Law Commission
Reforming the law

Form and Accessibility of the Law Applicable in Wales

Summary

LC366 (Summary)

REPORT ON THE FORM AND ACCESSIBILITY OF THE LAW APPLICABLE IN WALES: SUMMARY

PART 1
INTRODUCTION AND BACKGROUND

1.1 This is a summary of the Law Commission's recommendations in relation to the form and accessibility of the law applicable in Wales. In July 2015 we published a consultation paper setting out our analysis of the problems and asking questions about how to make improvements. This summary sets out the conclusions we have reached in our report and our recommendations to the Welsh Government. The full report and this summary are available in both Welsh and English, together with the consultation paper, an analysis of the responses to it and an assessment of the costs and benefits of our recommendations at http://www.lawcom.gov.uk/.

THE PROBLEM

1.2 It is increasingly difficult to find out what the law is in Wales. This problem is not unique to Wales, but has been exacerbated by devolution. There are a number of reasons why the problem exists, and why the situation is getting worse.

1.3 The first is the sheer volume of legislation. The United Kingdom has four legislatures producing primary and secondary legislation. There are some 250,000 pieces of legislation in force today. The statute book is vast and has been growing rapidly.

1.4 The form of the law and traditional legislative practice adds to the problem. The law on a particular subject does not tend to be available in one place, but in what the Welsh Government described to us as a "patchwork" of primary and secondary legislation and other materials. This makes it difficult for citizens to navigate the law and to understand their rights and obligations.

1.5 Legislation is frequently amended by subsequent legislation. This can be done by way of textual amendment, where the amending legislation directs that wording be inserted into or deleted from the existing text. Alternatively non-textual amendments can be made, for example, by providing that references to the Secretary of State in pieces of legislation are to be read as references to the Welsh Ministers.

1.6 This requires the reader to look not only at the original legislation but also to find and look at the amending legislation in order to work out the effect of the amending legislation upon the original text. This often involves looking at several successive pieces of amending legislation. It is a time-consuming task, difficult for lawyers and particularly so for other readers.

1.7 The problem can be alleviated – at least as far as textual amendments are concerned – by access to a database of legislation with the amendments incorporated into the text; we refer to this as an "updated" version of the

legislation. The National Archives maintains a website, legislation.gov.uk, which provides a comprehensive database of primary and secondary legislation in the United Kingdom and is free to access to the public. Bilingual legislation is available on it in both English and Welsh.

1.8 Unfortunately, the legislation on that site has not yet all been brought up to date with the incorporation of amendments. More up to date commercial legal websites exist, but are only available upon subscription and do not in general provide Welsh language texts.

1.9 Legislation is not the only source of law. Courts elucidate its meaning in judgments; government sometimes supplements it with guidance; explanations of it are found in commentary and textbooks. As the law of England and Wales diverges, textbooks have not kept pace. They often exclude Welsh law entirely, or make reference to the fact that it is different in certain areas but do not attempt to set it out comprehensively.

1.10 In Wales, inaccessibility has been compounded by devolution. The law on devolved subjects in the two countries is diverging as the respective governments enact new policies. In some cases, Parliament has changed the law in England but the National Assembly has not made the same changes for Wales, and vice versa. For example, the Social Services and Well-Being (Wales) Act 2014 repeals and replaces Part 3 of the Children Act 1989 in relation to Wales, but Part 3 of the Act remains in force in England.

1.11 In many cases, powers given by an Act of Parliament to the Secretary of State or another body, have since been transferred to the National Assembly for Wales, to the Welsh Ministers and to other bodies, but this is not clear on the face of the statute. For example, section 45 of the Wildlife and Countryside Act 1982, as enacted, provides that the Countryside Commission (now a defunct body) and the Secretary of State have powers to amend certain orders, whereas in Wales these powers are now held by the Natural Resources Wales and the Welsh Ministers. This is as a result of the combined effect of one provision elsewhere in the 1982 Act, the National Assembly for Wales (Transfer of Functions) Order 1999 and the Government of Wales Act 2006.

1.12 The impact of these difficulties is felt across society. Citizens can struggle to find, read and understand the law. This threatens the principle of the rule of law. Even legal professionals can experience difficulty. Throughout our consultation we heard anecdotal evidence of lawyers giving advice, or turning up in court, without appreciating that the law in England and in Wales was different. Policy makers in government can also have difficulty in accessing legislation. In our law reform work we have encountered situations where fragmented law hampers the development and delivery of government policy.

1.13 In our report we offer what we intend as an innovative but practical long term solution to this problem. Our plan has three essential strands: (1) an ongoing programme of codification to put primary legislation applying in Wales into an accessible form and keep it in an accessible form; (2) a new method of amending statutory instruments in order to do the same for secondary legislation; (3) both to be supported by an improved legislation website which provides access to well organised up to date law.

THIS PROJECT

1.14 The Law Commission was asked to conduct this project by the Welsh Government as well as the Law Commission's Welsh Advisory Committee. The terms of reference are:

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

1.15 We are also conducting a project on the codification of planning law in Wales, which as it progresses should put into effect some of the recommendations we make in this project.

1.16 The publication of our consultation paper in July 2015 opened a three month consultation period. During that time we held some 50 consultation meetings throughout Wales and in England, received 47 written consultation responses and a further 28 responses to our questionnaire on the impact of inaccessibility. All of these meetings and consultation responses have contributed to the formulation of the recommendations in the report.

1.17 Following the publication of our report, the Welsh Government will consider whether they accept our recommendations and, if so, how to implement them.

1.18 Our report explains how the consultation responses guided us to our conclusions. It also mentions a number of important issues raised by consultees which are outside the scope of this project. These related to: access to justice and the increasing numbers of litigants in person appearing before the courts, generating greater need for the law to be accessible to the public; a lack of legal and judicial training on the law applicable in Wales and for those practising through the medium of Welsh; the lack of availability of suitable resources to look up the law in the courts, which we were told rarely had computers linked to the internet or wireless internet connections in the courtroom, meaning that if an unexpected point arose it was difficult to look it up – a problem not limited to Wales but exacerbated in Wales by the absence of legal textbooks. Some consultees complained of a lack of communication and collaboration between the governments and legislatures in England and Wales

The Constitutional and Legislative Affairs Committee Inquiry

1.19 The National Assembly's Constitutional and Legislative Affairs Committee held an inquiry into the Fourth Assembly's law making and reported their findings in *Making Laws in* Wales. The Law Commission submitted written evidence and appeared before the Inquiry to give oral evidence on matters including the Law Commission procedures for consolidation and technical Bills. Some of the Committee's recommendations have been implemented in new standing orders. Others will be taken forward in the Fifth Assembly. The Committee's report and the submissions made to its inquiry have been invaluable sources of information and have fed into the development of our policy.

