allow a Bill to continue its passage, even if it does not amend a code and falls within the remit of a code where it is intended to replace in part an extant code. Under such circumstances, the bill would provide for the repeal of the relevant parts of the code, and include what were formally free-standing provisions intended to replace the previous code in respect of those provisions. The new, differently organised code would then be subject to a recognition motion.

Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?

Maintenance of the codes

8.104 A consequence of drawing a distinction between codes and Acts is that it is possible to create different additional procedures for codes.

8.105 First, some modification of the code may be necessary either to accommodate amendments made to it, or over time to ensure that it remains in good shape. As we explained above, in the United States, the relevant Congressional office undertakes the role of placing laws in the appropriate place in the code, and also exercises certain, fairly minimal, editorial functions. These are not subject to formal oversight by Congress.

8.106 Although we are not aware of similar powers peculiar to codes elsewhere in the common law, there is another source of precedent for such powers in the

52 Government of Wales Act 2006, s 110(3).
development of “revision” processes in some jurisdictions. “Revision” can mean a number of different things. In the United Kingdom, it is used for the technical process of identifying entirely spent statutes or provisions in statutes with a view to repealing them in periodic Statute Law Revision Acts. However, in other jurisdictions, it is indicative of a process of review and re-writing of statutes.\textsuperscript{53} In Australia and New Zealand and in Canada, there have on occasion been wholesale revisions of the statute book at one time. In Canada, for instance, this happened last in 1985. In our terms, at one end of the spectrum, these Commonwealth revisions amount to no more than our consolidation. However, it does allow the reviser (usually, Legislative Counsel or a specially appointed Commissioner or Commission) a number of powers that could usefully be available in respect of Welsh codes.

8.107 Typically, the powers available to a reviser include a technical set of editorial powers and powers of statute law revision in the UK sense. These include re-numbering sections and re-ordering statutes in more convenient ways, and striking out repealed or spent material. In some jurisdictions, the powers also include a power to make minor amendments. Such revisions are usually subject to Parliamentary approval, but that may be according to a truncated and more technical scrutiny process than general bills.

8.108 After examining Commonwealth practice in detail, the New Zealand Law Commission proposed a programme of revision of New Zealand law, in which the reviser would have power to do the following things (omitting those not relevant to a code, such as the amalgamation of Acts):

(1) alter the arrangement, to make it more logical;
(2) alter language to better express what was intended;
(3) reconcile seeming inconsistencies;
(4) correct obvious errors;
(5) include outline or overview provisions;
(6) modernise language, including gender references;
(7) omit spent provisions;
(8) add aids to interpretation such as diagrams or graphics; and
(9) move material between sections and schedules.

8.109 Depending on the use that is made of the power to amend to correct errors and reconcile inconsistencies, these are not dissimilar to the constraints that confine consolidation of statutes.

8.110 In addition to managing the technicalities of incorporating amending text into a

\textsuperscript{53} The practice is thoroughly reviewed in the New Zealand Law Commission report (undertaken in conjunction with Parliamentary Counsel Office) Presentation of New Zealand Statute Law (2008) Report No 104.
code and undertaking periodic technical reviews, there is a function to be performed of managing the process of identifying more substantive defects and promoting amendments to correct them.

8.111 We can see the benefit of all three sets of functions being undertaken by a Code Office in the Assembly.

8.112 We suggest that there are three distinct levels of significance of such changes, and each should attract a different level of engagement from the Assembly.

8.113 The first level is the technical one of 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. We envisage that in some cases, this could include re-ordering existing code material so as better to accommodate the amendments. We provisionally consider that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly. It is fundamentally a technical editorial function on a par with that performed by the Office of the Revising Counsel for US Federal legislation, and the equivalent offices at state level.

8.114 A short period would be required between Royal Assent to an Act amending a code and the formal re-publication of the code in order to effect the changes. Something as apparently trivial as the renumbering of sections can, however, attract significant controversy. Provisions of European Union treaties have been renumbered multiple times.54 The European Court of Justice published a system of citation of treaty provisions, in order to help avoid confusion. 55 It is likely to be sensible for the Assembly to develop a protocol, following consultation, governing when and to what extent section numbers should be changed. It might be desirable for the code to contain a small number of additional sections with the same number, differentiated by a letter (section 80, section 80A, section 80B etc), rather than to renumber sections with bewildering frequency.

8.115 Where it is necessary to use the powers set out above to make amendments to the words of a code, some greater measure of approval by the legislature may be necessary. 56 This might occur either when an Act amends a code or as a result of a periodic review of the code.

8.116 In either case, we suggest that it should be possible to calibrate a proportionate response. The system could provide for any textual amendment to be referred as appropriate for screening. If it is determined that the amendment is of some significance, then approval by the Assembly could be sought.

8.117 There are therefore two decisions to be made: who should perform the screening, and what procedure for approval should be required?

54 For example, the core competition law provisions that are now articles 101 and 102 of the Treaty on the Functioning of the European Union were formerly articles 81 and 82 of the predecessor Treaty as amended by the Treaty of Amsterdam, having previously been articles 85 and 86 of the original treaty.


56 See above.
8.118 The candidates as screeners would appear to be either the relevant subject committee of the Assembly or the Presiding Officer. We provisionally consider that it should be the former. Such an amendment is, even if only minor, the making of law, and it is therefore appropriate that elected legislators within the Assembly should undertake the role, rather than the officials. Our provisional view is that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly.

8.119 If an amendment is considered by the Committee to require Assembly approval, we suggest that the necessary procedure should not be time-consuming or onerous. By definition, the amendments under consideration are minor ones, even if they are of sufficient significance to require formal approval. Therefore we provisionally consider that such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for the further amendment of them to be considered.

8.120 Finally, it may be that a more substantive defect in the code is uncovered, perhaps by a court decision, or through some other route. By this we mean some failure of process or policy that, while not such as to require wholesale revision, does mean the code requires a substantive modification. A change of this magnitude should, we consider, require the amendment to be effected by some form of the normal legislative process. Thus, a bill including the amendment (or, as we suggested above, a collection of them applying to one or other of the codes) should pass through the normal stages for legislation in the Assembly. However, given the limited nature of the change, it may be that the Assembly would consider a somewhat truncated procedure. For instance, if the relevant subject Committee so concluded, having considered the issue, it may be that there would be no need for a substantive Stage 1 committee process. We provisionally consider that a shortened version of the normal legislative process be used to pass bills that correct substantial defects in the code.

8.121 We envisage that, in the first instance, it would be for the Committee to decide whether an amendment would be presented to the National Assembly on a motion for approval or by way of a Bill. If the Assembly Members regarded an amendment as too substantial to be suitable for a motion, they could reject the motion. Similarly, if they considered that an amending Bill ought to go through the stage 1 committee process, a motion to that effect could be proposed. We nevertheless invite consultees’ views on whether the Presiding Officer’s consent to the procedure proposed by the Committee should be required.
Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?

Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?

Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?

Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?

Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass bills that correct substantial defects in the code?

Creating the codes

8.122 We acknowledge that creating the codes will not be quick, simple, or cheap.

8.123 We believe that the Renting Homes (Wales) Bill is the longest bill yet to be introduced into the Assembly. It contains 255 clauses and 11 schedules covering 175 pages.\textsuperscript{57} It radically reforms and restructures the private law relations between landlords and tenants (or occupiers, as they would become known) and makes provision in respect of the adjudication of their disputes. So it could stand as a code in respect of those private law relations.

8.124 However, that would still be a long way away from being a full codification of the subject matter of the “housing” heading in schedule 7. There would remain all the public law side of “housing” as a subject matter. That includes local authority licensing of landlords; licensing of houses in multiple occupation; duties in respect of homelessness; the law relating to allocations of social housing; the public law system for policing housing conditions; the regulatory system for registered social landlords and councils as landlords; and so forth. It may be that, following consultation, it would become apparent that not all of that material should be in the same code. But it seems likely that, at the least, a tenant wanting to know how to deal with disrepair would want to know not just his private law rights, but also about the Housing Health and Safety Rating System. Similarly, a landlord considering advertising a property for rental would want to know about licensing and overcrowding laws as well as the law relating to the landlord’s bilateral relations with the tenants.

8.125 The Social Services and Well-Being (Wales) Act 2014 could be said to provide a core of a code in relation to the “social welfare” subject heading,\textsuperscript{58} although it

\textsuperscript{57} The Social Services and Well-Being (Wales) Act 2014 is slightly longer, at 182 pages, but as introduced as a bill, it had 143 pages.

\textsuperscript{58} Government of Wales Act 2006, sch 7, para 15.
does not include provision relating to adoption, fostering, care proceedings and the blue badge scheme, among other areas.

8.126 Once the Law Commission has finished its current project on planning law in Wales, the result of that, together with the Planning (Wales) Act 2015 will provide some of the ground work needed, in a modernised form appropriate for Wales, for at least a partial Welsh Planning Code. However, most of the current bill proceeds by amending previous Westminster legislation, particularly the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning Act 1990, rather than by creating freestanding law. So even after the reform process is completed, considerable further work would be needed to create a single unified instrument.

8.127 These examples provide one route to creating a code – doing so as an adjunct of policy-driven law reform. The impetus for such law reform work must be the desire for reform. In such a case the creation of a single instrument is a reform outcome – indeed, the lack of such an instrument is frequently the starting point for reform – but the reform of the law is more than just the creation of the single instrument.

8.128 There are other possibilities. We have discussed consolidation in chapter 7. Consolidation is a highly skilled and technically challenging endeavour. It will result in the creation of a single instrument. Consolidation forms a key part of any codification process. But consolidation is less advantageous than the creation of a code.

8.129 In the first place, the more fractured the law, the more inconsistent it is in both spirit and letter, the more a code is needed; but the harder it is for consolidation to deliver it. There comes a point where the law is too confused and contradictory to be satisfactorily consolidated.

8.130 Secondly, the restrictions within which consolidation is confined mean that an enormous amount of ingenuity and effort must go into making sense of the law while avoiding any but the most minor changes in its substance. Consolidation involves throwing scarce resources at preserving the current state of the law, however problematic the features being preserved are.

8.131 Finally, it is resource-intensive. It can only be done by legislative drafters, who are a scarce resource in high demand. We know of no formal study, but our experience suggests that it is no less time-consuming to consolidate statutes than it is to reform them. And from a codification perspective, a consolidation statute is unlikely to be as simple, modern and well-thought out as a reformed code.

8.132 Consolidation does enjoy one outstanding advantage as far as the United Kingdom Parliament is concerned. It does not have to compete with United Kingdom Government programme bills for Parliamentary time, because of the special procedure available.59

8.133 Consolidation, therefore, would be a valuable option if there were, first, the same

59 See chapter 7, above.
pressure on legislative time in Cardiff Bay as there is in Westminster, and, secondly, the same lack of enthusiasm for improving the quality of the law in Cathays Park as there is in Whitehall. We doubt that this is the case at present.

8.134 Nevertheless, we consider that there a mid-way option between consolidation on the one hand and full scale law reform on the other. The primary objective would be that of consolidation – the creation of a single instrument – rather than fundamental law reform. But the methods would be closer to those of law reform. There would be no formal restriction on the extent of change in the law that could be countenanced; but substantive change would be a by-product of the creation of the single instrument, rather than the other way round. It would be codification-led reform, rather than reform-led codification. In the result, it would involve fewer changes of basic structure. It would be closer to a cleaning and refurbishment project than a new-build. It would accordingly involve some savings in terms of time and resources compared to either a full scale reform project or a consolidation.

8.135 The price to be paid would be that the resulting single instrument would be subject to the full normal legislative process in the Assembly. That is a high price to pay if finding a legislative slot constitutes a major disincentive to undertaking consolidation; but not otherwise.

8.136 A fourth option is for the Welsh Government to take on the task of codifying an area of the law when undertaking normal policy-driven legislation in that area. This would clearly have efficiency advantages. Where legislation is planned anyway, and a process of policy development and drafting is under way, extending that to include a wider codification will inevitably require fewer extra resources than undertaking the codification process from scratch.

8.137 It is, however, important to be realistic about this prospect. Like all governments, the Welsh Government’s top priorities will be to deliver its substantive policies, policies it has adopted because it considers they will bring benefits to the people of Wales. Good and accessible law does, of course, also bring benefits, but even a Government persuaded of those benefits will still prioritise delivery of substantive policy commitments. Policy resources, drafting resources and legislative time are all limited.

8.138 However, the more extensive a Welsh Government political reform is, the less expensive is the premium for extending it to a full or partial codification. It would therefore be appropriate for the Welsh Government to consider the possibility of codification as part of its process of legislative development. In doing so, the Welsh Government has the advantage that it plans for a five year Assembly a long legislative programme.

8.139 We conclude, therefore, that there are at least four methodologies that could be used to produce Welsh codes: full scale law reform projects; codification-led law reform projects; consolidation; and Welsh Government programme legislation.

8.140 Clearly, the last would always require the full normal legislative procedure, as part of the political process. Our assumption so far is that the first two – full scale law reform and codification-led law reform – would proceed to legislation in the same manner. On the other hand, consolidation could benefit from a tailored and streamlined procedure.
8.141 It may be that some procedural concessions to the nature of the activity may be possible in respect of full scale law reform and codification-led law reform. In particular, the unreasonable danger in the full legislative process is not the scrutiny of the extent to which the Bill achieves its objects, but rather that the introduction of the Bill will open up political arguments on other aspects of the same subject matter. It might be possible to introduce a rule that when a bill is certified as arising out of a programme of codification, amendments at any stage will be limited to those designed to ensure that the Bill better codifies the law, rather than to promote independent policy initiatives. We put this idea forward tentatively. Whether it is possible to draft, and if drafted, possible to enforce, such a rule are specialist matters peculiar to legislative standing orders, in which the Assembly authorities have greater expertise and experience than we do. At this stage, therefore, we ask as a consultation question whether 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.

8.142 Different approaches will be suitable for different areas of the law. A full scale law reform project will usually take three years, including the drafting of a bill.

8.143 We estimate that a codification-led law reform project would usually take less time than this. Assuming that such a project retains the broad structure of a law reform project, it should be possible to produce a consultation paper more quickly than for a full scale project, and the formal consultation process could be shorter. (It is likely that forms of on-going stakeholder engagement will be comparatively more important than wide ranging public consultation). The preparation of instructions to counsel may be somewhat quicker, but the drafting process would probably not be. As with full scale law reform projects, detailed programming is only possible once the broad area of the law is identified. Nonetheless, it would probably be reasonable to assume an average time scale of two years or a little more.

8.144 Who should undertake codification exercises? One candidate would, of course, be the Law Commission. Whether the Commission would take on any particular project would be a matter for independent consideration by the Commission as well as by the Welsh Government.

8.145 It may well be, however, that there are also other ways to progress codification projects, perhaps in collaboration with the Law Commission where necessary. We remind ourselves that the Law Commissions Act 1965 envisaged that the Commission may propose that law reform work be undertaken by others.60

8.146 We can 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 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.

8.147 It will be evident that such a programme will have to extend over multiple Assemblies. It would be entirely unrealistic to expect the bulk of the law applicable in Wales to be codified during the course of one or even two

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60 Law Commissions Act 1965, s 3(1)(b).
Assemblies, unless what appear today to be unrealistic levels of resource are devoted to the endeavour. However, if the most important areas are tackled first, then the benefits will flow disproportionately early. And the earlier that the programme is put in train, the earlier all of the benefits of an accessible, modern, simple and rational law will be felt by the people, and economy, of Wales.

Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to Bills to those designed to ensure better codification, rather than alternative substantive provision?

Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?
CHAPTER 9
CONTROL MECHANISMS IN THE GOVERNMENT AND THE LEGISLATURE

INTRODUCTION

9.1 In this chapter we turn to consider one approach to avenues for reform which could prevent further problems of the sort we have described elsewhere. Here we discuss the possibility of harnessing the machinery of government to ensure that legislation is well designed and accessible from the start.

9.2 We draw in particular on lessons from New Zealand because New Zealand has significant similarities to Wales in that it is a small country, in terms of the population, with a unicameral legislature and a common law legal system. New Zealand has also tried and tested models which the Welsh Government and legislature can learn from. The New Zealand approach requires new legislation to conform to set standards by inserting controls into the development of policy and drafting processes before a Bill reaches the National Assembly.

THE PROCESS OF LEGISLATION DESIGN

9.3 In chapter 3, we outlined the legislative process in the National Assembly. Here we consider in more detail how legislation is designed and how it reaches the legislature.

9.4 The vast majority of legislation in the United Kingdom comes from the governments. It is therefore logical to start by looking to government in the first instance for better legislation.

9.5 New legislation usually has its origins in decisions by governments to change the law to advance a policy objective. This is not universally so: consolidation is a technical form of legislation that we deal with in more detail in chapter 7. More significantly, law reform may reformulate the law without substantially changing its policy content. But most legislation in all of the United Kingdom legislatures has its origins in the relevant government’s desire to change the law to implement a policy.

9.6 The process by which legislation is conceived, approved, formulated and drafted within government, and publicly announced, varies across the United Kingdom. Below we consider the position within the United Kingdom Government and the Welsh Government.

The United Kingdom Government

9.7 A legislative programme for each session of the United Kingdom Parliament is announced at the beginning of the session in the Queen’s speech. The process of developing the programme to be announced is overseen and controlled by a Cabinet Committee.¹ Over the years, the name of this Committee and the details

¹ The following account is largely based on Cabinet Office, Guide to Making Legislation (July 2014).
of the process have been subject to change, but in broad outline the process has been relatively stable for a long time.