The Wales Bill

1.20 Wales is moving into a new phase of devolution. The Wales Bill received its First

Reading in the House of Commons on 7 June 2016 and its Second Reading on 14 June. We have formulated our policy without knowing the outcome of the legislative process and have, therefore, designed our recommendations to be sufficiently flexible to allow the Welsh Government and Assembly to decide how best to implement them.

THE COST OF INACCESSIBILITY

1.21 In order to help the Welsh Government decide what steps to take to improve access to the law, we have looked at the costs of inaccessibility and attempted to weigh the costs and benefits of our recommendations. These are published alongside the report in an economic impact assessment.

1.22 Resources will be needed to implement the recommendations we make in this report. In particular, additional legislative counsel will be needed to draft codes and to staff the code office whose setting up we recommend, more personnel will be needed to enhance and develop the *Law Wales/Cyfraith Cymru* website in the manner we suggest and editors will be needed to carry out work to catalogue and improve the availability of up to date Welsh legislation at the National Archives on legislation.gov.uk.

1.23 We believe that the future benefits of improvements to the accessibility of the law for all citizens in the longer term will far outweigh the cost, making savings for the future.

A MOMENT OF OPPORTUNITY

1.24 As Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, has observed, there is:

> an appetite for reform from judges, politicians, academics, the voluntary and advice sector and many more. The [consultation] paper also notes the willingness of the Assembly to innovate. All in all, there is a real opportunity for Wales to lead the way in producing better law. In fact it is an opportunity that the Assembly must grasp, as it is difficult to see how it can afford the cost of not doing so, as it will deliver better law and less cost than the Westminster model can.[1]

1.25 As the Welsh Government said in its consultation response:

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

[1] The Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, The role of the judiciary in a rapidly changing Wales, Legal Wales Conference (11 October 2013).

1.26 It is important to bear in mind that a successful codification programme will require a significant commitment of effort and resources on the part of both the Welsh Government and the National Assembly. We recognise that it will not be possible to do everything at once and have designed a process that can be undertaken at a faster or slower pace as resources permit.

PART 2
CONSOLIDATION AND CODIFICATION

Recommendations

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

Recommendation 2: We recommend that codification should involve:

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

(2) reform of the legislation as appropriate.

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

THE MEANING OF CONSOLIDATION AND CODIFICATION

Consolidation

2.1 Consolidation is the process by which existing statutory provisions, spread across different statutes, are replaced with a single Act or a series of related Acts.[2] Consolidation rationalises existing legislation. At its narrowest, consolidation merely restates the law without changing the substance. The new text produces precisely the same legal effect as the texts it replaces. Consolidation may, however, be accompanied to a greater or lesser extent by alteration of that legal effect. We discuss this below

2.2 Consolidation is essentially a remedial process, solving problems of fragmentation for so long as the law remains unchanged. A government is, however, likely at some point to wish to change the law in the consolidated area by further legislation either amending the consolidated statute or making fresh provision in parallel to it. This leads to the legislation becoming fragmented again; the cycle of legislative accretion resumes, generating a renewed need for consolidation.

Codification

2.3 As we explain in the consultation paper and report, the term “codification” can be understood in a number of different ways. We have not envisaged for Wales the introduction of codes on the continental model described in the consultation paper and report. Nor have we envisaged a programme of bringing into statute areas of law that presently remain governed largely or entirely by the common law. That has largely been done in a process that started with nineteenth century

codifications of parts of the civil and criminal law.

2.4 There are two main differences between codification as we envisage it and consolidation as traditionally understood. One essential feature of codification is that it is a means of providing a rational format for future legislation. Codification of statute law implies that codes should, once created, stand as the main – or, if possible only – source of primary legislation covering their subject-matter. It also implies that the status of a code as the comprehensive and up to date source of law should be preserved notwithstanding subsequent amendments of its terms or further legislation in the area, both of which should be incorporated into the code. In short, codification preserves for the future the advantages achieved by consolidation.

2.5 The other difference is as to the degree of alteration of the substance of the law that might accompany the exercise. We now discuss this.

Consolidation, codification and reform

2.6 Both consolidation and codification may be accompanied by a greater or lesser measure of alteration of the substantive effect of the law. In Westminster and other common law jurisdictions, consolidation Bills go through expedited procedures, which take up less of the legislature's time and provide less scrutiny. As a result, Parliamentary consolidation procedures do not allow for law reform. However, it is not always possible, or at all events satisfactory, to consolidate existing law without removing inconsistencies or ambiguities or remedying slips that can result from successive pieces of legislation covering the same subject matter.

2.7 Two expedited legislative procedures exist at Westminster for consolidation Bills. One, under the Consolidation of Enactments (Procedure) Act 1949, has fallen into obsolescence, having been superseded by a procedure which we refer to as "Law Commission consolidation". In addition to notes produced by parliamentary counsel (the drafter of the Bill), a consolidation Bill under this procedure is also accompanied by a report of the Law Commission, usually drafted by parliamentary counsel but approved and signed by the chairman of the Commission, making recommendations for minor alterations in the effect of the legislation. The degree of substantive change to the existing law permitted in a Law Commission consolidation is confined to alterations necessary to produce a satisfactory consolidation of the existing statutes, rather than being based on any fresh ideas about how the legislation night be improved. Examples are: correcting mistakes where it is clear apparent from the text as a whole that a provision does not produce the effect that was intended, resolving doubts or ambiguities of wording where the intended effect of an ambiguously worded provision is apparent from the text as a whole, removing inconsistencies between provisions introduced by different Acts or restating archaic provisions in modern language.

2.8 We suggest that codification could usefully be accompanied by a greater measure of reform than typically accompanies a consolidation exercise in the United Kingdom Parliament, including the bringing into statutory form of rules derived from judge-made law such as settled case law establishing rules within the subject area of a code that could usefully be made more accessible by their inclusion in the code, as well as case-law that supplements particular statutory provisions by, for example, filling gaps or supplying definitions of undefined

statutory terms.

2.9 In short, codification as we envisage it differs from traditional consolidation in that (a) it is accompanied by a greater measure of reform of the legislation than is traditional in consolidation and (b) once a code is on the statute book, further legislation within its subject area (whether amending or adding to the existing text) is effected by amendment of or addition to the code and not in separate freestanding legislation.

THE CASE FOR CODIFICATION

2.10 Consultees overwhelmingly agreed that Welsh law needed to be rationalised and simplified in order to make it more accessible. They were much less clear about how that should be achieved and how to prevent the legislation from fragmentation in the future. Some consultees expressed concerns about the cost and time involved in consolidation or codification. A few consultees thought it unrealistic to expect the Welsh Government and Assembly to keep to the discipline of maintaining codes intact, arguing that Governments will take whatever approach is most expedient at the time in order to achieve their policy aims. We have concluded that there is a clear case for codification as we envisage it; it has all of the advantages of consolidation, but is a better long term solution.

2.11 We recommend that the ultimate goal of the Welsh Government and the National Assembly should be the organisation of primary legislation into a series of codes dealing comprehensively with particular areas of devolved law. We recognise that this goal will only be achieved slowly in view of the scale of the task, which is such that progress can only be achieved in stages. We also recognise the difficulty in present conditions of making available the resources to carry out all of even the work that can immediately be seen to be required. The speed of progress towards the goal will depend on the resources that can be made available.

2.12 We suggest that the process should begin as follows. First, those areas in which the law is in most need of being brought together in Assembly legislation should be identified and the process of bringing the legislation together should be undertaken. We make suggestions as to how to identify such areas of law in the report.

2.13 Where the resulting piece of Assembly legislation contains the whole of the primary legislation on a discrete topic, or represents a stage in the creation of such a text, the legislation should operate as a code. In essence this involves the observance of a discipline designed to preserve the integrity of the text by requiring fresh legislation in the subject area to operate by way of amendment of or addition to the code.

2.14 These exercises will vary in scope and that some of the resulting Assembly legislation will not necessarily be suitable to operate as a code. However, in order for codes to develop as a comprehensive statement of the law, and for those statements to remain intact, we consider that the process should be undertaken with the creation of codes as the ultimate objective. In this report we use the term “codification Bills” to refer to Bills that bring existing law together with a view to standing as codes.

2.15 We envisage that consolidation alone will be pursued, for example, where devolved competence does not extend to dealing with an area of law sufficiently comprehensively for the resulting product to stand as a code. In those circumstances, consolidations may not be accompanied by reform extending beyond what can be done in a consolidation at Westminster, though our recommended Assembly procedures (described below) will allow for such a greater measure of reform where appropriate. Another case where only consolidation may be practicable is where it is necessary to address problems of fragmentation urgently but the resources are not available to undertake at the same time the task of overhauling the legislation sufficiently thoroughly for the resulting product to be fit to stand as a code.

2.16 We also consider that, where appropriate, case law may usefully be incorporated into a code. This would need to be done on the basis of a careful assessment of the merits of doing so case by case. We remain of the view that codification should not fundamentally alter the relationship between statute law and judge-made law.

2.17 Codification might be undertaken along with the introduction of reforms decided upon as a matter of government policy. We anticipate, however, that it may be more commonly undertaken together with reform of what might be described as being of a "technical" nature. The expression "technical reform" can be a misleading one as it means different things to different people and its boundaries are at best imprecise. An example of what we mean by it is provided by the project we are currently undertaking for the Welsh Government on planning law in Wales where in view of the policy-driven reforms already effected by the Planning (Wales) Act 2015, the reforms that we envisage recommending will be limited to the simplification of the law by way of streamlining and rationalising procedures.

PROCEDURES IN THE NATIONAL ASSEMBLY

Recommendations

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

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

(2) other law reform Bills prepared by the Law Commission where the alterations or reforms are judged by the Assembly not to be controversial.

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

Recommendation 6: A committee of the Assembly should consider the Bill and Explanatory Memorandum and recommendations as to the suitability of sections for committee or Assembly scrutiny. The committee should

determine whether particular sections of a Bill are controversial, or make significant changes to the existing law such as to require scrutiny by the full Assembly, while others are suitable for scrutiny by an appropriate committee.

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

A consolidation and codification procedure

2.18 We looked at consolidation procedures in Westminster, Holyrood and in New Zealand. Their hallmark is that Bills to which they apply are not debated by the full legislature. At Westminster, consolidation Bills receive scrutiny, but it is conducted in committee and not on the floor of the House. Our conclusion was that the degree of reform allowed in those procedures was not adequate to facilitate a codification programme of the kind we envisage.

2.19 A streamlined legislative procedure is needed in order to facilitate codification in the National Assembly. It must enable codification Bills to pass efficiently through the Assembly without taking up too much time in the legislative programme. It must also provide for an appropriate level of scrutiny, according to whether there is any substantive law reform in the Bill. We recommend a flexible procedure suitable for consolidation and codification Bills, enabling different parts of a Bill to be subject to different degrees of scrutiny depending on the extent of the changes to the law that they make.

Trust in the procedure

2.20 Consolidation procedures in Westminster rely heavily on trust in the Law Commission and parliamentary counsel. These trusted professionals, independent of Government, assure the legislators that the legislation being put forward does not alter the existing law outside the parameters we have described above. A similar means of promoting trust in a legislative procedure in the National Assembly should be established.

2.21 The Constitutional and Legislative Affairs Committee of the National Assembly recommended a consolidation procedure involving certification by legislative counsel. Legislative counsel play a central role in our proposed procedure, but we think that an enhanced role for the Counsel General is also necessary.

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

2.23 At Westminster, parliamentary counsel have, in the course of drafting Bills, traditionally performed a wider advisory role in setting and maintaining a

consistent approach to legislative standards. In the rare event that this advice is not accepted by an instructing government Department, parliamentary counsel may refer the matter to the Attorney General. We regard this advisory role as valuable and consider that Wales would benefit from according a similar role to legislative counsel and the Counsel General. That view underpins a number of the recommendations in the report.

2.24 We are therefore recommending that the Counsel General should be responsible for recommending that a codification or consolidation Bill is suitable for the streamlined procedure that we recommend. We would expect the Counsel General to take the advice of the First Legislative Counsel. It will be important that the Counsel General's recommendations are transparently reasoned and objectively presented, stating accurately the effect of particular amendments. In practice, we expect that legislative drafters will advise on which form of scrutiny is suitable for different parts of a Bill and the Assembly must be confident in their advice. The role of the Counsel General will be important in providing accountability as well as in promoting the programme of codification within Government.