9.8 The Committee is currently known as the Parliamentary Business and Legislation Committee, or PBL. PBL is chaired by the Leader of the House of Commons. The membership of the Committee varies over time. The membership currently includes the Chancellor of the Duchy of Lancaster as chair, the Chancellor of the Exchequer, the Home Secretary, the Secretaries of State for Northern Ireland, Scotland and Wales, the Secretaries of State for Work and Pensions and for Communities and Local Government, the Leaders of the House of Commons and House of Lords, the Chief Whip and the Attorney General.

9.9 It will be seen that the membership of the Committee reflects both departmental interests and key political figures within Government (and, in this case, involved the political balancing necessary in a coalition Government). The secretariat for the Committee is located in the Cabinet Office. Thus at the United Kingdom level, the institution at the centre of the operational process is one with a high degree of political input and corresponding political influence.

9.10 PBL organises and sits at the centre of an annual bidding round. Departments of state make formal bids, in a standardised form, to the Chair of PBL, following his or her invitation to the members of the Cabinet to do so. This process usually starts at least a year before the Queen’s speech. If it submits more than one bid, a department must give each a priority ranking. The policy encapsulated in the bid will also be subject to the usual process of securing policy approval within Government, in the relevant Cabinet committee, and/or at Cabinet itself.

9.11 The Committee receives about twice as many bids from departments for a place in the legislative programme as are required. The number varies, but on average is about 30. PBL assesses the bids on the basis of their political importance, urgency and the practical readiness of the department to prepare the legislation, and advises Cabinet on the content of the programme to be announced. After a provisional programme is agreed, it is PBL that monitors and reviews the progress of departmental Bill teams in preparing legislation for introduction into Parliament. The final decision on the contents of the programme is only made by the Cabinet about a month before the Queen’s Speech. PBL authorises the use of the drafting resources of parliamentary counsel, and the First Parliamentary Counsel will attend meetings when necessary.

9.12 The United Kingdom Government is committed to publishing Bills in draft for pre-legislative scrutiny by a select committee of the House of Commons or a joint committee of both Houses. The process of approval of Bills for pre-legislative scrutiny is part of PBL’s bidding and sifting process. Thus a departmental proposal for a place in the legislative programme might instead be selected for pre-legislative scrutiny, an outcome often seen as an indication that the bid is likely to be successful next time. Successful pre-legislative scrutiny is one of the

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3 First Parliamentary Counsel has traditionally been accorded equivalence with permanent secretaries in Whitehall. For the first time, the current First Parliamentary Counsel, Richard Heaton, is also permanent secretary of the Cabinet Office.
criteria that PBL will consider when assessing a bid.

9.13 In evidence to the Political and Constitutional Affairs Select Committee of the House of Commons in January 2013, the then leader of the House (and chair of PBL) said that he regarded it as one of the functions of the Committee to assist in the production of high quality legislation.  

The Welsh Government

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

9.15 In the current, fourth Assembly (that elected in 2011), the First Minister announced the legislative programme for the full term of the National Assembly on 12 July 2011. What was to be included as a matter of policy in each Bill was subject to an intensive period of policy development thereafter, assisted by wide consultation with stakeholders outside the Welsh Government.

9.16 Internally, the development of the programme is administered by a central unit, the Legislative Programme and Governance Unit. The unit advises the Bill teams assembled in departments to work on Bills, and the lead minister on the Bill (the minister in whose portfolio the Bill falls, or, if more than one portfolio is engaged, one of those ministers appointed by the First Minister). It also advises the First Minister and the Minister responsible for Government Business (currently the Minister for Finance). The unit has a long reach. Not only does it advise on all stages of the process from early policy development and stakeholder engagement to passage of a Bill through the National Assembly, but it also clears the formal submissions to ministers relating to Bills ("legislation folders"). Members of the Unit also attend departmental project boards and Bill team meetings to ensure the efficacious and timely management of the process. It sets the Government timetable for Bills, both before and after introduction, and manages the overall timetable for the legislative process.

9.17 The Legislative Programme and Governance Unit also provides the secretariat to the Legislative Programme Board, which provides overall strategic management of the legislative programme, as part of the more general Programme for Government. The Board is made up of the Permanent Secretary of the Welsh

4 Political and Constitutional Reform Committee, Ensuring Standards in the Quality of Legislation (2013-2014) HC 85.
5 The following account is largely based on Welsh Government Legislation Handbook (3rd ed November 2014) or information supplied by the Welsh Government.
6 The legislative programme is available here www.assembly.wales/11-048.pdf (last visited 1 July 2015)
Government, the Directors General of the departments and others as well as the two most senior civil service lawyers and the Deputy Director to the Counsel General. It meets once a month. In turn, the Board reports quarterly to the Cabinet on the progress of legislation.

9.18 The First Minister must agree the inclusion of a Bill in the legislative programme, the policy of the Bill, its timetable and introduction into the Assembly and any Government amendments.

9.19 A consequence of the five year cycle is that there comes a time during the life of an Assembly when there is not sufficient Assembly time available to add to the legislative programme. Such was the case in the fourth Assembly by mid-2014. At that point, attention must start being paid to the development of the programme for the next Assembly.

9.20 Exactly what system for organising the (now) five-year Assembly programme will emerge over time remains to be seen. Apart from other considerations, the system will, of course, always depend on the wishes of elected politicians.

9.21 It can be seen that the United Kingdom Government’s system has a relatively short term horizon, and is operationally dominated by a political body. The Welsh system has a much longer planning period and the day to day structures are professional or bureaucratic, although of course the policy is determined politically. The Welsh Government programme is much smaller and more manageable than that in Whitehall and Westminster. In particular, the Cabinet itself, and indeed the First Minister, are likely to be nearer to policy decision-making. It is worth noting that there are more parliamentarians on PBL alone than serve in the Welsh Government’s Cabinet.7

EXISTING CONTROLS ON LEGISLATION IN WALES

9.22 In this section, we look at elements of the existing apparatus for controlling the quality of legislation in Wales. As explained earlier, we only touch incidentally on issues relating to scrutiny of Bills by the National Assembly as a revising legislature.8

Impact assessments

9.23 The Welsh Government has developed a sophisticated system of impact assessments. These are designed to draw out the implications of all policy developments – not just legislation – and thus to improve the quality of policy making and ultimately legislation.

9.24 In common with many governmental systems, the Welsh Government operates a

7 There are 12 members of either House on PBL as against 9 members of the Welsh Government’s Cabinet, including the Counsel General, who attends at the invitation of the First Minister. We discussed the role of the Counsel General and the drafters in his office in chapter 3 above.

8 See chapter 3 above.
system of cost/benefit analysis. In Wales, this is known as the Regulatory Impact Assessment. It involves assessing the monetised and non-monetised effects of a policy, from initial option identification to the passage of legislation. It occupies a central place in the system of impact assessment and is required by the standing orders of the National Assembly. It is not, however, the focus of our interest in this consultation paper.

Rather, our interest lies principally with those impact assessments that provide a method for judging the effect of a policy development on particular groups of people within Welsh society, or on the environment, the economy and culture.

Some of these impact assessments are required by legislation. Others represent policy commitments made by the Welsh Government. The impact assessments required by statute are those relating to equality and human rights, children and young people, the Welsh language and biodiversity. They are required in respect of all legislation – indeed, all policy. A second category of assessments are required of all legislation as a result of Welsh Government policy commitments to consider particular matters when developing and proposing legislation. These relate to sustainable development, rural proofing, health impacts, impact on the voluntary sector, climate change and economic impact. There is also a specific impact requirement in relation to the effect of policy developments on the Welsh Government’s area-based poverty programme.

A further category of impact assessments may or may not be necessary, depending on the subject matter and effect of the policy development. The need for each must, of course, be considered in relation to each policy development, and a decision that it is not needed must be documented. These cover the impact of the policy on privacy, justice, habitat regulation, the environment and environmental strategy and EU state aid rules.

The aim is that the impact assessments form a part of the policy process throughout. The contribution of the impact assessment process to each stage of the process of developing policy is as follows:

- case for change – the impact assessments help identify different facets of the problem, spot connections with other areas of work, and define objectives that reflect the Government’s strategic objectives;


Standing Orders of the National Assembly for Wales, Standing Order 26.6 requires, in effect, that the RIA is forms part of the Explanatory Memorandum required for virtually all legislation.


Known as the Communities First Programme available here http://gov.wales/topics/people-and-communities/communities/communitiesfirst/faqs/?lang=en (last visited 1 July 2015).
b. options – the impact assessments help determine how each option would affect different groups of people, the environment, economy and culture. This assists in giving balanced advice to Ministers;

c. developing the preferred option – impact assessments may identify detailed delivery issues which need to be resolved before proceeding further;

d. implementation – if the impact assessments have been undertaken correctly the delivery approach will be sensitive to the needs of the people the policy is aimed at helping, will be monitored well, and will include mitigation of potential adverse impacts; and

e. evaluation – impact assessments completed earlier will help to ensure the evidence needed for evaluation is identified in good time so that it is available when needed; some assessment duties include requirements to monitor and review the effect of the course of action taken.

9.29 The impact assessment process proceeds by requiring at set stages of the policy process the production of documents on a “template” produced by the team within the Welsh Government with policy responsibility for the relevant area of work. These teams will also provide policy-makers elsewhere with advice and assistance in developing the impact assessments.

9.30 For example, the equality impact assessment for the Higher Education (Wales) Bill in 2014 considers how the proposed changes to the regulation of higher education may affect different people in society. The equality impact assessment lists the stakeholders that have been involved in the preparation of the Bill, and details the evidence base concerning its impact on, for example, people with a disability. Notably, the equality impact assessment template specifically asks policy makers to determine the potential impact of the Bill on human rights, including United Nations Conventions.

9.31 Impact assessments are seen by the Welsh Government as important tools that were designed to influence and support policy-making, and form a key element of the appraisal of proposals. As such, they provide vital information for the Explanatory Memorandum and the Regulatory Impact Assessment.

THE NEW ZEALAND APPROACH

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

The Legislation Advisory Committee

9.33 The Legislation Advisory Committee was established by the then Minister of Justice in February 1986. It came into existence at the same time as the New Zealand Law Commission, and it has enjoyed a close relationship with the Commission since that time. The President of the Law Commission chairs the
The membership of the Committee includes lawyers in private practice and in academia, economists, and senior officials, both from departments (including, at the moment, the Treasury) and Parliamentary drafters. The Secretariat is provided by the Ministry of Justice, although the Committee comes under the Attorney-General in terms of Governmental responsibility, a recognition of its constitutional status.

It has a twofold role in relation to the quality of legislation. First, it sets standards. Primarily, it does this by the production of guidelines on the process and content of legislation. The guidelines aim to assist administrators by giving advice about the process of developing new legislation, and ensuring that it is consistent with “legal principles”. It also contains specific guidance about various potentially problematic features of new legislation, such as the creation of criminal offences or powers of delegated legislation. The document is formally approved by the Cabinet, and Ministers and officials are required to confirm to the Cabinet committee with oversight of the legislative process that proposals conform to the guidelines.

The latest edition of the guidelines is dated October 2014. The aim of the guidelines is to encapsulate best practice in relation to the development of legislation. The guidelines themselves comprise a series of questions that officials developing policy should be asking themselves, and a set of principles to be followed in most cases. The Committee expressly accepts that in some cases, the principles need not be adhered to, but where that is the case officials will be expected to provide a reasoned justification, and to include this justification in the supporting material published with the Bill at the end of the development process.

The starting point of the guidelines is the necessity for the policy objective of the proposed legislation to be clearly identified at an early stage. Officials are enjoined to ask themselves if legislation is the most appropriate way to achieve the policy objective and to ensure that proper consultation has taken place, both within Government and with the public. The guidelines ask if all the provisions of the proposed legislation clearly relate to the policy objectives and purposes.

The document goes on to provide guidance on ensuring that the new legislation is developed in a way that is consistent with, and properly addresses, the pre-existing body of law concerned with the same area. This includes not only identifying existing legislation and managing conflicts between the existing and

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

the proposed legislation, but ensuring that all relevant common law principles are identified and that the legislation interacts appropriately with common law rules. The guidelines go on to offer assistance, and provide principles, in relation to a series of practical issues that will confront those preparing legislative proposals.

9.39 The guidelines are at their most prescriptive when dealing with adherence to what it describes as the “basic constitutional principles and values of New Zealand law”. These are principles of general application in any common law system (except for special considerations applying to the Maori people and the Treaty of Waitangi). The principles that legislation must respect include those of natural justice, access to the courts, Parliamentary authority for taxing, spending or borrowing, the principle against retrospective effect and so on. It encapsulates the existing common law rule that “clear and unambiguous wording must be used if Parliament wishes to override fundamental rights and values.”

9.40 The guidelines are the principal contribution that the Committee makes to the quality of legislation at the stage when the legislation is internal to Government. It also undertakes a secondary role in providing advice to those within Government who seek it. In addition, it runs major seminars every two years aimed at those with an interest in the development of legislation.

9.41 The Committee’s second major function is the monitoring of Government legislation against its guidelines after publication and during the Parliamentary passage of the Bill. In particular, if its review raises issues of inconsistency with the guidelines, it makes a submission to the Parliamentary Select Committee which, in the New Zealand system, will be considering the Bill in detail. The New Zealand Law Commission provides the reports to the Committee that form the basis of its submissions to the Select Committees.16

9.42 The Committee’s annual reports give an account of its interventions arising out of the monitoring function. For example, in 2013, in what the Committee described as a heavy legislative programme, 38 Bills were received. The Committee made a submission to the Select Committee in respect of 15 of those Bills. In relation to another eight, drafting problems were drawn to the attention of the legislative drafters in the New Zealand Parliamentary Counsel Office.

9.43 The Legislation Advisory Committee thus sets the standards to be used internally within Government, but then monitors adherence to those standards externally in a way that informs the Parliamentary scrutiny process.

9.44 Professor Dawn Oliver has described the Legislation Advisory Committee as “the nearest parallel that I have come across in a common law Commonwealth country to the Continental style Council of State”, in respect of legislative scrutiny, as opposed to judicial, functions. In an article published in 2006 arguing for the adoption of New Zealand style legislative scrutiny standards, she puts forward the New Zealand Legislation Advisory Committee as the most developed

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16 To browse and search Legislation Advisory Committee submissions made to Select Committees see http://www.lac.org.nz/submissions/ (last visited 5 June 2015).
example of an independent legislative scrutineer and a model worth emulating in the United Kingdom.\textsuperscript{17} Since then, the Political and Constitutional Reform Select Committee of the House of Commons has reported on the quality of United Kingdom legislation, and recommended the adoption of a document setting down standards for legislation. Its report includes an initial draft of such a set of standards. The Government rejected this recommendation.\textsuperscript{18}

9.45 Sir Geoffrey Palmer QC, however, has taken a different view. Sir Geoffrey Palmer QC was the Justice Minister at the time when the Legislation Advisory Committee and the New Zealand Law Commission were created, in 1986. In 2006, he was President of that Law Commission, and accordingly also chair of the Legislation Advisory Committee. That year, he gave a subsequently published speech in which he noted Professor Oliver's views and said:

As both its founder and current Chair, I am not as sanguine as she is about the impact of the Committee’s work on the quality of New Zealand legislation. It seems to me to be benign, but peripheral. Indeed the experience of the Committee over 20 years has led to the conclusion that most of the problems with legislation occur early in its design phase. It is often too late to perform major surgery on a Bill after it has been introduced … Remodelling a Bill is difficult. The work needs to go into the original design. In New Zealand, almost all Bills go to Select Committee for public scrutiny and submissions, and the Select Committees alter the details of the legislation extensively in light of the submissions. However, wholesale revisions to the architecture of a Bill, while not unprecedented, are difficult to accomplish.\textsuperscript{19}

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

The Legislation Design Committee

9.47 The Legislation Design Committee was established in 2006. Its membership clearly indicated its identity as a more “insider” body than the Legislation Advisory Committee, although it was still chaired by the President of the Law Commission.


\textsuperscript{19} Sir G Palmer QC, “Improving the Quality of Legislation - the Legislative Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 Waikato Law Review. Sir Geoffrey Palmer QC had previously been Deputy Prime Minister, Attorney-General, Minister of Justice and Minister for the Environment, and from 1989 to 1990 Prime Minister, in addition to a distinguished career as a legal academic in America and New Zealand.
The New Zealand Cabinet Manual, dated 2008 but apparently still in force, describes the Legislation Design Committee as follows:

a ministerial committee that receives research and advisory support from the Law Commission. The Committee provides high-level, pre-introduction advice on the framework and design of legislation, with the goal of ensuring that policy objectives are achieved and the quality of legislation is improved … Ministers and departments are encouraged to seek formal or informal advice and assistance from the committee at an early stage on projects that are significant in terms of their scope, involve complicated Legislation Design issues, require an innovative approach, or are likely to raise issues about the overall coherence of the statute book … The Committee may also approach departments to offer assistance on relevant projects.20

A striking account of the operation of the Legislation Design Committee in its early days is given by Jonathan Robinson, the Director of Resources and Legal Services at the Environment Agency in England. In a speech given at the annual conference of the UK Environmental Law Association in 2009, he explained that in 2006, he had been head of the legal team of New Zealand’s Ministry of Social Development, the approximate equivalent of the United Kingdom Department for Work and Pensions. He led his team in resisting a challenge to the Department in the then-newly established New Zealand Supreme Court, and duly won. However, in the course of argument, the Court had been fairly scathing about the state of the primary statute on benefits, the Social Security Act 1964, which had been amended multiple times. Robinson notes that the Act "would not actually look too bad by the standards of London, or I dare say Cardiff, Edinburgh or Belfast".