The Bill procedure

2.25 Every Assembly Bill must already be accompanied by an Explanatory Memorandum designed to help Assembly Members to understand the Bill. It must include an explanation of the policy aims of the Bill and set out the costs and benefits likely to result, amongst other requirements. In the case of consolidation or codification Bills we suggest that the Explanatory Memorandum should explain both the effect of and the justification for any sections of the Bill that go beyond restating the law without alteration; where the Law Commission has been involved, these can be based on our report. The accuracy of the Explanatory memorandum in these respects should be endorsed by the Counsel General. We further suggest that the Memorandum should include or be accompanied by recommendations as to whether particular sections or parts of a Bill are suitable for scrutiny in committee or should be debated by the full Assembly.

2.26 The Bill should then proceed to an Assembly committee (the identity of which we leave to the Assembly), which would consider the Explanatory Memorandum together with the Counsel General's recommendations and would report to the Assembly on which sections of the Bill should be scrutinised by it or another committee and which should be scrutinised by the full Assembly.

2.27 The approach that the committee should follow is, in our view, a combination of the approach taken in Westminster to consolidation Bills and the approach taken to non-controversial Law Commission law reform Bills (discussed below). Where the justification for an alteration is that it is necessary in order to produce a satisfactory consolidation, we envisage that the committee would both review that claim and at the same time ask itself whether the alteration is nevertheless of such significance that it ought to be debated in the Assembly. In other cases it should ask itself whether the proposed reform is controversial.

2.28 It seems to us that that aspect of the procedure will only work satisfactorily – and probably only work at all – if the committee proceeds on a basis of consensus. As a safeguard, the Assembly should be able to call for a debate on the committee's report.

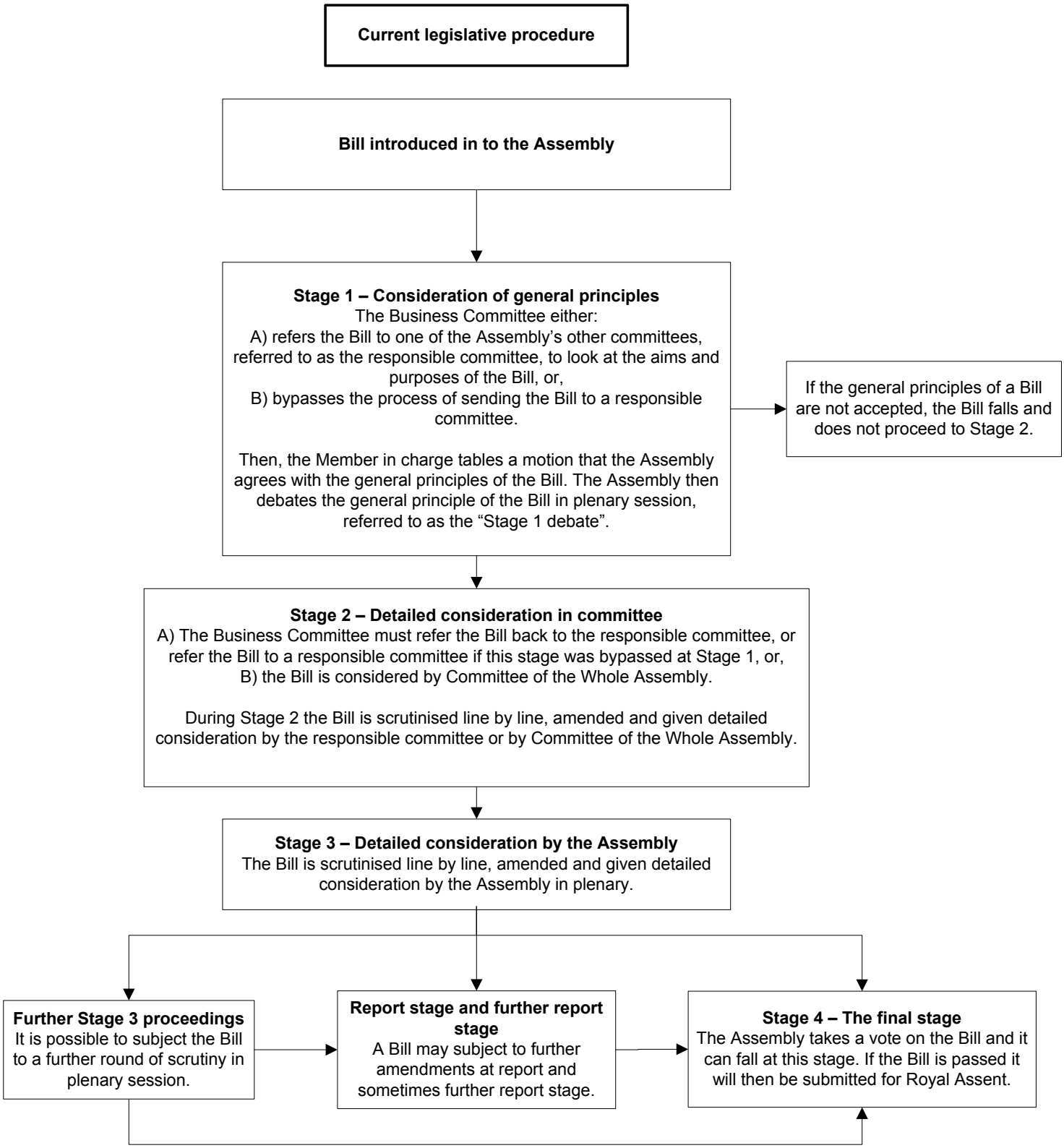
2.29 There are three key benefits from this procedure.

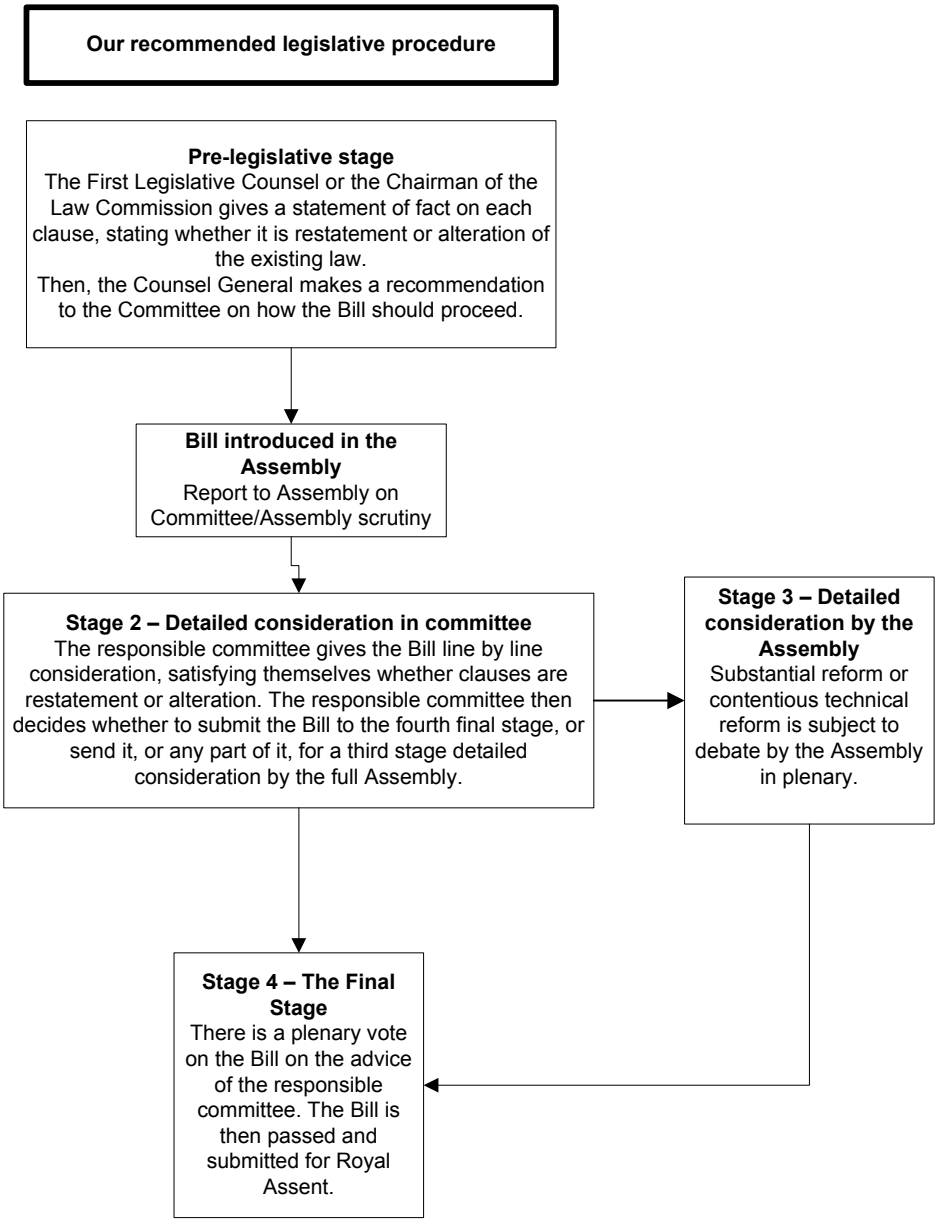
(1) The National Assembly retains control of the level of scrutiny required for each part of the Bill.

(2) Technical parts of the Bill and restatements of the existing law can be insulated from amendments while controversial parts can be subjected to full scrutiny and amendment.

(3) The Explanatory Memorandum can help the committee to understand the Bill, so that they do not waste time on mere restatements of the law and can decide the level of scrutiny that is necessary and proportionate for parts which substantively reform the law.

2.30 The flow charts below illustrate the current legislative procedure in the Assembly and our recommended procedure for consolidation and codification Bills.


Current legislative procedure
Bill introduced in to the Assembly
Stage 1 – Consideration of general principles
The Business Committee either:
A) refers the Bill to one of the Assembly's other committees, referred to as the responsible committee, to look at the aims and purposes of the Bill, or,
B) bypasses the process of sending the Bill to a responsible committee.
Then, the Member in charge tables a motion that the Assembly agrees with the general principles of the Bill. The Assembly then debates the general principle of the Bill in plenary session, referred to as the "Stage 1 debate".
If the general principles of a Bill are not accepted, the Bill falls and does not proceed to Stage 2.
Stage 2 – Detailed consideration in committee
A) The Business Committee must refer the Bill back to the responsible committee, or refer the Bill to a responsible committee if this stage was bypassed at Stage 1, or,
B) the Bill is considered by Committee of the Whole Assembly.
During Stage 2 the Bill is scrutinised line by line, amended and given detailed consideration by the responsible committee or by Committee of the Whole Assembly.
Stage 3 – Detailed consideration by the Assembly
The Bill is scrutinised line by line, amended and given detailed consideration by the Assembly in plenary.
Further Stage 3 proceedings
It is possible to subject the Bill to a further round of scrutiny in plenary session.
Report stage and further report stage
A Bill may subject to further amendments at report and sometimes further report stage.
Stage 4 – The final stage
The Assembly takes a vote on the Bill and it can fall at this stage. If the Bill is passed it will then be submitted for Royal Assent.


Our recommended legislative procedure
Pre-legislative stage
The First Legislative Counsel or the Chairman of the Law Commission gives a statement of fact on each clause, stating whether it is restatement or alteration of the existing law.
Then, the Counsel General makes a recommendation to the Committee on how the Bill should proceed.
Bill introduced in the Assembly
Report to Assembly on Committee/Assembly scrutiny
Stage 2 – Detailed consideration in committee
The responsible committee gives the Bill line by line consideration, satisfying themselves whether clauses are restatement or alteration. The responsible committee then decides whether to submit the Bill to the fourth final stage, or send it, or any part of it, for a third stage detailed consideration by the full Assembly.
Stage 3 – Detailed consideration by the Assembly
Substantial reform or contentious technical reform is subject to debate by the Assembly in plenary.
Stage 4 – The Final Stage
There is a plenary vote on the Bill on the advice of the responsible committee. The Bill is then passed and submitted for Royal Assent.

"NON-CONTROVERSIAL" LAW COMMISSION LAW REFORM BILLS

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

2.32 In its report, *Making Laws in Wales*, the Constitutional and Legislative Affairs Committee recommended that the Business Committee explore the scope for a simplified procedure for law reform Bills implementing Law Commission reports. We have concluded that the procedure that we have outlined above could usefully apply to such Bills. As we have indicated in our discussion above, we regard it as a matter for the Assembly whether sections of a Bill are or are not "controversial". That applies equally to a Bill that effects substantive law reform independently of consolidation or codification. We consider that the Explanatory Memorandum accompanying such a Bill could properly describe the scope of any substantive changes being made and contain or be accompanied by recommendations to the suitability of sections for committee or Assembly scrutiny. The description of the scope of the reforms effected by the Bill would in practice be based on the Law Commission's report accompanying the Bill.