"A couple of days later", he relates, the chair of the Legislation Design Committee – Sir Geoffrey Palmer QC – contacted the equivalent of the permanent secretary about the comments; and shortly thereafter summoned Robinson to discuss the Act with the Committee. Mr. Robertson described the members of the Committee as “real legal experts … a formidable bunch, but also an extremely expert bunch”. The result was advice issued to the Department (and publicly available) which Robinson found to be “of an extremely high quality”. The key issues for the committee were, first, how far the department had progressed with consolidation and codification; second, the failure to set out the underlying principles of this area in law, the normal practice in New Zealand having become to set out principles and purpose at the start of an Act (an approach now often taken with Welsh legislation); and thirdly, the proper approach to the hierarchy of norms – the need for primary matters of policy to be in the Act itself, with only appropriate matter being the subject of secondary and tertiary legislation.21

Robinson’s account of the Committee’s intervention

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20 New Zealand Department of the Prime Minister and Cabinet Office, Cabinet Manual (2008), p 92, paras 7.34 to 7.36..
21 The distinction between secondary and tertiary legislation in New Zealand is not the same as in England and Wales: see J Burrows, “Legislation, Primary, Secondary and Tertiary” 42(65) Victoria University of Wellington Law Review.
concludes with the ministry bringing to fruition a long running project
to produce a new Bill, stripping away the complex accretions to the
1964 Act … setting out at the start the purpose and principles of
social security law, bringing all matters of significant policy up from
delegated legislation into the Bill itself, and written in a style which
was actually readily accessible to a law audience.  

9.52 However, to date, the 1964 Act (yet further amended) remains largely in force as
the principal Act in New Zealand covering social security law. Sir Geoffrey Palmer
QC has recently described it as “the worst statute on the books in New
Zealand”. Incidentally, the Ministry of Social Development has announced that it
intends to “rewrite” the 1964 Act, and present a draft Bill by the end of 2015. The
Ministry has acknowledged its “fragmented” and “confusing” state, noting that
section 3 of the 1964 Act has been amended 279 times. The aim of the rewrite of
the 1964 Act is to

make the Act easier to read and use for all interested parties. A
rewritten Act that is clearer in its intent would be less open to
interpretation and challenge.

9.53 The Legislation Design Committee undertook its task as “guide, philosopher and
friend to departmental officials generating difficult legislation” on a series of Bills
from 2006 to 2011. The Committee was initially a standing advisory body,
available to Government departments or agencies if its advice were sought. In
late 2007, following a successful evaluation of its contribution, a more formalised
procedure was adopted, under which the legal advisor at the Department of the
Prime Minister and Cabinet, the legislation programme co-ordinator in the
Cabinet Office and the chief parliamentary counsel identified about 15 Bills in the
programme for that year for particular attention by the Committee. Departments
were still able to seek advice from the Committee on other matters. It appears
that the rugby world cup legislation and Bills on consumer law reform and
securities law were dealt with under this procedure.

9.54 Even under the more formalised procedure described above, the Committee still
operated on an advisory basis, rather than having a screening role as part of the

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22 J Robinson, “Improving Environmental Law” (2009) 21 Environmental Law and
Management 120. For Robinson, the question is why there is no such similar vehicle for
the improvement of law in the United Kingdom, with particular reference, in his case, to
environmental law.

23 Sir G Palmer QC, “Law-Making in New Zealand – is there a better way? The Harkness

24 For information on the Social Security Act 1964 rewrite see http://www.msd.govt.nz/about-

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

26 Sir G Palmer QC, “Law-Making in New Zealand – is there a better way? The Harkness
See also: The New Zealand Law Commission, Briefing for the Minister Responsible for the
information#item1 (last visited 1 July 2015).
9.55 It remains unclear from the published sources how exactly it intervened in the process of development of a Bill and what its relationship was with the administrative and political processes which result in the creation of the Government’s legislative programme.

9.56 The Legislation Design Committee has now, however, ceased to function. In its Briefing to the Minister Responsible for the Law Commission dated December 2011, the Committee was described as “only operating on a partial basis”. Anecdotally, we have been told that the Committee ceased to meet after the election in November 2008, an election that resulted in a change of administration. The published sources are silent as to the reason why the Committee fell into disuse. Sir Geoffrey Palmer QC attributes its demise to political antipathy, or at least indifference, on the part of the new Government.

9.57 Sir Geoffrey Palmer QC had anticipated that, had the Legislation Design Committee been a success, it would have superseded the Legislation Advisory Committee, which would have been abolished.

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

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


29 Information supplied by Sir Geoffrey Palmer QC.

30 New Zealand Productivity Commission, Regulatory institutions and practices (16 July 2014).
A LEGISLATION OFFICE?

9.60 Sir Geoffrey Palmer QC recently presented an alternative hybrid model.\(^{31}\) It is an adaptation of a model he has previously put forward for adoption in New Zealand.\(^{32}\)

9.61 The key to his proposal is the establishment of a new “Legislation Office”. It would be located in the National Assembly, rather than the Welsh Government, but would be under the general control of the Counsel General. This change would be accomplished by a Legislative Standards Act, for which the Counsel General would be, in effect, the responsible minister.\(^{33}\)

9.62 Under this scheme, the First Minister and Cabinet would remain responsible for the policy of the legislation and would continue to have “ultimate control” over the content of Bills before they were introduced. It would, however, “make those elements more transparent, leaving room for quality to flourish and sound legislative principles to be upheld.”

9.63 The Office of the Legislative Counsel would be transplanted to the new Legislation Office, and would form the backbone of its permanent membership. Bill teams for particular pieces of legislation would be assembled by seconding officials from the relevant Welsh Government department for the duration of the drafting and legislative process. This team would produce the information, analysis (with assistance from economic analysts) and a draft Bill to be published with a white paper for pre-legislative consideration by the National Assembly and stakeholders.

9.64 Sir Geoffrey Palmer QC sees the empowerment of legislative counsel as being important for the quality of legislation:

[Legislative] counsel will be prominent members of the new Legislation Office and their independence needs to be strengthened. Placing them in the new Legislation Office … will send a powerful signal in that regard. The status of [legislative] counsel as constitutional gatekeepers needs to be recognised. They more than anyone are responsible for the quality of the statute book and they need to be given the tools to do the job. They need to be able to refuse to draft provisions that are dubious even if officials or even some ministers want them. They are, with the Counsel General, the


\(^{32}\) Sir G Palmer QC, “Improving the Quality of Legislation - the Legisatory Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 Waikato Law Review.

\(^{33}\) Whether the National Assembly has the power to legislate for such a proposal can be argued both ways. However, that may change as a result of proposals for developing devolution made during 2015: see Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (2015) Cm 9020; and The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament (November 2014). We deal with questions relating to the role of the National Assembly in determining its own procedures and its legislative process below.
The Legislation Office would additionally be responsible for the publication of legislation, and with the performance of post-legislative scrutiny after an appropriate interval following enactment.

This proposal is a bold attempt to re-draw the boundary between the legislative and the executive branches in an attempt to distance the preparation of legislation from overwhelming political influence over practical and technical matters, whilst retaining the Government’s ability to determine policy.

We provisionally consider that this model, as set out, is probably more appropriate to conditions in New Zealand – where Parliamentary Counsel Office has a statutory basis, and there is a greater tradition of legislating for such processes – than to those in Wales. In particular, it is not clear, in the Welsh context, what would be meant by “locating” the new Legislation Office in the National Assembly. There would be no additional functions granted to the National Assembly in connection with the Office. It could be made part of the Assembly Commission; however, that would appear to have no more than symbolic advantages and the disadvantage, it seems to us, of it being inappropriate for a member of the Welsh Government to be responsible for a part of the National Assembly’s support structure.

Shorn of the link with the National Assembly, the consideration becomes an alternative way of organising the drafting of legislation within Government. As a suggestion for a machinery of government change, it may or may not commend itself to the Welsh Government, but this seems to us to be something that it is properly within the sphere of the executive to determine.

However, we have found the broad thrust of Sir Geoffrey Palmer QC’s proposal – the attempt to bring the legislature more to the fore in organising the law – very helpful in directing our thinking about how codification might work in Wales, which we addressed in chapter 8.

REFORM OPTIONS

In this section, we outline two possible options for reform, both of which aim to harness the bureaucratic governmental structure to improve the quality of legislation before it reaches the National Assembly, let alone before it reaches the statute book.

Using the impact assessment process

One option would be to use the existing apparatus of impact assessments to include Legislation Design issues. A distinct “legislative impact” assessment could be introduced, which required those developing policy to consider what impact the proposal would have on the existing law in relation to the same subject matter and how the law should be configured to accommodate it. In common with the other subject-specific impact assessments, it would require policy makers to take account of legislative design issues at all stages, from the

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initial case-building exercise to the passage of the legislation itself.

9.72 This option would have the considerable advantage that it would be building on an existing, well-developed structure, rather than be creating a new mechanism from scratch. It would not require legislation (although making it a statutory responsibility would be a possibility); and the cost of it would be moderate. It has the potential advantage of bringing the issue to the fore at the early design stage, the importance of which Sir Geoffrey Palmer QC has emphasised.

9.73 There are, however, significant disadvantages.

9.74 First, the use of impact assessments as a means of governing policy is not without controversy. There is now a substantial critical literature, albeit one that focuses primarily on cost/benefit analysis. It is not necessary for us here to engage with a fundamental critique of impact assessment, but we note its existence.\(^35\)

9.75 More importantly for our purposes, even if the concept is useful as a general rule, a “legal impact” approach may not be so well suited to the development of policy as the other impact assessment elements. All of the other assessment processes are designed to encourage policy makers to think about how the substantive policy under consideration would affect particular groups of people or other subjects of policy-making, like the environment, the economy or culture. These are all matters within the purview and expertise of policy professionals. The assessment process is a way of bringing to their attention, or moving up their agenda, something that sits within their normal expertise – something, the assessment process tells them, they should be thinking about anyway. The shape of the law does not fit into the same category. From the perspective of a policy official, the law is one way – often the primary way – in which a substantive policy is implemented. It is not, for most policy makers, a subject for policy making in itself.

9.76 Policy is developed in the Welsh Government by policy officials, under the direction of ministers. They draw on the expertise of the subject-specialist lawyers assigned to their policy area for help with the law (and, in practice, there is a great deal that an effective government lawyer can contribute to successful policy making); and later, it will be those lawyers who instruct the specialist legislative drafters. But the engine of policy development is the policy official. The lawyer is one of the resources at his or her disposal at the appropriate stages in the process. Integrating legislative design to make it internal to policy development as a professional activity in the form of a legislative impact assessment would run the danger of seeking to turn policy officials into lawyers (or lawyers into policy officials).

9.77 It is perhaps worth noting that Sir Geoffrey Palmer QC has come to the view that impact assessments under the New Zealand system “seem to me to have been ineffective at improving the quality of legislation and have become a bureaucratic exercise that deters ministers from their course very little and engage the public

\(^{35}\) Perhaps the best known article is B Morgan, “The Economization of Politics: Meta-Regulation as a form of Nonjudicial Legality” (2003) 12 Social and Legal Studies 489.
not at all”.36

Consultation question 9-1: We ask consultees whether a “legislative impact” assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government?

A Legislation Design Committee for Wales

9.78 If attempting to internalise Legislation Design into the policy making process via an impact assessment is unpersuasive, would a New Zealand style Legislation Design Committee be desirable?

9.79 The New Zealand committee was chaired by the President of the Law Commission. The membership generally, however, was confined to senior officials, making it a body clearly more internal to Government than the Legislation Advisory Committee (whatever the formal status of the latter). The members were the most senior officials (the equivalent of permanent secretary in Whitehall or director general in the Welsh Government) of the Department of the Prime Minister and Cabinet, the Ministry of Justice and the Treasury, the Solicitor-General and the Chief Parliamentary Counsel (or their nominees).

9.80 The fact that the Committee was chaired by the President of the Law Commission was no doubt a reflection of its origins in an analysis of the flaws of the Legislation Advisory Committee. It may, indeed, have reflected Sir Geoffrey Palmer QC’s particular experience and status.

9.81 In common with the Legislation Advisory Committee, the New Zealand Law Commission provided both administrative support and research assistance. It may well be that the involvement of the Law Commission in New Zealand represents the particular circumstances of the Commission in that jurisdiction, and would not be appropriate in Wales.

9.82 There is no exactly equivalent alternative choice for chair in the Welsh context. If a high level legal chair were required, then the Counsel General would be the obvious choice. That would move away from the New Zealand model, in which all of the members of the Committee were civil servants or, in the case of the chair, a statutory office holder, to include a political figure.

9.83 The Counsel General is something of a hybrid figure. It is a party political appointment, however, the Counsel General exercises statutory functions under the Government of Wales Act, provides objective legal advice to the Welsh Government and in some circumstances is required to act in a non-political way, for instance when considering whether to refer an Assembly Bill to the Supreme Court to determine whether it is within the competence of the National Assembly. As we explained earlier, the Counsel General attends Cabinet at the invitation of the First Minister rather than being a political member. He or she need not be an

Assembly Member. The first two Counsel General\(^{37}\) were Assembly Members, but the current incumbent, Theodore Huckle QC, is not. In the Welsh context, therefore, it would appear appropriate for the Counsel General to chair the Committee.

9.84 If the membership were broadly to mirror the New Zealand model, the other members would include the Permanent Secretary, whose department performs similar functions to the New Zealand Department of the Prime Minister and Cabinet (or the United Kingdom Cabinet Office), and some of the six directors general, plus the Director of Legal Services and the First Legislative Counsel. In New Zealand, there was provision for the appointment of nominees to substitute for the listed member. We do not know if the appointment of nominees was the normal practice or not. We note Robinson’s description of the members being “an extremely expert” as well as a “formidable bunch”.

9.85 A Welsh Legislation Design Committee could, on the early New Zealand model, perform a purely advisory role. However, the fact that the New Zealand Committee quickly moved away from this suggests a more formal place in the system would be appropriate.

9.86 In the second phase in New Zealand, the Committee remained advisory, but the advice was formally targeted on the more important Bills and proposals. Such an approach would not be helpful in Wales. The Welsh legislative programme is much smaller than that in New Zealand, so this sort of prioritisation is unlikely to be necessary.

9.87 The Committee could, however, take on a more significant formal role in Wales. On this approach, the Committee would undertake a formal role at a number of key stages in the development of a legislative proposal. For these purposes, those stages might be:

1. Early design: the legal structure of eventual legislation would be considered by the Committee with the policy team working up a legislative proposal even before the inauguration of the Bill team.

2. Development: the Committee would aim to ensure that the design issue featured at the green paper/public engagement stage. While the legal structure may not be a key feature of public debate (although in some cases it might be), the implications for legislative design of the messages received during public engagement should be understood.

3. The crystallisation of policy: continued engagement during the white paper stage.

4. Instructing parliamentary counsel.

5. The final draft of the Bill before introduction.

9.88 At one end of the spectrum, the policy officials or Bill team could be made aware

\(^{37}\) That is, under the statutory role so designated in the Government of Wales Act 2006. The first use of the term “Counsel General” was as the job title of an official of the first National Assembly, that constituted under the Government of Wales Act 1998.
of the assistance available from the Committee and be invited to make use of it. At the other end, the Committee might be required to sign off the process at each stage. This would give the Committee effectively a veto on the continued development of the legislation unless its requirements were met. Between these two poles, the Committee could report on the merits of the proposals as they impacted on legislative design at each stage in the process.

9.89 If it worked, this approach could provide a mechanism for ensuring that considerations of legislative design were more integrated into the process of developing policy. In common with the proposal considered above, it would not require legislation. Indeed, it would be difficult to legislate, without legislating for a particular process to be followed for the development of legislation within government – a proposal not only novel, but also inflexible and unnecessary.

9.90 This is one of the disadvantages of this approach. Any proposal for changing the arrangements for the preparation of legislation amounts to interfering in the domestic business of government. As the experience of the Legislation Design Committee in New Zealand suggests, different governments may come to different conclusions about how they wish the system to work. In doing so, they might be influenced by different perspectives on what constitutes effective administration. But equally, they may be exercising a political judgement about which mechanisms would serve, and which inhibit, their political objectives. Those judgements (which may well be entirely legitimate in their own terms) may coincide with administrative arrangements that conduce to the production of good law. But equally, they may not, and there is no necessary connection between the two. Thus a government persuaded to value improvements in the quality of legislation may introduce such a system; but a subsequent government with other priorities may, even more easily, relinquish it.

9.91 But in any event, would such a system work? There is certainly an argument that it would not add anything considerable, in the Welsh context, to the existing arrangements. As things stand, the Counsel General is currently closely involved in the process of development of all Welsh Government legislation. He or she receives formal reports from the point at which subject-specialist Welsh Government lawyers instruct legislative counsel.

9.92 Similarly, the other major pool of putative members of a legislative design committee – the permanent secretary, the directors general and the director of legal services – are already centrally involved in supervision of the legislative programme as members of the Legislative Programme Board. And First Legislative Counsel, as manager of a unit now comprising 14 people, is necessarily much closer to the drafting of each Bill than his or her counterpart in either Whitehall or Wellington.

9.93 So the danger is that the establishment of a Welsh legislative design committee would amount to a mere bureaucratic reorganisation of the roles of individuals who are already all closely engaged in the development of the legislative programme.