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

MAINTAINING CODES

Recommendations

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

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

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

Recommendation 11: The standing orders of the National Assembly should enable the Presiding Officer to put forward a motion that a Bill (in whole or

part) falls within the subject area of a code and should be treated as such.

Distinguishing codes from Acts

2.34 We see merit in distinguishing codes from other Acts of the Assembly; it signals to citizens that they are the place to look for the primary legislation on their subject-matter. However, we see the force of objections voiced in consultation that the creation of a further species of legislation in Wales could be a source of confusion. We therefore recommend that a code should simply be an Act of the Assembly which identifies itself as a code. Section 1 could provide, for example, "this Act may be cited as the Education Code". The short title would then be "the Education Code".

2.35 A Bill that is designed to become a code will usually be identified as such before it is introduced into the Assembly. There may, however, be some occasions where it is decided at a later stage that a Bill should be a code, or even that an existing Act should be recognised as a code. This could be done by the insertion of an appropriate section.

Preserving codes

2.36 To achieve improved accessibility in the long term, a code must remain the comprehensive and exclusive source of legislation on its subject-matter. We recommend that once a code is in place, amendments or additions to the law covered by a code should be made to the code and not in free-standing legislation. This rule might be introduced by standing orders, or by other means as the Assembly sees fit.

2.37 Some flexibility will however, be essential. If an Assembly Member promotes legislation contrary to this code discipline, the Explanatory Memorandum in support of the Bill should justify this. We envisage that the Committee scrutinising the Bill at stage 1 of the Assembly legislative procedure would report to the Presiding Officer if it were not persuaded by the justification for departing from the code discipline.

2.38 We recommend that the Presiding Officer should be given the responsibility of determining whether the subject matter of a Bill is within the subject area of an existing code. The Presiding Officer should have the power to propose that the whole or part of a Bill falling in the subject area of a code should be rejected or reintroduced as a Bill amending the code.

2.39 We also observe that where freestanding legislation is passed in the subject area of a code, it should be possible to integrate those amendments into a code at a later date using the streamlined Assembly procedure we have described above.

Code maintenance

2.40 We considered whether to recommend streamlined procedures for making editorial changes to codes, or technical and non-controversial amendments without going through full legislative processes in the Assembly. Some consultees expressed concerns that this could put essential democratic processes at risk. On reflection, we have decided not to recommend another special procedure. Amendments of this sort should follow the procedure we recommend for consolidation and codification Bills.

SECONDARY LEGISLATION (STATUTORY INSTRUMENTS)

Recommendations

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

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

2.41 Consultees told us that often the law they need access to most is contained secondary legislation. It is therefore particularly important for secondary legislation to be accessible. However, secondary legislation can be difficult to find in an up to date and readable form. This is partly because the sheer volume of statutory instruments makes this body of law difficult to navigate.[2] Secondary legislation also tends to contain more detailed and complex rules than primary legislation. Lastly, secondary legislation is more frequently amended than primary legislation. Without access to an updated text, the original and amending statutory instruments have to be pieced together to find the up to date position.

2.42 There is no collection of updated statutory instruments that is free to access online. The National Archives is currently working hard to update the primary legislation on its website legislation.gov.uk; updating secondary legislation is a vast task and is not being accomplished at the same rate. This problem relates to secondary legislation applicable both in Wales and in England.

2.43 Currently a statutory instrument is amended by laying an amending statutory instrument before the Assembly. This does not set out the amended law, but only the changes to be made to the original statutory instrument. The reader has to find the original, discover all the amending statutory instruments that have been made to it, and piece together the resulting changes. The current system dates back to a time when legislation was created in paper form, whereas nowadays legislation is drafted digitally.

2.44 We recommend a new procedure for amending statutory instruments. We propose that the text of the statutory instrument as amended should be laid before the Assembly, in a form that highlighted the proposed amendments. The affirmative or negative resolution of the Assembly would be limited to the changes made. Once it came into force, the updated statutory instrument could be published immediately by the National Archives. The previous version would need to remain available to view, with an indication of the dates of effectiveness of the different texts, as it is currently done on legislation.gov.uk for updated primary legislation.

2.45 This should speed up the process of getting secondary legislation online up to date. In the long run it would ensure statutory instruments remain kept up to date, helping users of legislation.

[2] In 2015 there were 2,059 pieces of secondary legislation made in the United Kingdom. There were only 37 United Kingdom public general Acts. In the same year there were 314 pieces of secondary legislation made by the Welsh Ministers and six Acts of the National Assembly.

A CODIFICATION PROGRAMME

Recommendations

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

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

2.46 In New Zealand the Legislation Act 2012 imposes a statutory obligation on the Attorney General to prepare and present three-yearly programmes of consolidation to the New Zealand Parliament. Each draft programme is subject to public consultation.

2.47 We recommend a similar approach for Wales, in order to ensure that time and resources are found for codification on an ongoing basis. The Counsel General should be obliged to prepare regular programmes of codification. Draft codification Bills should be prepared by the Code Office (discussed below) under the supervision of the Frist Legislative Counsel. The Welsh Ministers would also be able, by agreement, to refer reform work associated with the production of a codification Bill to the Law Commission if that was judged appropriate.

2.48 The Counsel General should be formally responsible for the programme, and accountable to the National Assembly on that basis. The Constitutional and Legislative Affairs Committee of the National Assembly could produce a report on the codification programme at prescribed intervals, identifying lessons learned, in a similar way to its report on *Making Laws in Wales*.

Topics for codification

2.49 We do not make any formal recommendations on which subjects should be codified. We envisage this as a task for the Welsh Government, carried out by the Code Office we discuss below.

2.50 In the consultation paper we looked at case studies on the condition of legislation in Wales. In the report we reviewed these in light of consultation responses. The cases studies covered the law applicable in Wales in relation to:

(1) Education;

(2) Social Care;

(3) Waste and the environment;

(4) Town and Country planning; and

(5) Local government.

2.51 Consultees provided useful insight into the different challenges and needs in these areas of law. There was a strong demand for the consolidation of education law. Some consolidation has taken place in the field of social care and this area, in part, illustrates the limitations of codification for Wales as important parts of the relevant law in the Children Act 1989 is outside the Assembly's competence. The

law on waste provides an example of an area where it could be undesirable for the law to diverge from the law of England. In the case of planning law, we are considering how best to create a code.[3] Local government law is undergoing significant reform and might be suitable for codification after the process is completed.

A CODE OFFICE

Recommendations

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

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

(1) approval or oversight of the exercise of technical maintenance of the codes;

(2) periodic technical reviews; and

(3) managing the process of identifying more substantive defects in codes and drafting amendments to correct them.