9.94 As outlined above, the one potential role of a Welsh legislative design committee that, arguably, is not covered by existing legal actors is consideration of legislative design at the earliest stages of policy development, including public
engagement. This may, indeed, be a gap in existing arrangements, although one that, it may well be, is largely attributable to resource limitations – the Welsh Government Legislation Handbook makes it clear that legislative counsel, for instance, are too few and in too great demand to give advice at earlier stages during the development of policy or instructions.

However, even if that is the case, it is not obvious that plugging that gap requires the establishment of a legislative design committee, as opposed to some more proportionate bureaucratic response.

Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?
Consultation question 9-3: We would also welcome consultees' views on alternative models.
Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models.
PART 3
THE WELSH LANGUAGE

CHAPTER 10
WELSH AS A LEGAL LANGUAGE

INTRODUCTION

10.1 Although the Welsh language has the status of an official language in Wales, the English language is the dominant language. The 2011 census recorded a population of 3.06 million and that 23.3% of those born in Wales were able to speak Welsh. In 2012-13 it was estimated that 11% of the total population were fluent in Welsh. Furthermore, with the exception of the small settlement in Patagonia, Welsh is not a community language anywhere apart from Wales. As Dr. Richard Crowe, the Welsh Government’s Chief Jurilinguist, points out, trying to treat Welsh “no less favourably” than English in the face of the English language’s dominance on the world stage is no easy matter. In part 3 we address a series of issues concerning the impact of a bilingual system on the form and accessibility of the law applicable in Wales.

WELSH AS A LEGAL LANGUAGE

10.2 One of the reasons given in the statute 26 & 27 Hen 8 c. 26 for the incorporation of Wales into the realm of England was that

the People of the same Dominion have, and do daily use a Speech nothing like, ne consonant to the natural Mother Tongue used within this Realm.

10.3 As a result, that statute not only provided for the annexation of Wales but also made clear that the English language alone was to be the official language in all legal proceedings.

Also be it enacted by the Authority aforesaid, That all Justices Commissioners, Sheriffs, Coroners, Escheators, Stewards, and their Lieutenants, and all other Officers and Ministers of the Law, shall proclaim and keep the Sessions Courts, Hundreds, Leets, Sheriffs

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2 The role of jurilinguists within the Welsh Government is described in chapter 11.
Courts, and all other Courts in the English Tongue;

(2) and all Oaths of Officers, Juries and Inquests, and all other Affadavits, Verdicts and Wagers of Law, to be given and done in the English Tongue;

(3) and also that from henceforth no Person or Persons that use the Welsh Speech or Language, shall have or enjoy any manner Office or Fees within this Realm of England, Wales, or other the King’s Dominion, upon Pain of forfeiting the same Offices of Fees, unless he or they use and exercise the English Speech or Language.4

10.4 Despite this injunction, however, Welsh continued to be used in courts of law in Wales. The Hughes Parry Committee observed in 1965:

Though the law was administered in English, the Welsh language was undoubtedly widely used in the law courts from those at the highest level, like the Council of the Marches and the Court of Great Sessions, down to the humblest hundred and manor courts.5

10.5 It appears, moreover, that it was used extensively in county courts in Wales from their creation in 1846.6 In addition, during the nineteenth and twentieth centuries some efforts were made to make legislation and official documents accessible in Welsh to a Welsh readership.7

10.6 In the twentieth century successive statutes gradually improved the legal status

3 An Act for Law and Justice to be Ministered in Wales in like Form as it is in this Realm of 1535/6, 26 & 27 Hen 8 c. 26, section 1. This Act and the Act for Certain Ordinances in the King’s Dominion and Principality of Wales of 1542/3, 34 & 35 Hen 8 c. 26 are usually referred to as the Acts of Union. See, generally, T G Watkin, The Legal History of Wales (2nd ed 2012) chapter 7.

4 26 & 27 Hen 8 c. 26, section 17. An echo of these provisions can be heard in the Government Report on Education in Wales published in 1847 (Brad y Llyfrau Gleision / The Treason of the Blue Books). The Commissioners concluded:

“The evil of the Welsh language … is obviously and fearfully great in courts of justice … It distorts the truth, favours fraud, and abets perjury, which is frequently practised in courts, and escapes detection through the loop-holes of interpretation … The mockery of an English trial of a Welsh criminal by a Welsh jury, addressed by counsel and judge in English is too gross and shocking to need comment. It is nevertheless a mockery which must continue until the people are taught the English language…” Report of the Commissioners of Inquiry into the State of Education in Wales: Accounts and Papers (1847) Vol. 27, Pt. ii, 66.


6 Sir J Thomas, “Legal Wales: Its Modern Origins and its role after Devolution: National identity, the Welsh Language and Parochialism” (2001) 1 Welsh Legal History Society 113, at 115 118, 136 to 149. Judge Sir Artemus Jones QC simply ignored section 17, asserting that after 400 years and numerous changes to the courts it was simply obsolete. He gave evidence to the Royal Commission on the Despatch of Business at Common Law, which reported in 1936, that in the county courts where he sat in North Wales he conducted cases entirely in Welsh whenever possible.

of the Welsh language. The language clause of 26 & 27 Hen 8 c. 26 was repealed by the Welsh Courts Act 1942. However, that statute did not confer a right to use Welsh in the courts; it merely provided that

... the Welsh language may be used in any court in Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh.8

10.7 More recently, the Welsh Language Act 1967 permitted any party or witness or any other person who desired to use the Welsh language in court to do so and the Welsh Language Act 1993 established the principle that:9

In the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on the basis of equality.10

10.8 These changes in legislation have been accompanied by a sea change in judicial attitudes to the use of the Welsh language in courts in Wales. In 1967 Widgery J, later Lord Chief Justice, observed:

I think it is quite clear that the proper language for court proceedings in Wales is the English language. ... [T]he language difficulties which arise in Wales can be dealt with by discretionary arrangements for an interpreter precisely in the same way as language difficulties at the Central Criminal Court are dealt with when the accused is a Pole.

10.9 In his view the use of Welsh “impeded the efficient administration of justice in Wales”.11

10.10 By contrast Judge LJ, also later Lord Chief Justice, in Williams v Cowell in 2000 referred to the prohibitions on the use of Welsh in 26 & 27 Hen 8 c. 26, and added

In other words Welsh people appearing in courts in Wales, litigating over problems in their own country, were prohibited from using their own language. Mr Williams and those who support him no doubt regard this legislation, and the subsequent Act of 1542 ... as an outrage... [F]or what it is worth I agree with them.12

10.11 Today, the Welsh language has official status in Wales. In particular that status

8 Welsh Courts Act 1942, s 1.
9 Welsh Language Act 1967, s 1.
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

(3) confer a right to speak the Welsh language in legal proceedings in Wales.13

10.12 The official languages of the National Assembly are English and Welsh and both official languages must, in the conduct of Assembly proceedings, be treated on a basis of equality. All persons have the right to use either official language when participating in Assembly proceedings. Reports of Assembly proceedings must, in the case of any proceedings of the Assembly, committees of the Assembly or sub-committees of such committees, contain a record of what was said, in the official language in which it was said, and also a full translation into the other official language.14

10.13 The English and Welsh texts of any Assembly Measure or Act of the Assembly which is in both English and Welsh when it is enacted, and any subordinate legislation which is in both English and Welsh when it is made are to be treated for all purposes as being of equal standing.15 Measures and Acts of the Assembly are always enacted in both English and Welsh and subordinate legislation made by the Welsh Government is usually made in both languages.16

… [A]ll of the primary legislation enacted by the National Assembly between 2007 and 2011 in the form of Assembly Measures and since 2011 in the form of Assembly Acts, and virtually all of the subordinate legislation made by the Assembly until 2007 and since then by the Welsh Ministers, has been bilingual. Welsh Ministers make subordinate legislation in both languages and the Assembly passes Acts in bilingual form, thus in both cases ensuring the equal standing of the two versions for all purposes. Legislative proposals in the form of bills are introduced into the Assembly in both languages, they are scrutinized in committees in both languages and debated upon in the

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

14 Government of Wales Act 2006, s 35(1) as amended by National Assembly for Wales (Official Languages) Act 2012, s 1. Section 35 in its original form provided that the Assembly must, in the conduct of Assembly proceedings, give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality.

15 Government of Wales Act 2006, s 156. Section 156(2)-(5) is considered below. It 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.

chamber in the language of the individual members' choice. When committees report, their reports are in both languages; when amendments are tabled, they are considered in both languages, and when bills in their final form are passed in plenary session, the final text is approved in both English and Welsh.\textsuperscript{17}

10.14 In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates’ court to such prior notice as may be required by rules of court.\textsuperscript{18} Any necessary provision for interpretation is to be made accordingly. Furthermore, the power to make rules of court includes power to make provision as to the use, in proceedings in or having a connection with Wales, of documents in the Welsh language.\textsuperscript{19} This right to use the Welsh language in legal proceedings does not extend to courts outside Wales. Accordingly, Welsh may not be used before appellate courts when they sit outside Wales.\textsuperscript{20}

10.15 The Welsh Language (Wales) Measure 2011 does not seek to regulate the use of the Welsh language in courts. Both the “matter” in Schedule 5 to the Government of Wales Act 2006 under which the Measure was made, and the corresponding subject in Schedule 7 to the Act, which governs the National Assembly’s current legislative competence, expressly exclude “the use of the Welsh language in courts”. The Measure does, however, provide for the imposition of mandatory “standards” aimed at ensuring equal treatment for the two languages, on public bodies, including, with the consent of the Secretary of State, UK organisations such as HM Courts and Tribunals Service (“HMCTS”). This is in line with the current position under which HMCTS has a Welsh language scheme under the Welsh Language Act 1993. The Measure is likely therefore to impact, in due course, on many aspects of how courts and non-devolved tribunals in Wales are administered and therefore, indirectly, on the use of Welsh in proceedings.

10.16 The Welsh language is now used extensively in courts in Wales. In the year 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 civil courts and 25 before tribunals. All of these figures represent a fall from a peak in 2011 when there were 1,348 Welsh language cases in total, 358 of which were in the county

\textsuperscript{17} T G Watkin, “Bilingual Legislation and the Law of England and Wales” (2014) 2(2) \textit{The Theory and Practice of Legislation} 229 at 237. Professor Watkin explains that the principal exceptions in the case of subordinate legislation have been statutory instruments made in the context of an emergency, for instance in dealing with epidemics such as foot-and-mouth disease.


\textsuperscript{19} Welsh Language Act 1993, s 22.

\textsuperscript{20} However, both Divisions of the Court of Appeal sit regularly in Cardiff to hear Welsh appeals.
In 2006 a murder trial was conducted in Welsh before Roderick Evans J. at Caernarfon Crown Court. A notable example of the use of the Welsh language to present detailed legal argument is *R. (The Welsh Language Commissioner) v. National Savings and Investments and The Welsh Ministers* where the Welsh Language Commissioner successfully challenged, before a Divisional Court of the Queen’s Bench Division sitting in Cardiff, the decision of National Savings and Investments to withdraw its Welsh language scheme. Most of the documents and all written submissions were lodged in Welsh and counsel used Welsh or English as they chose during the course of the hearing. The court delivered judgment in both English and Welsh.

10.17 Other agencies and bodies concerned in the administration of justice, such as the police and the probation service employ Welsh as a matter of course in those parts of Wales where the language is most commonly used. Thus, police interviews, for example, are frequently conducted in Welsh by the North Wales Constabulary and the Dyfed-Powys Constabulary.

10.18 The Lord Chancellor has established a Standing Committee on the Welsh Language on which all of the public bodies involved in the administration of justice in Wales are represented. Its purpose is to ensure that these bodies adopt similar policies toward the Welsh language and the implementation of the Welsh Language Act 1993. It is intended to minimise costs and difficulties and to ensure that proper and uniform practices are in place.

10.19 The Lord Chancellor’s Standing Committee has, in turn, set up an organisation, Justice Wales Network (Rhwydwaith Cyfiawnder Cymru) to co-ordinate the training efforts of these bodies. Its purpose is to promote bilingualism within the justice sector in Wales by raising staff awareness of the importance of language sensitivity and of facilitating language choice. It seeks to increase the linguistic capacity of the main agencies within the sector by offering opportunities for staff to learn Welsh and by improving the skills of Welsh speakers.

10.20 In addition, the North Wales Local Criminal Justice Board has created a Welsh Language Criminal Committee which aims to ensure that the justice system accurately identifies the choice of language of members of the public and acts upon that choice. It also seeks to identify weaknesses within the system which prevent the provision of a full bilingual service and, in conjunction with other bodies, to remedy them. This group has now requested that it become a sub-committee of the Wales Criminal Justice Board. The Judicial College organises

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21 In the year to March 2014 there were 743 cases conducted wholly or partly in Welsh, of which 545 were in the magistrates’ courts, 26 in the Crown Court and 138 in the county courts and 34 before tribunals. 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.


23 On 1 July 2014 the Wales Probation Trust was replaced by the Wales Community Rehabilitation Company and the National Probation Service Wales.

24 The University of South Wales has recently become the first university in the country to deliver training sessions for Police Science students through the medium of Welsh. This initiative is supported by funding from Coleg Cymraeg Cenedlaethol.
courses and produces materials to support the judiciary in its use of the Welsh language in courts in Wales. In addition, the Lord Chancellor has appointed Liaison Judges for the Welsh Language.

10.21 Many issues concerning the use of the Welsh language in the legal system fall outside the scope of this project. In the following chapters we will address legal terminology, the form of bilingual legislation, bilingual drafting and the interpretation of bilingual legislation.
CHAPTER 11
LEGAL TERMINOLOGY AND DRAFTING

INTRODUCTION

11.1 There can be no doubt that Welsh is a highly sophisticated language, suitable for the expression of complex legal concepts and issues. Law courses in the medium of Welsh are offered at all five Welsh law schools. The nature and extent is variable. Some offer lecture courses in Welsh. Others provide lectures in English and tutorials in Welsh or may offer a particular module in Welsh. Coleg Cymraeg Cenedlaethol has been facilitating the availability of lectures by one institution to students in the others so as to enable all to take advantage of the expertise scattered across the sector.1 The practice to date has been for the students to use standard English text books. However, Coleg Cymraeg Cenedlaethol has funded a project run by Bangor Law School under the general editorship of Professor Thomas Glyn Watkin to produce textbooks in Welsh for all the core subjects. Welsh texts on Public Law and on Equity and Trusts are in preparation and it is hoped to produce texts on the Law of Contract and on Land Law.

11.2 The Law Commission publishes some of its papers and reports in both English and Welsh. Most notably in 2013 we published our report on residential tenancies in Wales in both English and Welsh.2 In recent years there has existed a law journal which published articles in both English and Welsh.3 The Statute Law Review has published an article on bilingual legislation in Wales in both English and Welsh.4

11.3 The suitability of Welsh as a medium for modern legal communication and debate has certainly been established.

11.4 Essential to this function has been the development of a modern standardised legal terminology which equips Welsh for use as a legal language. The English language has developed, over many centuries, succinct terminology to describe legal concepts. The Welsh language has some catching up to do. However, as Catrin Fflur Huws 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.5

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1 Coleg Cymraeg Cenedlaethol (Welsh National College) works with universities across Wales to develop Welsh language medium opportunities for students. It funds Welsh medium lecturers and offers undergraduate and postgraduate scholarships for students to study higher education courses through the medium of Welsh.
2 Rhentu Cartrefi yng Nghymru / Renting Homes in Wales (2013) Law Com No 337.
3 Former title Cyllchrawn Cyfraith Cymru / Wales Law Journal. Current title Cyllchrawn cyfraith a pholisi Cymru / Wales journal of law and policy which was published from 2001 to 2005.
5 C F Huws, “The day the Supreme Court was unable to Interpret Statutes” (2013) 34(3) Statute Law Review 221.
11.5 The development of a modern standardised legal terminology in Welsh is making good progress. A Welsh Legal Dictionary published in 2003 contains approximately 30,000 items. In 2008 Bangor University produced a dictionary of standardised Welsh language legal terms for students as an aid to the teaching of law through the medium of Welsh. A group of practitioners and scholars has recently completed a project, sponsored by the Welsh Language Board, to standardise Welsh legal terminology which has reached agreement on some 1,600 terms. This project came to an end with the dissolution of the Welsh Language Board. The Lord Chancellor’s Standing Committee and the Welsh Language Unit of HMCTS are currently seeking to establish a new process to standardise new terminology as it is identified. It has, however, been represented to us that there is a great deal more retrospective work to be done in this field and that without proper funding it will be difficult to achieve.

11.6 A body of Welsh language legal terms have already been defined in legislation since the National Assembly started legislating in Welsh in 1999. In time it is likely that bilingual legislation will lead to a full standardised legal terminology. However, it does appear that there is a current need for further work in this area.

11.7 The study group from Wales which visited Canada in 2001 reported that in that jurisdiction 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. It consists of representatives from the Department of Justice and the courts. It is also supported by the Government translation centre, and legal translation and terminology centres based in Universities across Canada. The Committee has five permanent members, including lawyers, judges, translators and a linguistic expert. The Committee considers reports made by a team and makes decisions on the terms to be used. Once terms are decided upon, they are used in legislation, judgments and legal textbooks.

Consultation question 11-1: We invite the views of consultees as to how the process of standardising and keeping up to date Welsh legal terminology should be continued and funded. In particular, what manner of body should be responsible for performing this role?

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6 R Lewis, Geiriadur Newydd y Gyfraith (Saesneg – Cymraeg) / The New Legal Dictionary (English – Welsh) (2003). This work was preceded by two other works by the same author: Termau Cyfraith / Legal Terms (1972) and Geiriadur y Gyfraith / The Legal Dictionary (1992).