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

2.52 Codification will involve a great deal of work. We have concluded that it will be necessary to set up new infrastructure to drive codification: a Code Office. The Code Office should be responsible for creating as well as maintaining codes.

2.53 We considered whether a Code Office should be located within the Assembly Commission or within the Welsh Government or whether it could be a joint enterprise. We have accepted the Welsh Government's argument that the creation of the legislative programme and management of legislation is a matter for Government. Also, in practical terms, the Office of the Legislative Counsel already has the necessary expertise to perform the core functions of the Code Office.

2.54 Legislative counsel will need to draft code Bills, with instructions and assistance from government policy officials. The Office should be led by the First Legislative Counsel and its staff should be dedicated to the codification programme. Welsh Government directorates may need to second policy or legal staff to the Code Office while a code in a particular field is being drafted, and to assist the Code Office to make recommendations as to areas of law suitable for codification.

2.55 Legislative counsel in the Code Office would also carry out code maintenance. This would include working out how best to incorporate amendments into a code, advising the Counsel General on the incorporation of new legislation into existing codes, undertaking periodic technical reviews of codes, identifying defects in

[3] Planning Law in Wales (2016) Law Commission Scoping Paper No 228.

codes and drafting amendments.

PART 3
LEGISLATIVE PRACTICES

Legislative standards

Recommendations

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

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

Introduction

3.1 In the consultation paper, we considered whether the form and quality of legislation would be improved by the creation of a new committee which could provide advice on legislation and/or legislative design, or by introducing legislative impact assessments. We looked at models in other common law jurisdictions, particularly New Zealand. Here we also consider the introduction of formal legislative standards.

3.2 The National Assembly is a young legislature without the benefit of a second chamber with the time and experience to scrutinise and oversee the development of legislation. Concerns were raised by some consultees about the variable quality of legislation, the quality of scrutiny and the lack of oversight of the development of the statute book as a whole. Those in Wales with responsibility for legislative quality and good practice rarely have the time to step back to consider the impact of proposed legislation on the quality and accessibility of the law overall.

A new committee

3.3 We looked at the different roles that have been performed by legislation advisory committees in New Zealand. Its current Legislation Design and Advisory Committee is a Government body, responsible for drafting and enforcing legislative standards and working with agencies at an early stage of Bill development "to address problems in the basic architecture of legislation and identify potential legal and constitutional issues before bills are introduced".

3.4 We are not persuaded that such a committee would represent for Wales the best use of limited resources. We agree with the concerns expressed by some consultees that such a committee is vulnerable to the political whims of Government. Moreover, many of the functions it might take on are already within the responsibilities of existing bodies, such as Assembly committees and the Office of the Legislative Counsel. We suggest that available resources would be better dedicated to funding the Code Office and the programme of codification that we recommend. However, the work of the newly constituted Legislation Design and Advisory Committee in New Zealand should be kept under review.

Formal legislative standards

3.5 Wales does not currently have a set of formal standards for legislation. Formal standards could be a valuable resource for government officials considering whether and how to legislate. They could also provide a standard measure against which the Constitutional and Legislative Affairs Committee or others could judge legislation and a powerful tool for achieving better quality legislation.

3.6 In our evidence to the Constitutional and Legislative Affairs Committee we suggested that better legislation could be promoted by:

(1) identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;

(2) formulating well thought-through policy objectives, with transparent impact assessment;

(3) carefully assessing whether a legislative or non-legislative solution would be more appropriate; and

(4) setting aside adequate time and resources for pre-introduction public consultation and solution-testing.

3.7 In addition, the quality of legislation could be improved by

(1) ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;

(2) having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;

(3) minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;

(4) making greater use of Keeling Schedules (as part of the explanatory notes) to clarify changes that a Bill makes to previous enactments;[4] and

(5) providing for the clear repeal of any existing enactments that are superseded by the Bill.

3.8 We take the view that legislative standards should contain guidance on the matters listed above and on policy development and the preparation of better legislation as well as standards for consolidation, codification and the discipline for the preservation of codes.

3.9 We suggest that the Counsel General should be responsible for developing legislative standards. Insofar as they relate to the design and content of legislation the standards should be reviewed by an Assembly committee and could be formally adopted by the Assembly by resolution in Plenary. Ideally standards should be agreed between the Welsh Government and Assembly.

[4] This change has been implemented by amendments to the Assembly's Standing Orders: National Assembly for Wales, *Standing Orders of the National Assembly for Wales* (May 2016), SO 26.6C.

Pre-legislative and post-legislative scrutiny

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

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

(2) post-legislative scrutiny of Bills, including their impact on the accessibility of the statute book.

3.10 We agree with the conclusions of the Constitutional and Legislative Affairs Committee that there should be a presumption in favour of publishing draft Bills. Whilst we accept that in some cases there will be other ways of consulting which are more suitable, we agree with the Committee that the reason for not publishing a Bill in draft should be explained in its Explanatory Memorandum. We also agree with the Committee's suggestion that Assembly committees consider the suitability of a Bill for later post-legislative scrutiny as part of their scrutiny during its passage.

EXPLANATORY MEMORANDA, EXPLANATORY NOTES AND KEELING SCHEDULES

Recommendations

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

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

3.11 Assembly Standing Orders require that an Explanatory Memorandum must accompany every Bill introduced into the Assembly. The purpose is to help the Assembly Members to understand the policy intentions and potential impact of the Bill. Consultation responses to the Constitutional and Legislative Affairs Committee's inquiry into law making in the Fourth Assembly suggested, however, that their quality can be highly variable. The Committee recommended in its report, *Making Laws in Wales,* that the Welsh Government should review its approach to Explanatory Memoranda. The outcome of that review is awaited.

3.12 We commend the amendments made to the Standing Order requirements for Explanatory Memoranda in March 2016. We would add that Explanatory Memoranda should set out and justify any departure from the legislative standards that we recommend should be drawn up.

3.13 Explanatory notes are published alongside Acts in to explain the purpose and effect of each section. They can be very helpful in understanding legislation, but too often are not. As Keith Bush QC explained in his consultation response:

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

could be valuable in interpreting unclear provisions.

3.14 In 2014 the Office of the Parliamentary Counsel's Good Law Project carried out a review of what is needed to make explanatory notes more useful to readers. and consultation responses in this project added views in relation to Welsh legislation. The Welsh Government told us that it has been considering how to improve the presentation of explanatory notes. We recommend that the outcome of the review should be set out in standards for the content of explanatory notes included in the legislative standards that we have recommended.