8 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 1 July 2015).

11.8 Dr. Richard Crowe, the Welsh Government’s Chief Jurilinguist, points out that there is a greater difference between spoken and written Welsh than between spoken and written English. Formal written Welsh is much more of a separate language with its own syntax and vocabulary which varies little according to geography. By contrast the spoken language is much less formal and to speak it reveals where you are from. The Welsh text of legislation is produced in formal written Welsh.

11.9 It does appear 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. Many Welsh speakers would find it difficult if not impossible 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 users and legal professionals alike.

11.10 In this regard we draw 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.

Consultation question 11-2: Accordingly, we invite the views of consultees as to what, if anything, can be done to make Welsh legal terminology more accessible to legal professionals and to the public.

THE FORM OF BILINGUAL LEGISLATION

11.11 Acts and (and Measures) are produced in print in facing page format. Statutory instruments are produced in print in a two column format which sets out the English and Welsh texts side by side. Both formats give equal status to the texts in the two languages and facilitate a comparison of the two texts. However, at the instigation of the Welsh Government, the National Archives has produced a prototype system which enables the reader to choose the desired format: English only, Welsh only or English and Welsh side by side. Once this is made available to the public it will greatly facilitate the comparison of language texts.

11.12 The published text of the interpretation clause in each language includes a reference to the term in the other language version. As terms listed in alphabetical order will not appear in the same order in both languages, this further facilitates comparison of the two texts. This format has been adopted from the Canadian practice.

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10 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-ieithyddaeth-a-geiriaduraeth-gymraeg-in-Welsh-only (last visited 1 July 2015).

11 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” 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 Rhenntu Cartrefi yng Nghymru / Renting Homes in Wales (2013) Law Com No 337.

Consultation question 11-3: We invite the views of consultees as to whether the form or presentation of bilingual legislation could be improved and, if so, in what ways.

DRAFTING BILINGUAL LEGISLATION

11.13 The use of Welsh as a language of statutory drafting is a very recent development. As Professor Rawlings points out:

\[A\]t the time of devolution, the practical experience of legislative drafting in Welsh was virtually non-existent … it had been largely confined to ecclesiastical law in the guise of the Constitution of the Church in Wales.\(^{13}\)

11.14 Moreover, prior to the advent of devolution there was no experience in the United Kingdom of the making of legislation in bilingual form. However, the bilingual character of Welsh legislation is now central to the role of those charged with drafting it.

11.15 Section 156 of the Government of Wales Act 2006 provides:

156 English and Welsh texts of legislation

(1) The English and Welsh texts of–

(a) any Assembly Measure or Act of the Assembly which is in both English and Welsh when it is enacted, or

(b) any subordinate legislation which is in both English and Welsh when it is made,

are to be treated for all purposes as being of equal standing.

(2) 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.

(3) No order is to be made under subsection (2) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, the Assembly.

(4) An 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, is to be construed in accordance with any order under subsection (2); but this is subject to anything to the contrary contained in the Assembly Measure, Act of the Assembly or subordinate legislation.

(5) This section applies in relation to subordinate legislation made by the First Minister or the Counsel General as in relation to subordinate legislation made by the Welsh Ministers.

11.16 The Explanatory Notes to this Act state as follows:

This section confers equal validity on the English and Welsh texts of legislation (including Assembly Acts and Measures, and subordinate legislation) made bilingually.

It also contains a provision allowing the Welsh Ministers to provide by order (subject to the prior approval of the Assembly by formal resolution) that particular Welsh words and phrases in Assembly Measures or Acts, or in subordinate legislation made under them or by the Welsh Ministers, are to have the same meaning as the English words and phrases specified in relation to them in the order. The purpose of this provision is to ensure that the legislation has the same effect in both languages.14

11.17 The power conferred by section 156(2)–(5) has not been exercised to date. It has been suggested that it is not consistent with the principle of equal standing stated in section 156(1). It is difficult to see why it is necessary in order to ensure that the legislation has the same effect in both languages. It may be that the provision arises out of a concern not to alter the meaning of an expression which has been interpreted in a judicial decision on an earlier text in English only (for example, where Westminster legislation has been replaced by an Assembly Act).

11.18 Professor Watkin observes of section 156(1):

The Welsh text of such bilingual legislation was not to be a quaint addition to the authoritative English text for the convenience of those who wished to access the text in their native tongue, but a fully equivalent expression of the legislative intention.15

11.19 The National Assembly and the Welsh Government have, therefore, been required to develop their own approach to the preparation of legislation in two languages. In doing so they have sought guidance from other common law

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14 The name “Welsh Government” has now been legally adopted in section 4, Wales Act 2014 which received royal assent on 17 December 2014.

jurisdictions with such experience, most notably Canada.16

**Canada**

11.20 The bilingual legislation of Canada and its provinces was a major influence on Wales in the early days of devolution. At first sight, at least, there were parallels with the situation in Wales. However, as Professor Watkin points out, there were also important differences. In Canada, even in provinces which were predominantly English-speaking and aligned to the common law tradition, the context was one in which there were two languages – English and French – both of which had been widely used for legal purposes for centuries. “Each was located within a well-established legal tradition so that each had a legal register of its own and a tradition of legislative drafting in that tongue.” By contrast, in Wales there was simply no tradition of legislative drafting in the Welsh language.17 In addition, Canada is not merely bilingual; Federal laws have to be effective not only in common law provinces but also in Quebec which has a civil law system.

11.21 In Canada the Constitution Act 1867 requires federal laws to be enacted in both official languages, English and French, and provides that both versions shall be equally authentic.18 This is also a constitutional requirement in some provinces and a statutory requirement in others.19 The experience of the Federal Government which has sought to ensure that the French version of laws is effectively equal in authority and value to the English version is particularly instructive and is described in detail by Lortie and Bergeron, in an article in the Statute Law Review.20

11.22 In the 1980s the Canadian Department of Justice set up a working group with the task of proposing a way to ensure the equality of French and English versions of legislation.21 The Legislation Section of the Department of Justice had up to that point translated legislation drafted in English into French. There were concerns about the quality of the French versions. The working group examined various

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20 S Lortie and R C Bergeron, “Legislative Drafting and Language in Canada” (2007) 28(2) Statute Law Review 83. The account in the text is based on this article.

options to improve the quality of the French version and considered five different work methods.

1 Co-drafting, under which a law is jointly drafted by one French-speaking drafter and one English-speaking drafter.

2 Shared drafting, under which two drafters, one French-speaking and one English-speaking, would each write specific parts of the proposed law in his or her language and translation would be used to deliver the final product.

3 Alternate drafting, under which laws were drafted alternately in French and English, so that every second law would be written in French and translated into English.

4 The use of drafter-translator teams, whereby each drafter would be assigned a legal translator who would participate in every step of the process.

5 Drafting of both versions by the same drafter, who would be equally proficient in French and English but who would always have the support of language specialists.

11.23 The group concluded that there was no easy solution and recommended that they all be tried over a period of two years.

11.24 Lortie and Bergeron state that the option of having the same jurist draft both versions of a law was abandoned due to a lack of sufficiently qualified personnel. The shared drafting and alternate drafting methods were used for several years after 1976 until the Department of Justice was able to recruit enough French-speaking and English-speaking drafters to move to co-drafting, the method which has found favour over the others and which has been applied since 1978. Co-drafting was re-evaluated in 1996 by the Legislative Services Branch Committee on Drafting and Language Services. It concluded that co-drafting continued to offer the most efficient means of ensuring that the principle of bilingualism was implemented.

11.25 This process of co-drafting adopted by the Canadian Federal Government is described by Lortie and Bergeron.

1 At least two drafters are assigned to each file, with one responsible for each language version. One drafter is given primary responsibility for communicating with the instructing officers of the sponsoring Department and the Legislation and House Planning Secretariat and also for arranging meetings and distributing drafts.


The drafters meet at the beginning of their work on the file to discuss how they plan to proceed in terms of their work schedule, the structure of the Bill and their particular approach.

At their first meeting with the instructing officers, the drafters ensure that the officers are able to work with them in both languages and are aware of the need for instructions in both official languages.

Meetings with instructing officers are scheduled so that both drafters and instructing officers can attend. Meetings with a single drafter are held only exceptionally.

Drafters work together closely throughout the drafting process, including discussing the structure of the Bill and sharing the results of any research they conduct.

Drafters read each other’s draft to ensure consistency between the two versions.

The work method employed in Ottawa also includes the following features:

Drafters receive the support of specialists in legal language known as jurilinguists, whose chief role is to help drafters achieve the highest quality of French or English possible when drafting Bills.

Editing services are provided to drafters. Editors review each draft for clarity, consistency of language and the logical expression of ideas. They also ensure conformity with the specialized rules and conventions that govern the drafting and presentation of Bills.

The Department of Justice has created a number of work instruments:

(a) It has published an official guide to the drafting of the French version of laws which contains the results of the jurilinguists’ research on recurring language-related problems (Guide federal de jurilinguistique francaise).

(b) It has published an equivalent guide to the drafting of the English version (Legistics).

(c) It has also produced a bilingual manual dealing with the legal and technical aspect of legislative drafting (Legislation Deskbook / Manuel de legistique).

(d) Drafters also receive from the head of the Legislation Section linguistic guidelines (Legislative Drafting Conventions) and directives on the drafting of Bills and regulations (Notes to Drafters).

A position of Assistant Chief Legislative Counsel has been created. When the Chief Legislative Counsel is a native French speaker his assistant is a native English speaker and conversely.
The opportunity has been taken, when reviewing earlier legislation, to improve the quality of the French version. In this way there has been a steady improvement in the quality of the French versions.

A formal training programme in legislative drafting in French has been established.

A Cabinet Directive on Law-Making, issued in March 1999, emphasised that Bills and regulations must be prepared in both official languages and that it was not acceptable for one version to be simply a translation of the other. For this reason sponsoring departments and agencies are required to ensure that they had the capability to develop policy, consult and instruct legislative drafters in both official languages.24

In 2001 a group from Wales undertook a study visit to Canada in an attempt to learn from the Canadian experience.25 The study group provided the following description of co-drafting as employed by the Federal Government. Once a recommendation for new legislation is approved a file is assigned to two drafters. Members of the relevant department, usually a lawyer and a policy official, 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. The structure of the Bill will be decided by both drafters and the policy department. Both language versions use the same sections and sub-sections.26 In this consultation paper we refer to this method of co-drafting as “the full co-drafting method”.

The study group also reported on the Federal practice in relation to regulations (secondary legislation). Instructing departments usually drafted their own regulations, which were then checked by the Regulation Unit, under the First Legislative Counsel, for conformity with the enabling statute and the quality of the drafting. Some regulations, they found, were co-drafted but some others were translated.27

The study group also described the rather different process of co-drafting which it

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25 The report, Office of the Counsel General, Bilingual Lawmaking and Justice: A Report on the Lessons for Wales from the Canadian Experience of Bilingualism (2001). The members of the working party were Mr. Justice Thomas, Senior Presiding Judge of the Wales and Chester Circuit, HHJ Roderick Evans QC, Recorder of Cardiff, Winston Roddick QC, Counsel General to the National Assembly of Wales, Nerys Arch, Senior Assembly Counsel, National Assembly of Wales, Gwyn Griffiths, Senior Assembly Counsel and Catrin Huws, Assembly Counsel.


observed in New Brunswick. There, a proposal is brought forward in English from the relevant department. Both drafting lawyers attend meetings with the instructing department. These meetings are usually held in English. The lead drafter then prepares a first draft and shares it with the other lawyer who comments on it and prepares a draft in the other language. Each lawyer therefore works on an individual document but there is a great deal of continuous communication between both lawyers throughout the process. The draft is then sent back and forth between the drafters and the instructing department for amendment. In this consultation paper we refer to this method of co-drafting as “the New Brunswick method”.

Hong Kong

11.29 The former Crown Colony of Hong Kong is now a Special Administrative Region within the People’s Republic of China but it retains its common law legal system. The Official Languages Ordinance of 1974 provided for equality of use of the English and Chinese languages and declared both to be official languages for communication between the government or any public officer and members of the public. However, the Ordinance provided that “every Ordinance shall be enacted and published in the English Language”.

11.30 More recently, in preparation for the return of Hong Kong to China, a Joint Declaration by China and the United Kingdom provided for the continuation of laws and provided that both Chinese and English may be used in government administration and in the courts of Hong Kong. Pursuant to the Joint Declaration, China passed a constitution for the Hong Kong Special Administrative Region (“the Basic Law”), article 9 of which provides:

28 New Brunswick is officially a bilingual province with a language profile which resembles that of Wales (English 70%, French 30%). However, as Dr. Richard Crowe, the Chief Jurilinguist in the Welsh Government points out, the resemblance can be misleading because French is an official language in Canada in a way which is not true of Welsh in the United Kingdom. In addition, French is a world language and speakers of French in New Brunswick can avail themselves of the resources available to every francophone. By comparison, Welsh is in much more of a minority situation in Wales.


31 Chinese is not a single language but a family of spoken languages and a written language based on pictograph characters. These characters have no direct spoken equivalents. The spoken language of public administration, including the courts, in Hong Kong is the local version of Cantonese. Accordingly, references in the text to “Chinese” may, depending on the context, refer to written Chinese or to the particular form of oral Chinese commonly used in Hong Kong.

32 Official Languages Ordinance, Laws of Hong Kong, Ch. 5, (1974).
In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.\textsuperscript{33}

11.31 In response to the Basic Law, the Official Languages Ordinance and the Interpretation and General Clauses Ordinance were substantially amended in 1987 to end the monopoly of English in legislation. The Official Languages Ordinance requires that both new principal legislation and amendments to ordinances that are already in bilingual form shall be drafted in both languages. These amendments came into force in 1989.\textsuperscript{34}

11.32 The Interpretation and General Clauses Ordinance addresses the legal implications of bilingual legislation. It provides that the Chinese and English language texts shall be equally authentic, that the provisions of an Ordinance are presumed to have the same meaning in each authentic text and that differences in meaning between the two texts shall be resolved by ascertaining the meaning which best reconciles the text, having regard to the object and purposes of the Ordinance.\textsuperscript{35}

11.33 Since 1987 all new legislation has been drafted and enacted in both Chinese and English and subsidiary legislation has been dealt with in a similar way. In addition, the Law Drafting Division of the Legal Department began in 1987 and completed in May 1997 a programme of translating all existing legislation originally enacted in English into Chinese. This has involved the translation of over 22,000 pages of legislation. A Bilingual Laws Advisory Committee was established to review the translation of existing legislation enacted only in English. In this way Hong Kong has produced a bilingual statute book.\textsuperscript{36}

11.34 Tony Yen identifies two main difficulties encountered in bilingual drafting in Hong Kong. The first is the lack of equivalent Chinese expressions to convey English common law expressions. This has sometimes compelled a bilingual drafter and law translator to coin a new Chinese expression. He states that these newly

\textsuperscript{33} Article 9, Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1990), 29 ILM 1519 (1990).

\textsuperscript{34} Official Languages (Amendment) Ordinance 1978 (No. 17 of 1978) (HK); Interpretation and General Clauses (Amendment) Ordinance (No. 18 of 1987)(HK); Y Zhao, “Hong Kong: The Journey to a Bilingual Legal System” (1997) 19 Loyola of Los Angeles International and Comparative Law Journal 293 at 304.

\textsuperscript{35} Official Languages Ordinance, Laws of Hong Kong, Ch. 5, paras. 10B(1), 10B(3); Y Zhao, “Hong Kong: The Journey to a Bilingual Legal System” (1997) 19 Loyola of Los Angeles International and Comparative Law Journal 293 at 305; T Yen, “Bilingual Drafting in Hong Kong” [August 2010] Journal of the Commonwealth Association of Legislative Counsel at 67. D Morris, “Multilingualism and Legislation: Dominance or Equality?” (1999) 20(1) Statute Law Review 74 identifies certain practical difficulties which can arise in bilateral or multilingual legislation if one language is given a superior status for the purpose of interpretation.
coined legal expressions have gradually crept into everyday usage in the local Chinese speaking community, especially among lawyers, with the result that some have now become accepted Chinese expressions. In this way, he considers, the problem has now been largely resolved. The second is the complex sentence structure of most of the English language statutory provisions. This has proved to be a greater problem because enormous differences exist between English and Chinese in grammar, syntax, style and structure. As a result, the rendering of complex English sentences into Chinese requires restructuring in the Chinese language in order to avoid an incomprehensible result. He states that many of the problems of bilingual legislation were more manifest in the preparation of the Chinese texts of pre-1987 laws because translators were confronted with old laws that were not drafted in a plain modern style.37

11.35 In drafting new bilingual laws the Law Drafting Division of the Legal Department first prepares the English text. On the basis of this text the Chinese text is then prepared. This process, he explains, differs from translating the existing version because, when difficulties are experienced in preparing the Chinese text, the English version can be varied to accommodate the Chinese version and to ensure a uniform meaning in both languages. It has been their experience that if the English text is drafted in plain language, preparation of the Chinese text is much easier. Yuhong Zhao states that, at the time of writing (1997) parallel drafting in both English and Chinese was not yet common practice because the policy branches invariably prepared the drafting instructions in English. As a result, legislative drafters preferred to consider the English drafts first. In addition, most of the more experienced draftsmen were not bilingual lawyers. These two factors rendered parallel drafting impracticable.38

11.36 In the early 1990s legislative counsel in Hong Kong initiated a language re-engineering exercise which was a gradual movement towards plain legal drafting. As a result the preparation of Chinese texts has been made much easier, with the result that the Chinese texts of more recent laws are also found easier to read


37 T Yen, “Bilingual Drafting in Hong Kong” [August 2010] Journal of the Commonwealth Association of Legislative Counsel at 68. He provides what he describes as a notorious example of unintelligible translation. The original English text of section 11, Evidence Ordinance of the laws of Hong Kong contains 354 words, 32 commas and only one full stop. The resultant Chinese translation is, he says, also unintelligible.

and understand. Tony Yen observes:

It is clear that the traditional wordy, cumbrous and impersonal nature of statutory provisions and legal instruments has resulted in Hong Kong statute law being less effective. It has also hindered the construction of an effective bilingual legal system. With the language re-engineering exercise ... and with the writing of Hong Kong laws in a plainer and more modern manner, those laws are now more accessible to the Hong Kong public than they were before. This helps enhance the public's awareness of their rights and obligations and thus helps to promote the rule of law in Hong Kong.

11.37 The Bilingual Laws Information System (BLIS) is a searchable electronic database of the laws of Hong Kong, including all the ordinances and subsidiary legislation of Hong Kong which is currently in force, as well as earlier versions (including repealed legislation) since 30 June 1997.

11.38 A by-product of the Law Drafting Division's bilingual drafting and translation of existing ordinances has been the production of an English – Chinese Glossary of legal terms which in its second edition contained over 19,000 terms.

THE DEVELOPING PRACTICE IN DRAFTING BILINGUAL WELSH LEGISLATION

11.39 In the first phase of devolution the National Assembly had no powers to make primary legislation. With regard to subordinate legislation section 56(4), Government of Wales Act 1998 provided:

The subordinate legislation procedures must include provision for securing that a draft of the statutory instrument containing any Assembly general subordinate legislation may be approved by the Assembly only if the draft is in both English and Welsh unless in the particular circumstances it is inappropriate or not reasonably practicable for the draft to be in both languages.

11.40 Section 122(1) of the Government of Wales Act 1998 provided that the English and Welsh texts of any subordinate legislation made by the Assembly which was in both English and Welsh when made should be treated for all purposes as being of equal standing.

See D Berry, “The effect of poorly written legislation in a bilingual legal system” at 89, available here http://www.opc.gov.au/CALC/docs/Loophole_papers/Berry_Mar2007.pdf (last visited 5 June 2015). Berry has proposed that the English versions of older Hong Kong statutes and regulations should be re-written in plain, modern language that would be much easier for Anglophone users to read, understand and use (at p 91).


The study party which visited Canada in 2001 described the method by which the Welsh language version of legislation was produced at that time. It explained that it was drafted by a lawyer working alone in English and then translated into Welsh. It was then checked by a bilingual lawyer. No particular training was provided in drafting or in language.

The study party considered the model of co-drafting as applied in Ottawa to be the ideal because all drafters were bilingual and all instructions were bilingual. However, it considered the methods employed in New Brunswick, where instructions and meetings were usually in English, to be more achievable given the conditions applying in Wales. Accordingly, it recommended that a start be made on the co-drafting of National Assembly legislation and that this be done initially by means of pilot projects, co-drafting two or three instruments.43

The methodology which was then developed in Wales during this first phase of devolution by the Office of the Counsel General, which carried out legal drafting for the Assembly Government, is described by Keith Bush QC, who was then Assembly Legislative Counsel.44 It adopted a model under which the original text was not finalised in advance of the subsidiary one. Where an idea was expressed in the former in a way which could not easily and naturally be expressed in the latter, this approach permitted the language of the former to be adjusted so as to facilitate an acceptable translation. A “Welsh-checking” process was also instituted, where a bilingual lawyer other than the original drafter read through both the English and Welsh text to ensure legal equivalence. This process remains in place for subordinate legislation, and is now largely undertaken by a bilingual legal editor.

Keith Bush QC explains that a number of practical reasons prevented a more ambitious approach under which a much wider divergence between the structure and form of the two texts might be permitted. First, there were limited numbers of bilingual lawyers with a sufficient command of both languages to be able to understand what can and cannot be expressed easily and naturally in each. Secondly, there was a lack of bilingual administrators able to understand, at least in general, the linguistic implications of different approaches. Thirdly, because the powers of the National Assembly were at that time limited to making secondary legislation, the terminology, conceptual framework and often the basic content of the instrument were pre-determined by the mono-lingual English statute from which it arose. He expressed the belief that were the National Assembly to acquire primary legislative powers, Welsh devolved primary legislation and secondary legislation flowing from it could both be the product of co-drafting and would take on a linguistic character much more distinctive from that produced at Westminster, as a result of the interplay between the English and Welsh texts.

The context of legislative drafting in Wales has changed very significantly since the National Assembly has acquired primary legislative powers. The Office of the Legislative Counsel (“OLC”) now bears the considerable burden of overseeing

43 Office of the Counsel General, Bilingual Lawmaking and Justice: A Report on the Lessons for Wales from the Canadian Experience of Bilingualism (2001) 15.4.1, 15.4.3.
the production of drafts of both primary and secondary legislation in two languages. However, the developments in drafting procedure predicted by Keith Bush QC have not taken place.

11.46 The dominance of the English language within the Welsh civil service, where the proportion of Welsh speakers generally reflects the position in the nation at large, means that legislative proposals usually start their life in the English language. With the exception of issues relating to the Welsh language itself, the vast majority of initiatives employ concepts formulated by politicians, officials or interest groups in English.

11.47 The current system for the production of Government Bills and amendments to Bills is for initial drafts to be produced in one language and translated into the other. The initial text is usually in English. OLC is responsible for ensuring that the Welsh and English texts are legally equivalent. The Welsh text of a Bill or an amendment is always produced at a stage before both the English and Welsh texts are finally settled. Translators and OLC drafters sometimes identify ways in which the English text could be altered to improve the linguistic quality of the Welsh. The production of the Welsh text often highlights problems with the English which would not otherwise have been identified. OLC drafters and the legislative translators then work together to resolve the issues, changing one or both texts in an attempt to produce clearly expressed English and Welsh, which respects the natural idiom of both and achieves the same legal effect. Occasionally, OLC drafters produce text in both languages – usually when late changes are made to Bills or amendments before publication. These are then checked from a linguistic standpoint by the legislative translators. Bilingual drafters will also raise any Welsh terminology issues that occur to them with the legislative translators at any stage in the process.

11.48 Dr. Crowe observes that the fact that policy is first formulated in the English language makes the full co-drafting model difficult if not impossible to employ and that it is, therefore, not surprising that no complete Bills have ever been co-drafted or drafted in Welsh first and translated into English. Although public consultation is bilingual, responses in Welsh are translated into English, for the benefit of the non-Welsh-speaking officials. The policy instructions are drafted in English, as are the legal instructions. In both cases English is the common working language. In discussions with lawyers and policy officials, English is likely to be the common language once again. The use of Welsh in the pre-drafting stage would either require every internal meeting and document to be bilingual or would require certain Bill projects to be resourced entirely by Welsh speakers. Most of the conceptual work will have taken place in English before it reaches the drafters. If the drafters were to decide to “co-draft”, the lead drafter in Welsh would have to translate those concepts into Welsh and do so within the legislative framework of a statute book which is for the most part in English only. In Dr. Crowe’s view, it is hard to imagine how a lead drafter in Welsh could, under these circumstances, express a concept without any reference to the original

45 11.9% of officials in the Welsh Government have described themselves as being able to read Welsh fluently, and 7% as being able to write it.
Furthermore, many laws made by the National Assembly or the Welsh Government are made in order to be part of a larger legal framework. This may be because it amends an existing primary Act or because it is secondary legislation made pursuant to a primary Act. As C F Huws points out:

> Because the wording of the law – in English at least – must be consistent with the terminology used within the existing law, this then constrains the possible wording that may be used in the Welsh version, and compels choices to be made at the drafting stage regarding the intended meaning.\[^{47}\]

**Discussion**

In our view the principal objectives of bilingual drafting should be:

1. fidelity to the intention of the promoters of the Bill;
2. consistency of meaning between the different language texts of the same provision;
3. clarity of communication to two audiences;
4. efficiency in the maintenance of a bilingual legal order; and
5. achieving effective equality between the two languages.

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

> Our vision of the essence of co-drafting is that it is any technique for drafting in more than one language which seeks to assure to the text in each language sufficient autonomy to protect the natural forms and traditions of that language. The ideal to be achieved is a text in each language which conveys the same meaning as the other but which readers in each language perceive both to be equally natural and familiar use of language. The desirability of striving towards this aim is not based on sentiment alone. Anyone familiar with the way in which official documents were, and often still are, translated from English into Welsh will understand that the product, rigidly yoked to the original, may be so unnatural in its mode of expression that it becomes unintelligible to the ordinary reader.\[^{48}\]

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

\[^{46}\] Information provided by Dr. Richard Crowe.
We turn to consider how these objectives can best be achieved.

A CENTRALISED DRAFTING SERVICE

There already exists a centralised drafting service within the Welsh Government. All Assembly Bills promoted by the Welsh Government and Government amendments to all Bills are drafted by Office of the Legislative Counsel (OLC). Opposition Bills that gain support from the Government are usually substantially amended by the Government. Sometimes amendments drafted by the OLC are handed out by the Government to Members of the Assembly who are not members of the Government. Statutory instruments which amend primary legislation and the vast majority of other statutory instruments are 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 OLC. The OLC 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 OLC for approval.

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

METHODS OF DRAFTING

The study party which visited Canada in 2001 concluded that the objectives of clarity and consistency of meaning are far more likely to be achieved by a method of co-drafting, whether it is the full co-drafting method or the New Brunswick method, than by the translation of a final text prepared in one language or by one person drafting in two languages. Such a process of co-drafting ensures that equal care is devoted to both language versions and is more likely to promote consistency. As there are two lawyers working on each piece of legislation, they are more likely to identify gaps and problems and identify how to solve them. They adopt the solution most appropriate to each language draft.49

By contrast, simply translating legislation drafted and finalised in one language into another cannot fully achieve the aim of equality between the two texts.

Different languages have their different structures and rhythms and a translation cannot avoid being influenced by those of the source language. If exceptional faithfulness to the material being translated is demanded, as in the case of legislation, the influence is all the greater. The detriment to the language which is being forced into the mould of the other is particularly marked if, as in the case of translation from English into Welsh, there are very large differences between the syntaxes of the two languages.50

11.56 What is required therefore is a method of preparing legislation involving an iterative process before either language text is finalised. The Canadian experience and the Welsh experience to date demonstrate that there is more than one way of satisfying this basic requirement.

At its simplest the technique [of co-drafting] requires no more than that the original text should not be finalised in advance of the subsidiary one. Where an idea is expressed in the former in a way which cannot easily and naturally be expressed in the latter, then the language of the former can be adjusted so as to facilitate an acceptable translation.51

11.57 While not strictly a process of co-drafting, the method currently employed by the OLC enjoys many of its advantages. In particular, it should result in a bilingual text in which one language version has the capacity to cast light on the meaning of the other. The expression of legal concepts simultaneously in two languages can result in the removal of ambiguity from each.52 However, more than this, it is likely to assist in avoiding ambiguity in the first place.

Where a piece of legislation is being prepared bilingually, it is far more likely that ambiguities in one of the language versions will be spotted and remedied as a result of comparing that version with the text in the other language. It is not simply the case that bilingual legislation allows for the resolution of ambiguity by calling in aid the other language version; it is also the case that the careful preparation of texts in more than one language in itself decreases the risk of such ambiguities in the first place. Preparing legislation bilingually does indeed pose challenges – but it also confers benefits.53

11.58 Furthermore, it is likely that a method of co-drafting would be far more labour intensive and time-consuming than the method currently employed.54

54 See above.
Accordingly we seek the views of consultees on the following questions.

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

Consultation question 11-7: Would there be any advantage in the Welsh Government’s seeking, as a long term objective, to move from its current model to a system of co-drafting?

JURILINGUISTS AND EDITORS

In Canada drafters receive the support of jurilinguists who are specialists in legal language. They are typically employed as linguists first, 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.55

Lortie and Bergeron see the role of professional legislative editors as key to ensuring consistent quality. They describe their role as follows:

In Canada, federal editors have a threefold task: editing laws while in Bill form, preparing Acts for printing and updating consolidated versions of the Acts. They verify the accuracy of cross-references, check historical precedents and citations, and ensure that the technical presentation of a Bill or regulation conforms to accepted formats and official standards. Legislative editors frequently redraft provisions to assist drafters. They control the printing of the manuscript copies of draft Bills in preparation for the introduction of the final version in Parliament. Legislative editors determine the appropriate wording of amending clauses and advise drafters on the format of schedules, the standard wording of particular expressions, the formulation of coming into force and transitional provisions, and technical matters. Finally, the editors update master copies of all federal Acts, including indexes of amendments.56

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

SPECIAL TOOLS

The work instruments created by the Department of Justice in Canada to assist in bilingual drafting are described above. The study group reported the use of desk instructions, precedents and notes to drafters, the last of which are eventually


incorporated into a deskbook of advice to drafters.\textsuperscript{57}

11.63 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

\begin{itemize}
  \item the collection of the knowledge accumulated by legislative draftsmen in an authoritative guide to the drafting of legislation;
  \item 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;\textsuperscript{58}
\end{itemize}

11.64 The Welsh Government translation service has already produced an English-Welsh legislative vocabulary and legislative translation style guide for use in the production of Welsh legislation.\textsuperscript{59} OLC have comprehensive drafting guidance which we consider in chapter 4.

Consultation question 11-9: We invite the views of consultees as to whether any other working tools would be of assistance in the production of bilingual legislation in Wales.

\textsuperscript{57} Bilingual Lawmaking and Justice (2001) 10.2.6, 15.4.

\textsuperscript{58} S Lortie and R C Bergeron, “Legislative Drafting and Language in Canada” (2007) 28(2) Statute Law Review 83

CHAPTER 12
THE INTERPRETATION OF BILINGUAL LEGISLATION

INTRODUCTION

12.1 A system in which laws are made in two languages which are to be treated for all purposes as of equal standing has created novel challenges for those required to interpret and apply them.¹ In particular, the question arises as to what are the appropriate means of determining the meaning of texts in different languages.

12.2 In this section we address the way in which bilingual and multilingual texts are interpreted in international law, in EU law, in Canada and in Hong Kong before considering possible approaches which may be adopted in Wales.

INTERNATIONAL LAW

12.3 The Vienna Convention on the Law of Treaties, to which 114 states are currently parties, includes detailed provisions on the interpretation of treaties.² These provisions may be taken as declaratory of customary international law. Article 31 provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(4) provides that a special meaning shall be given to a term if it is established that the parties so intended. Article 32 then provides that recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

12.4 Article 33 makes specific provision for the interpretation of treaties authenticated in two or more languages. It provides:

1. 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.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

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

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts having regard to the object and purpose of the treaty, shall be adopted.

12.5 Article 33(3) sets out the basic rule which is intended to reflect the fact that there is a single treaty with a single set of terms. Sir Ian Sinclair draws attention to the difficulty of ensuring that the different language texts of a plurilingual treaty are in concordance with each other. He cites the following statement by the International Law Commission:

Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event, the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty.

12.6 However, the International Law Commission went on to emphasise that:

[T]he 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.

12.7 Kuner sees the presumption in article 33(3) as a rule of convenience designed to reconcile the practice of providing authentic versions of treaties in as many as five or six languages with the general unwillingness to interpret treaties in a truly multilingual fashion. He argues that the presumption makes it unnecessary to compare different authentic language versions on a routine basis and hinders the objective of arriving at a correct evaluation of the intention of the parties as expressed in the treaty because discrepancies between language versions are likely to be the rule rather than the exception. However, it may be that this objection is over-stated since, as Kuner himself points out, the presumption is rebuttable and ceases to apply when a difference in meaning between different language versions has been alleged. In those circumstances, a comparison of

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the different authentic language texts becomes essential. To require the examination of all authentic texts in all cases is, perhaps, a counsel of perfection and those interpreting the text may well not have the means to do so. However, what can be said is that in cases where an ambiguity is apparent in one authentic language text, the presumption should not operate as a disincentive to examine other authentic language texts in order to identify the true intention of the drafter.

12.8 Article 33(4) is intended to deal with situations in which the application of the standard rules for the interpretation of treaties cannot resolve differences between language texts all of which are equally authentic and where there is no provision as to which is to prevail. In these circumstances a number of possible outcomes have to be excluded as unintended and unacceptable: that the provision be given the most restrictive meaning or that which is the lowest common denominator of all the language texts or that different states may rely on different language texts. The conclusion that the provision is void for uncertainty should be arrived at only in extreme circumstances.\(^7\) The residual rule applied under the Vienna Convention is that the meaning which best reconciles the texts having regard to the object and purpose of the treaty is to prevail.\(^8\) However, both Sinclair and Aust argue that in such cases it will often be appropriate to give precedence to the language version or versions in which the treaty provision was originally drafted. Sinclair, referring to the \textit{Young Loan} arbitration, states:\(^9\)

Where there is a difference of meaning between expressions used in several authentic texts, some weight ought to be given to the original language text on which the negotiators agreed if it is apparent from the \textit{travaux preparatoires} ... that other language versions are mere translations. The jurisprudence of the International Court of Justice in interpreting Charter provisions supports the view that account must be taken, by way of priority, of the language version or versions in which the disputed provision of the treaty was originally drafted. Automatic and unthinking reliance on the principle of equal authenticity of texts can lead to a failure to give effect to the common intentions of the parties where it is or becomes apparent from the \textit{travaux preparatoires} of the treaty that a disputed provision was originally drafted in a particular language version and that the other language versions are no more than translations; in such a case, it is submitted that ... there should be a presumption in favour of that original text, the strength of the presumption depending upon the circumstances in which the various language versions of the


\(^8\) A Aust, by way of example, refers to Case C-327/91 France v. Commission [1994] ECR I-3641 (discussed below) where the European Court of Justice interpreted Article 228 of the Treaty of Rome by considering the authentic English, Danish, Dutch, French and German texts. Compare with Schilling below.

\(^9\) \textit{Young Loan Arbitration} 59 ILR 495.
THE APPROACH OF COURTS IN THIS JURISDICTION TO THE INTERPRETATION OF PLURILINGUAL TREATIES

12.9 Although the bilingual legislation which is produced by the National Assembly and the Welsh Government is the first of its kind to be produced in this jurisdiction, our courts have a long experience of interpreting international instruments. Here, they have shown a willingness to refer to authentic foreign language texts. Thus in Post Office v. Estuary Radio, a case concerning the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 as implemented by the Territorial Waters Order in Council, 1964, the Court of Appeal considered, obiter, that where there was an ambiguity in the Order in Council it would be permissible to have recourse to the Convention in its various authentic foreign language texts.

12.10 However, subsequent cases reveal a great variety of judicial opinion as to the approach to be adopted.

12.11 In James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd, the House of Lords considered a provision in the Convention for the International Carriage of Goods by Road (CMR) as implemented by the Carriage of Goods by Road Act 1965. The Convention was in two languages, English and French, each text being equally authentic. The English text alone was implemented by the United Kingdom statute. Different views were expressed as to the correct approach to interpretation. Lord Wilberforce rejected the notion (although it had not in fact been argued) that only the English text should be looked at. In his view the correct approach was to interpret the English text in a normal manner appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or English legal precedent. He considered that it was perfectly legitimate to look for assistance to the French text and that this was permissible even if the English text was not ambiguous. He continued:

… I would not lay down rules as to the manner in which reference to the French text is to be made. It was complained - by reference to the use of the French text made by Roskill LJ and Lawton LJ – that there was no evidence as to the meaning of the French text, and that the


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

Lords Justices were not entitled to use their own knowledge of the language. There may certainly be cases when evidence is required to find the exact meaning of a word or a phrase; there may be other cases when even an untutored eye can see the crucial point (cf. Corocraft Ltd. v. Pan American Airways Inc (insertion of "and" in the English text)). There may be cases again where a simple reference to a good dictionary will supply the key (see per Kerr J in Fothergill v. Monarch Airlines Ltd, on "avarie"). In a case, such as I think the present is, when one is dealing with a nuanced expression, a dictionary will not assist and reference to an expert might also be unhelpful, for the expert would have to direct his evidence to a two-text situation rather than simply to the meaning of words in his own language, so that he would be in the same difficulty as the court. But I can see nothing illegitimate in the court looking at the two texts and reaching the conclusion that both are expressed in general or perhaps imprecise terms, so as to justify rejection of a narrow meaning.

12.12 Lord Salmon considered that if in a statute which is based on an international convention expressed in two different languages there is some doubt as to its meaning in one language, it is permissible to seek help from the way in which it is expressed in the other. Lord Edmund-Davies, with whom Lord Fraser of Tulybelton entirely agreed, had misgivings about the court drawing on its own knowledge of a foreign language in arriving at important conclusions. However, he recognised that his misgivings may be ill-founded and he was not, therefore, “disposed to differ from the conclusion of Lord Wilberforce regarding the propriety of adverting to the French text”. However, in his view this was permissible only if the English version was ambiguous, which he considered it was not.

12.13 It appears therefore that Lord Wilberforce may have been alone in concluding that recourse may be made to an authentic foreign language text in the absence of ambiguity. In an illuminating analysis of this decision Professor Watkin distinguishes the nature of the ambiguity required by Lord Edmund-Davies as a pre-condition to referring to the foreign language text from the concept of “latent ambiguity” referred to by Lawton LJ in the Court of Appeal in Buchanan v. Babco.

... Lord Edmund-Davies would require that an ambiguity be identified before any recourse be had to a second language as an aid to interpretation. Lawton LJ on the other hand was aware that, once there was flexibility with regard to the interpretation of a word or phrase, an ambiguity might not be identified other than by examining

18 James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd [1978] AC 141 at [166-7].
12.14 In *Fothergill v. Monarch Airlines Ltd.* the House of Lords returned to the issue of how the court ought to ascertain the meaning of a word or an expression in a foreign language. The Carriage by Air Act 1961 implemented the Warsaw Convention in this jurisdiction. Schedule 1 to the Act set out both the English and the French texts of the Convention and section 1(2) provided that if there were any inconsistencies between the texts the French text was to prevail. Lord Wilberforce observed:

...[A]s in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*, I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it: this is particularly true of the French or Latin languages, so long languages of our courts. There is no reason why he should not consult a dictionary if the word is such that a dictionary can reveal its significance: often of course it may substitute one doubt for another. (In Buchanan's case I was perhaps too optimistic in thinking that a simple reference to a dictionary could supply the key to the meaning of "avarie." ) In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and, if they think fit, they can supplement his resources with other material - other dictionaries, other books of reference, text-books and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment.

12.15 Lord Fraser of Tulleybelton agreed with Lord Wilberforce that precise rules were inappropriate on how reference should be made to foreign language texts. A rule prohibiting a judge from referring to foreign language texts without evidence from experts would be unreasonably restrictive. When a judge's personal knowledge of the foreign language is inadequate for the task he should rely on dictionaries or, if they are not sufficient, on evidence from qualified experts as seems appropriate in the particular case.

12.16 Lord Scarman considered that the French text should be approached as follows:

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First, the problem of the French text. Being scheduled to the statute, it is part of our law. Further, in the event of inconsistency, it shall, as a matter of law, prevail over the English text. It is, therefore, the duty of the court to have regard to it. We may not take refuge in our adversarial process, paying regard only to the English text, unless and until one or other of the parties leads evidence to establish an inconsistency with the French. We are to take judicial notice of the French. We have to form a view as to its meaning. Given our insular isolation from foreign languages, even French, and being unable to assume that all English judges are familiar with the language, how is the court to do its duty? First, the court must have recourse to the English text. It is, after all, the meaning which Parliament believes the French to have. It is an enacted translation, though not binding in law because Parliament has recognised the possibility of inconsistency and has laid down how that difficulty is to be resolved. Secondly, as with the English language, so also with the French, the court may have recourse to dictionaries in its search for a meaning. Thirdly, the court may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue. The same problem arises frequently with the English language, though here the court relies on its own knowledge of the language supplemented by dictionaries or other written evidence of usage. At the end of the day, the court, applying legal principles of interpretation, selects the meaning which it believes the law requires.25

12.17 Lord Roskill considered that it was likely that a court would need extrinsic help in construing a foreign text. Like Lord Wilberforce he declined to lay down a precise rule as to where such help should be found. If the judge has a knowledge of the foreign language it would be pedantic and perhaps intellectually impossible to deny him the right to use it. However, such a judge would be unlikely to rely solely on his own knowledge of the language and can have regard, inter alia, to dictionaries, commentaries and foreign judicial decisions. An expert could give great assistance as to the true meaning of the foreign language text.26

12.18 Subsequently, however, in Samick Lines Co. Ltd. v. Owners of the Antonis P Lemos Lord Brandon, with whom Lord Scarman, Lord Diplock, Lord Roskill and Lord Templeman agreed, considered that, while it was open to the court to refer to the French text of the Brussels Convention for the Unification of certain Rules relating to the Arrest of Seagoing Ships, 1952, in an attempt to resolve an ambiguity as to the meaning of the expression “arising out of”, there was no evidence to show what meaning, as a matter of French law, the expression “ayant l’une des causes” had.27 He considered that it might well be a term of art in French law, in which case it would be impossible to ascertain its meaning

without expert evidence from a qualified French lawyer as to what that meaning was. In the absence of such evidence he did not consider that any assistance could be derived from a comparative examination of the French text.28

THE APPROACH OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

12.19 The European Union currently legislates in 23 languages and all language versions of a piece of legislation are, in the words of the European Court of Justice ("the Court"), "equally authentic".29 The Court has accordingly inferred that "[a]n interpretation of a provision of Community law thus involves a comparison of the different language versions".30 It is also axiomatic that 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.31

12.20 The interpretative methods used by the Court are, however, much less literal than is customary in the courts of the United Kingdom:

… every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof….32

12.21 Even where language versions are uniform, the meaning of a piece of legislation may be more influenced by the Court’s consideration of the legislative purpose underlying the legislation than the precise meaning of the words used.33 Some of the Court’s case law appears to eschew linguistic comparison as an aid to interpretation. In one case the Court said

28 *Samick Lines Co. Ltd. v. Owners of the Antonis P Lemos* [1985] AC 711 at [731].

29 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; a consolidated version can be found at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429866560963&uri=CELEX:01958R0001-20130701 (last visited 5 June 2015). The languages are Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish. 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.

30 Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415 at [18].

31 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”.

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

33 An example quoted by A Arnull, *The European Union and its Court of Justice* (2nd ed 2006) p 613 is the decision in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 that national courts did not have jurisdiction to hold acts of Community institutions invalid, despite the terms of the then art 177 of the EEC Treaty which gave national courts the power, but did not in most cases impose on them a duty, to refer questions of such validity to the European Court.
No argument can be drawn either from any linguistic divergences between the various language versions, or from the multiplicity of the verbs used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective.\footnote{Case 61/72 \textit{PPW Internationaal v Hoofdproduktschap voor Akkerbouwprodukten} [1973] ECR 301.}

12.22 Divergence between language versions is sometimes treated as fortifying the case for a purposive interpretation.\footnote{L M Solan, “The interpretation of multilingual statutes by the European Court of Justice” (2009) 34 \textit{Brooklyn Journal of International Law} 277 contrasts the US and United Kingdom approach of treating the meaning of the words used as the best indicator of the legislative purpose with the European Court’s consideration of an enactment’s wider or ultimate purpose, and observes that that option is not available to a court in the absence of a single, authoritative text.} Thus, in a case where the English language version of a Directive used the same word in two different provisions, suggesting that the same concept was intended, while other language versions used different terminology in each provision, the Court reasoned that

The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.\footnote{Case 30/77 \textit{Bouchereau} [1977] ECR 1999.}

12.23 In another case involving uniform terminology in two provisions in the English language version of a Directive and different terminology in other language versions, the Court’s judgment set out the European Commission’s argument based on the other language versions but neither accepted nor rejected it, ruling in the Commission’s favour on the basis of the context and purpose of the provisions.\footnote{Case 353/85 \textit{Commission v United Kingdom} [1988] ECR 817.}

12.24 Advocates General of the Court have tended to make more use of comparison of different language texts in their Opinions than the Court has done in its judgments.\footnote{See, for example, Case 29/69 \textit{Stauder v City of Ulm} [1969] ECR 419.}

12.25 Nevertheless the Court’s judgments also yield examples of the use of linguistic comparison of texts as an aid to interpretation. In considering them, it must be borne in mind that the position of the European Court as regards multilingual interpretation differs from that of a court interpreting bilingual Welsh legislation not only in the European Court’s traditionally less literal interpretative approach but also in the greater number of language versions available to it.\footnote{Steadily rising from 4 at the inception of the Communities and 6 following the first accession (of Denmark, Ireland and the United Kingdom) to the current 23. The accession of 10 new member states in 2004 nearly doubled the number of official languages of the EU, raising it from 11 to 20.} This has on occasion enabled the Court to detect a preponderance of literal meanings, an
approach that is not available where only two language versions exist. In other cases, however, the Court has found some language versions to be clearer than others, an approach which is in principle applicable where one of two language versions has a clearer meaning.\footnote{See A Arnul, \textit{The European Union and its Court of Justice} (2nd ed 2006) pp 608-611, who identifies cases where linguistic comparison has identified clearer language versions, where it has shown some versions to be “out of line” and where it has proved inconclusive.}

12.26 Case C-296/95 \textit{R v Commissioners of Customs and Excise ex parte EMU Tabac SARL} concerned arrangements under which residents of the United Kingdom ordered tobacco goods from a supplier in Luxembourg and commissioned a carrier to deliver the goods to them in the United Kingdom. Liability to UK excise duty depended on whether the words “transported by them” in a Directive were limited to goods transported personally by private individuals who had acquired them for their own use. Holding that only personal carriage was contemplated, the Court found it clear that

\ldots none of the language versions expressly provides for such involvement [ie of a carrier] and that, on the contrary, the Danish and Greek versions indicate particularly clearly that, for excise duty to be payable in the country of purchase, transportation must be effected personally by the purchaser of the products subject to duty.\footnote{Case C 296/95 \textit{The Queen v Commissioners of Customs and Excise, ex parte EMU Tabuc} [1998] ECR I-1605.}

12.27 The Court rejected an argument that the Danish and Greek versions should be disregarded on the grounds that those member states only accounted for 5\% of the Community’s population, reasoning that

\ldots to discount two language versions … would run counter to the Court’s settled case law to the effect that the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages…. Lastly, all the language versions must, in principle, be recognised as having the same weight and thus cannot vary according to the size of the population of the Member States using the language in question.\footnote{Case C 296/95 \textit{The Queen v Commissioners of Customs and Excise, ex parte EMU Tabuc} [1998] ECR I-1605 at [36].}

12.28 In a case in which the European Commission claimed an inherent power to enter into a particular international agreement on behalf of the Community on the basis of a treaty provision referring (in the French text) to the powers that the Commission was “recognised” as having, the Court fortified its rejection of the argument with a consideration of three other language versions of the article, including the English, which referred to the “powers vested in the Commission”; these indicated that the Commission’s powers were limited to those explicitly conferred on it.\footnote{Case C-327/91 \textit{France v Commission} [1994] ECR I-3641.}
In some cases, a text that was free of internal contradiction or ambiguity has been rejected, more or less as simply being out of line. Thus, where the Dutch language version of a Regulation used the term “wife” and all others used the gender-neutral term “spouse”, the Regulation was construed in accordance with the majority of the texts. That approach would not be possible in a context where there were only two texts to compare.

However, comparison of language versions may help to resolve a contradiction or ambiguity within one version; that approach would appear permissible in the context of two versions, one of which was self-contradictory or ambiguous.

On at least one occasion the Court of Appeal in England and Wales has compared language versions of a European Directive. In Customs and Excise Commissioners v Bell Concord Educational Trust Ltd the taxpayer was a charity and accordingly precluded from distributing profits, but budgeted to make a surplus on its activities. Its exemption from VAT turned on whether it systematically aimed to make a profit. The Court of Appeal found the English text unclear. The ambiguity of that text made it permissible to look at the French text on the basis of James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd.

One commentator, arguing that the EU should switch to a system of one authentic language version of a piece of legislation, points to an inherent contradiction between the propositions that each language version is equally authentic and that the meaning of a particular language version may be required to yield to a meaning derived from the meaning of the others, and to the legal uncertainty created for citizens who cannot rely upon the clear meaning of the version in their language without comparing it with 22 others. The criticism based on legal uncertainty strikes us as stronger than the charge of contradiction. The notion of language versions being equal does not equate to the notion that each is supreme.

Legal uncertainty arising out of inconsistent language versions is a concern, and the fact that a system of two language versions is less inherently problematic than one of 23 does not resolve the concern entirely. Improved legislative techniques that reduce the scope for inconsistency between language versions are evidently one way of addressing the problem; hence our request for consultees’ views on the bilingual drafting techniques to be used in Wales. But, making the realistic assumption that inconsistencies will occur nevertheless, we are interested in consultees’ views, possibly informed by the discussion in this

44 Case 9/79 Wörsdorfer v Raad van Arbeid [1979] ECR 2717. The Court did add that that interpretation was borne out by the purpose of the provision and the principle of equal treatment of the sexes in matters of social security entitlement.

45 See, for example, Case 90/83 Paterson v W. Weddel & Co Ltd [1984] ECR 1567; Case C-64/95 Konservenfabrik Lubella Friedrich Bükner GmbH & Co. KG v Hauptzollamt Cottbus [1996] ECR I-5105.

46 Customs and Excise Commissioners v Bell Concord Educational Trust Ltd [1990] 1 QB 1040.

47 [1978] AC 141, discussed above.

chapter, on how the courts should approach them.

12.34 The European Court’s approach strikes us as influenced by a concern to avoid the impression that any EU language is, in Orwellian terms, more equal than any other. That concern may, for example, have led the Court in *Stauder v City of Ulm* to eschew that part of the Advocate General’s approach that involved giving priority to the version in the language in which the instrument was drafted.\(^{49}\)

While simple weight of numbers may conclude (or almost conclude) the issue in favour of competing versions – a situation that cannot arise in Wales – our investigation of the European case-law has led us to the provisional view that decisions in favour of a particular language version are supported by some other factor, typically consistency with the wider purpose of the legislation or some point of superiority, not of one language over another but of one or more texts over others: in particular, clarity in the one case and self-contradiction or ambiguity in the other.\(^{50}\)

THE INTERPRETATION OF BILINGUAL LEGISLATION IN CANADA

12.35 In Canada, the French and English versions of bilingual legislation at the federal and provincial levels are enacted as law and both are equally authentic.\(^{51}\)

12.36 Statutory interpretation of bilingual enactments begins with a search for the meaning shared by the two language versions. In interpreting bilingual legislation Canadian courts apply the shared meaning rule which is described by Sullivan as follows:

The basic rule that has come to govern the interpretation of bilingual legislation in Canada is known as the shared meaning rule. In cases 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. This rule is based on the fundamental assumption that both versions of a legislative text must declare the same law.\(^{52}\)

12.37 However, the shared meaning rule 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 it does not necessarily prevail over other principles of interpretation.

[The shared meaning rule] is a guide; it is one of several aids to be

\(^{49}\) Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, see above.

\(^{50}\) See Case 9/79 *Wördsorfer v Raad van Arbeid* [1979] ECR 2717 above where, as we pointed out, the Court did add that that its interpretation was borne out by the purpose of the provision and the principle of equal treatment of the sexes in matters of social security entitlement.


used in the construction of a statute so as to arrive at the meaning which, “according to the true spirit, intent and meaning of an enactment, best ensures the attainment of its objects” ... The rule ... should not be given such an absolute effect that it would necessarily override all other canons of construction.53

12.38 Thus, Professor Côté explains:

Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.54

12.39 In R. v. Daoust Bastarache J. explained the procedure to be followed in applying the rule:

27. There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles... A purposive and contextual approach is favoured: ...

28. We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning" ...If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions:... The common meaning is the version that is plain and not ambiguous. ...

29. If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: ...

30. The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament’s intent; ...

12.40 In a survey of the shared meaning rule, Sullivan makes the following points:

In the case law, the shared meaning rule is invoked and relied on when one language version of legislation is thought to be ambiguous while the other appears to be clear, and the clear meaning offers a plausible interpretation of both versions.


When the two versions of legislation say different things, there is no shared meaning and the courts must resort to other interpretive strategies to resolve the conflict.

When one version of the legislation is broader in scope than the other, it is sometimes said that the narrower meaning should be preferred since this meaning is shared by both versions. However, this analysis has been repeatedly rejected by the courts. Unless the broader version is ambiguous and the narrower version is clear, there is no basis for invoking the shared meaning rule under these circumstances. The proper approach when the scope of the versions differs, and both are more or less clear, is to rely on other interpretive techniques.\(^56\)

12.41 However, Paul Salembier, Counsel General in the Canadian Department of Justice, has argued that the shared meaning rule is largely ineffective and potentially misleading.\(^57\) He distinguishes the following cases. First, in cases of equally clear but divergent language versions, the lack of commonality between the two versions precludes any attempt to apply the shared meaning rule.

12.42 Secondly, in cases 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 shared meaning rule would result in the narrower of the two meanings prevailing. However, Salembier argues that, having regard to the source of such errors, there is no rational basis for applying the shared meaning rule. Moreover, in such cases the rule has not been consistently applied by the Canadian courts; on the contrary in many such cases the courts have traditionally applied the standard techniques of statutory interpretation and have adopted the language version whose meaning led to the most harmonious and effective operation of the legislative scheme in question. Indeed, the courts opted for the broader meaning in slightly more than half of the cases surveyed. In cases where the narrower of two clear but divergent language versions was adopted, the court did so on the basis of the shared meaning rule in only a minority of the cases surveyed.

12.43 Thirdly, Salembier considers the case where one version of the statutory provision is vague or ambiguous, while the other is clear, reflecting one or more of the meanings that can be attributed to the vague or ambiguous version. Here he concludes that the clear version will constitute an accurate reflection of legislative intent more than half the time but this is because, at least some of the time, clarification will have been requested by the drafter of one version which will produce a clear version even from originally imprecise instructions. However, the fact that the clear version accurately reflects legislative intent more often than random chance would dictate is a function of the fact that in some cases intervention by the drafter of the other version in seeking clarification produces a clear version from the same imprecise instructions. He argues, therefore, that a theory of interpretation of linguistic divergences in such situations should be


founded on clarity, not commonality. He also argues that this approach more accurately reflects the practice of the courts in the cases surveyed.

12.44 Salemblier concludes that a more reliable approach to interpreting bilingual legislation is to apply the accepted canons of statutory interpretation to both versions of a bilingual statute to arrive at a single meaning most harmonious with the purpose and scheme of the Act.

THE INTERPRETATION OF BILINGUAL LEGISLATION IN HONG KONG

12.45 Section 10B(1) of the Interpretation and General Clauses Ordinance, inserted in 1987, states that the English and Chinese texts of an Ordinance shall be equally authentic and the Ordinance shall be construed accordingly.

12.46 In May 1998 the Law Drafting Division of the Department of Justice published a paper containing guidance on the interpretation of legislation in the two languages. It states that the rules of statutory interpretation developed by the courts should apply equally to the interpretation of two language texts, whether or not a discrepancy in meaning between them is alleged. It observes that, given that both language texts are part of the governing law, the court should be seen as no less competent in determining the legal meaning of a term in the Chinese text than one in the English text. However, in the case of a technical, non-legal term, evidence may be adduced if its meaning is doubtful, whether it is a Chinese or English term. If a term is derived from Chinese law or custom, the court may take judicial notice of its meaning or may admit expert evidence as to its meaning.58

12.47 Section 10B(2) presumes the provisions of a statute to have the same meaning in each authentic language text. However, when a real doubt about the single legal meaning arises out of a divergence in the meanings derived from the two texts, section 10B(2) should not be taken to require an interpretation which is semantically compatible with the two texts and the version that bears the narrower meaning does not necessarily prevail. In these circumstances it is necessary to move on to section 10B(3) to resolve the discrepancy.59

12.48 Under section 10B(3), bilingual discrepancies are to be approached in two stages. First the rules of statutory interpretation ordinarily applicable should be applied. If this fails to resolve the matter, the meaning that best reconciles the texts, having regard to the object and purposes of the statute, should be adopted.60

58 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. 3.1-3.5.

59 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. 4.1-4.4.

60 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.
12.49 The authors of the paper observe:

The process of reconciliation is different depending on the nature of the alleged divergence and the context of the statute. A direct solution is to adopt the meaning that is shared by both versions where one text is ambiguous and the other is plain and unequivocal, or where one text has a broader meaning than the other. However, the common meaning obtained by a purely semantic approach may not be decisive. It must correspond to the legal meaning intended by the legislators.\(^{61}\)

12.50 The paper also includes this pertinent observation concerning the situation where the Chinese text is a subsequent translation:

In the case of a statute that was initially enacted in English only with its Chinese text subsequently prepared and declared authentic, the English version was the original official text on the sole basis of which the Chinese counterpart was prepared. In ascertaining its legal meaning, the English text should be taken as more accurately reflecting the legislature's intent when the statute was initially passed. In this case, the meaning borne by the English version will therefore take precedence over the Chinese one.\(^{62}\)

DISCUSSION

12.51 Section 156(1) of the Government of Wales Act 2006 provides that the Welsh and English versions of the text of laws which are enacted or made in both English and Welsh shall have equal standing. In our view, this requires reference to be made to both versions of the text when interpreting bilingual statutes. A reading of section 156 which would permit a court to rely only on its preferred version 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.\(^{63}\)

12.52 We consider that the starting point must be that the bilingual texts of Welsh legislation are intended to bear a single meaning. We consider that it will be necessary to develop a body of rules concerning the approach to the identification of that meaning.

12.53 It seems to us that the principal objectives of interpretation of bilingual legislation in English and Welsh should be to ascertain and to give effect to the intention of the legislature and to maintain the equal status of the two languages. However,

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61 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) para. 55.4.5.

62 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) para. 6.3.

these two objectives will not always be achievable to the full extent and there will sometimes be a tension between them.\textsuperscript{64}

12.54 It is likely that there will be occasions when the existence of parallel texts in English and Welsh will be of positive benefit to the attempt to ascertain the legislative intent. Professor Watkin argues for an approach to the interpretation of bilingual legislation which recognises that the exact meaning to be given to each language text depends on the meaning of the other.\textsuperscript{65} Such an approach would mean that the legislative intention could not be ascertained from one language version alone but would be more likely to result in a definitive interpretation. This approach could be beneficial, for example where the meaning in one language is wider than that in the other but includes the meaning in the second. However, it would not necessarily follow in all cases that the intended meaning was the narrower meaning. The answer may depend on what alternatives may have been available to the draftsman.

12.55 This approach would have implications for the accessibility of the law in that it would require proficiency in both languages to arrive at the meaning of the legislation. However, this may be thought to be a natural consequence of legislation in two languages each of which is an equally authoritative expression of legislative intent.

12.56 On the other hand, there are likely to be occasions on which there is a conflict between the respective meanings of the two language texts which cannot be resolved in this way. It may be that in these situations neither text is capable of illuminating the other and, as a result, there is a stark choice between two incompatible meanings. Such a situation might arise, for example where the English and Welsh texts bear inconsistent meanings which do not coincide at all. In these circumstances, one possibility would be to apply a shared meaning rule similar to that applied in Canada. Another would be to adopt the meaning which best reconciles the texts having regard to the object and purpose of the instrument and the statutory scheme.

12.57 A further issue which arises here is whether any preference should be given to the version in the language in which the statute was originally drafted, on the ground that any change introduced in the other language text might simply reflect a translation error.\textsuperscript{66} This prompts the question whether, under the system of drafting currently employed by the Office of the Legislative Counsel, the second language version is any more likely to contain an error than the original language version.


\textsuperscript{65} T G Watkin, “Bilingual Legislation: Awareness, Ambiguity and Attitudes” [2014] 00(00) \textit{Statute Law Review} 1.

\textsuperscript{66} The Law Drafting Division of the Hong Kong Department of Justice has recommended such an approach in relation to statutes drafted in English which have been translated into Chinese and declared authentic under the Hong Kong Official Languages Ordinance. Hong Kong Government, Law Drafting Division, Department of Justice, \textit{A Paper Discussing Cases where the Two Language Texts of an Enactment are alleged to be Different} (May 1998) para 6.3.
version? More generally, should any account be taken of the legislative history of the provision and, if so, how is that history to be determined? Would the courts in this jurisdiction be willing to investigate such matters?

12.58 The decided cases in this jurisdiction on the interpretation of treaties express very different views as to whether judges should be able to employ their own language skills without the benefit of expert evidence. There is, of course, a fundamental difference between the cases considered above and that of bilingual legislation made by the National Assembly or the Welsh Government. The Welsh language is not a foreign language but an indigenous language which has equal status with the English language. Professor Watkin in his commentary on *James Buchanan v. Babco* makes the following observation which has a particular relevance to the present project:

> Many judges today might feel similarly challenged if confronted with a bilingual text in English and Welsh. However, in the case of bilingual English and Welsh legislation, the language will not be a foreign language, but one expressly stated by the United Kingdom parliament to have equal standing for all purposes with English with regard to any piece of legislation enacted or made bilingually, and a language which has, according to the law of England and Wales, "official status in Wales". Moreover, if a judge in such a situation could not rely on his or her own knowledge of both languages, but required evidence as to the meanings of words or phrases in one but not the other, it is questionable whether the two versions could properly be said to have been treated as of equal validity for the purpose of their interpretation.

12.59 Catrin Fflur Huws argues that the present 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 interpreter 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 the interpreter determines the meaning of the dual language text the interpreter will be assuming the role of the judge. This, she submits, is likely to raise serious concerns in terms of due process and fairness. We agree that it makes it essential to define the interpreter’s role. In particular, in what ways may an interpreter assist the court without usurping the court’s judicial functions?

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

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In particular, we welcome views on the following:

Consultation question 12-2: Do consultees agree that all interpretation of the law enacted bilingually by the National Assembly or made bilingually by the Welsh Government will need to take account of both language versions?

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

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

Consultation question 12-5: In interpreting a bilingual text should account be taken of its drafting and legislative history? If so, how is that to be ascertained? In particular, should greater weight be given to the language in which the initial draft was prepared?

Consultation question 12-6: Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?

A system of legislation expressed in two languages, each of which is equally authoritative, will inevitably make demands on the subjects of the law. There will be a particular need for linguistic proficiency on the part of those whose occupations or professions require them to understand and apply the law. This is especially true of legal professionals and, perhaps above all, of the judiciary on whom we depend for definitive interpretations of statute law.

A system of bilingual legislation inevitably has implications for the appointment of judges and magistrates. The current numbers of judges in Wales able to conduct proceedings in the Welsh language are as follows (shown as a fraction of the total number of judges of that rank): Circuit Judges 7/28, Deputy Circuit Judges 3/9, District Judges 7/24, District Judges (Magistrates’ Courts) 3/7, Deputy District Judges 13/48, Recorders 9/52. In addition at least 15 judges are learning Welsh. Given the limited number of judges appointed to sit in Wales, these figures are encouraging and represent a strong Welsh speaking cohort. Moreover, the Welsh speaking judiciary tend to be concentrated in court centres in areas where the Welsh language is strongest. Thus, for example, all of the District Judges currently sitting in North Wales are Welsh speakers. In addition, there are currently 208 Magistrates in Wales able to conduct proceedings in the Welsh language. On the other hand, it does appear that representation of Welsh speakers among Tribunal Judges throughout Wales is particularly poor and not representative of the general population of Wales.

In recent years the Judicial Appointments Commission has stipulated that for certain appointments to the judiciary or the magistracy in Wales, fluency in the

70 Figures provided by HMCTS Wales.
71 Figures provided by HMCTS Wales.
Welsh language is essential. 72

12.64 Bilingual legislation will also place demands on legal education and training.

12.65 As stated earlier in Chapter 10, 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. It is our preliminary view that the study of bilingual legislation and its interpretation should form part of university law degree courses in Wales.

12.66 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. It is likely that this provision will need to be further developed.

Consultation question 12-7: Consultees are invited to express their views on the future needs for legal education and training to take account of bilingual legislation and how these may best be met.

Consultation question 12-8: In particular, should the study of bilingual legislation and its interpretation form a compulsory part of university law degree courses in Wales? If so, for whom should it be compulsory?

Consultation question 12-9: Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?

CHAPTER 13
CONSULTATION QUESTIONS

13.1 In this Part, we set out the consultation questions we ask consultees to consider.

PART 1: THE CURRENT POSITION

Chapter 1: Introduction and overview

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

Chapter 2: The legal history of Wales

13.3 There are no proposals or consultation questions posed in this chapter.

Chapter 3: The current legislative process and the Welsh Government

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

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

Chapter 4: Drafting and interpreting legislation

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

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

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

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

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

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

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

13.13 Consultation 4-8: Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?
13.14 Consultation 4-9: Do consultees find aspirational clauses a helpful addition to legislation?

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

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

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

Chapter 5: The condition of legislation in Wales: Case studies

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

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

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

PART 2: DEVELOPING SOLUTIONS

Chapter 6: Publishing the law: websites, textbooks and other sources

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 7: Consolidation

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

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

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

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

Chapter 8: Codification

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

13.40 Consultation question 8-2: Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?
13.41 Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?

13.42 Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?

13.43 Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?

13.44 Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?

13.45 Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?

13.46 Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?

13.47 Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?

13.48 Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?

13.49 Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?

13.50 Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?

13.51 Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?

13.52 Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to bills to those designed to ensure better codification, rather than alternative substantive provision?
Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others, should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?

Chapter 9: Control mechanisms in the Government and legislature

Consultation question 9-1: We ask consultees whether a “legislative impact” assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government?

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

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

Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models.

PART 3: THE WELSH LANGUAGE

Chapter 10: Welsh as a legal language

Consultation question 10-1: We invite the views of consultees as to how the process of standardising and keeping up to date Welsh legal terminology should be continued and funded. In particular, what manner of body should be responsible for performing this role?

Consultation question 10-2: Accordingly, we invite the views of consultees as to what, if anything, can be done to make Welsh legal terminology more accessible to legal professionals and to the public.

Consultation question 10-3: We invite the views of consultees as to whether the form or presentation of bilingual legislation could be improved and, if so, in what ways.

Consultation question 10-4: Do consultees agree with our analysis of the objectives of bilingual drafting?

Consultation question 10-5: Do consultees consider that the current arrangements for the allocation of drafting are satisfactory?

Consultation question 10-6: Does the system presently employed by the Welsh Government satisfactorily achieve the objectives of bilingual drafting?

Consultation question 10-7: Would there be any advantage in the Welsh Government’s seeking, as a long term objective, to move from its current model to a system of co-drafting?
13.66 Consultation question 11-8: What roles do consultees consider appropriate for jurilinguists or editors to play in the preparation of bilingual legislation in Wales?

13.67 Consultation question 11-9: We invite the views of consultees as to whether any other working tools would be of assistance in the production of bilingual legislation in Wales.

Chapter 12: The interpretation of bilingual legislation

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

13.69 Consultation question 12-2: Do consultees agree that all interpretation of the law enacted bilingually by the National Assembly or made bilingually by the Welsh Government will need to take account of both language versions?

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

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

13.72 Consultation question 12-5: In interpreting a bilingual text should account be taken of its drafting and legislative history? If so, how is that to be ascertained? In particular, should greater weight be given to the language in which the initial draft was prepared?

13.73 Consultation question 12-6: Should expert evidence be admissible in relation to the meaning of the Welsh text? Alternatively, should the court be assisted by an interpreter or adviser? In the latter case, what should be the qualifications and precise role of the interpreter or adviser?

13.74 Consultation question 12-7: Consultees are invited to express their views on the future needs for legal education and training to take account of bilingual legislation and how these may best be met.

13.75 Consultation question 12-8: In particular, should the study of bilingual legislation and its interpretation form a compulsory part of university law degree courses in Wales? If so, for whom should it be compulsory?

13.76 Consultation question 12-9: Should issues of bilingual interpretation be part of the teaching of statutory interpretation in all university law schools throughout the shared jurisdiction of England and Wales?