3.15 We also considered the role of "Keeling schedules". In its full sense, a Keeling schedule is a schedule to a Bill that amends existing legislation containing the text of the legislation as amended. An alternative is for that text to accompany the Bill without being a formal schedule to it. In those circumstances the text is purely of assistance during the legislative process and does not become part of the amending Act as enacted. Since our consultation closed, the Assembly has amended its Standing Orders. New Standing Order 26.6C requires:

> Where the Bill proposes to significantly amend existing primary legislation, the Explanatory Memorandum must be accompanied by a schedule setting out the wording of existing legislation amended by the Bill, and setting out clearly how that wording is amended by the Bill.[5]

3.16 We commend this change. We also note that legislative drafting technology is in need of modernisation and that work is under way to design software which allows much more flexibility and communication between the drafters in devolved legislatures. Where a revised Explanatory Memorandum is required, following amendments to a Bill, it may be helpful to prepare a revised Keeling schedule.[6]

3.17 We do not recommend a requirement for a formal Keeling schedule, enacted as part of the legislation.

DRAFTING GOOD LEGISLATION

3.18 Drafting plays an important role in making legislation accessible. The Office of the Legislative Counsel is the Welsh Government's drafting service. All Assembly Bills promoted by the Welsh Government and Government amendments to all Bills are drafted by legislative counsel. Statutory instruments are usually drafted by legal teams advising Welsh Government policy departments and should be cleared with the Office of the Legislative Counsel if they amend primary legislation. Other guidance and directions are drafted by policy officials within departments and may be submitted to the Office of the Legislative Counsel for approval.

3.19 We looked at the institutional arrangements for allocating responsibility for drafting legislation and concluded that they are working well. Training and updating are important in ensuring that departmental drafters who produce secondary legislation are aware of drafting developments within the Office of the

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

Legislative Counsel.

3.20 Consultees expressed a wide range of views on drafting and we also considered the views of stakeholders who contributed to the Constitutional and Legislative Affairs Committee's inquiry. The Committee's overall assessment was:

> At a technical level, there has been general admiration for the drafting of our legislation, and the few relatively modest recommendations that we have made in relation to aspects of the drafting process will hopefully be seen in that context.
>
> We acknowledge and recognise that, as the Welsh Government indicates, "drafting legislation is … complex, and drafting it in two languages is even more challenging", particularly in terms of recruitment, resources and training. Equally we recognise the huge effort and commitment of the drafters in the Office of the Legislative Counsel who are at the forefront of, as the First Minister told us, resurrecting Welsh as a legal language after 1,000 years and in quite a short space of time.[7]

3.21 The current drafting guidelines produced by the Office of the Legislative Counsel are well thought through and useful. They are now published on the *Cyfraith Cymru/Law Wales* website

3.22 We also asked consultees for their views on two particular aspects of the Office of the Legislative Counsel's drafting practice: overviews and aspirational clauses.

3.23 An overview is an introductory summary of the structure and content of legislation, usually at the beginning of the Act or statutory instrument or at the start of each part. The aim is to help the reader to navigate around the legislation where the table of contents will not be sufficient to give a clear picture.[8] Consultees thought that overviews provided helpful signposts. Some suggested that overviews should include links to relevant parts of the legislation and we endorse that idea. Several consultees agreed that overviews would be likely to be treated as admissible as aids to interpreting legislation in the courts. The Drafting Guidelines recognise this and warn drafters that an overview needs to be drafted so that it could not have an unintended interpretation.

3.24 Aspirational or purpose clauses set out the aim of the legislation explicitly or impose a statutory obligation to work towards a goal which is an aspiration, rather than a measurable target. An aspirational clause may or may not be legally enforceable. Some consultees thought that aspirational clauses helped the reader to understand the Assembly's intentions and were likely to promote consistency and good practice. Others thought that it was difficult to be certain of the rights and obligations they imposed and preferred policy intentions to be set out in Explanatory Memoranda. Our report notes the risk of a tension between the statement of the aspiration of legislation and the detailed provision for

6 Standing Order 26.27 requires a revised Explanatory Memorandum to be prepared where a Bill is amended during its passage through the Assembly.

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

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

achieving that aspiration. We see no reason why legislation should not impose aspirational duties on, in particular, public bodies. It must be borne in mind that such duties may well not be legally enforceable.

PART 4
THE WELSH LANGUAGE

BILINGUAL LEGISLATION

Recommendations

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

Recommendation 25: We recommend that the Welsh Government and the National Assembly consider, and keep under review, the practical benefits of introducing an Interpretation Act of the Assembly.[9]

Welsh as a legal language

4.1 Welsh and English are both official languages of Wales. According to the 2011 census, 23.3% of those born in Wales were able to speak Welsh.

4.2 The Welsh language is used widely in courts in Wales. In the year March 2015 to March 2016, 581 cases were conducted wholly or partly in Welsh.[10] Legislation made by the National Assembly is available in both Welsh and English on the National Archives' website legislation.gov.uk.

4.3 The official status of the Welsh language includes requirements that:

(1) the Welsh and English languages 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.

4.4 In addition to legal requirements, it is Welsh Government policy to promote the Welsh language.

4.5 The suitability of Welsh as a medium for modern legal communication and debate has been established. Work is still in progress to develop a modern, standardised

[9] Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, chapter 10.

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

legal terminology for Welsh as a legal language. In doing so, it is important to ensure that "legal Welsh" is accessible and understandable and does not provide a bar to Welsh speakers conducting legal proceedings in Welsh.

4.6 Most consultees thought that there should be a formal process for developing and recognising legal terms in Welsh to assist with the process of creating a standardised legal terminology. Some also thought that there should be a process for referring questions of terminology for expert advice and a few thought that the language should be left to develop organically. Consultees also referred to the existing BydTermCymru website, a database of Welsh and English terminology which is maintained by the Welsh Government's Translation Service.

4.7 We have concluded that there should be formal responsibility and a transparent process for determining Welsh legal terms. Standardising Welsh legal terminology should also be a part of the policy development and legislative drafting process. A central body should be created to:

(1) identify problematic terms, or gaps in the terminology, in advance and prescribe solutions; and

(2) respond to particular issues as and when they arise, so that terminology can be developed in response to real situations.

4.8 We consider that the Welsh Government should be recognised as formally responsible for the standardisation and development of Welsh language legal terminology. We recommend that an independent multi-disciplinary terminology panel is established to advise the Welsh Government on terminology issues. Practitioners, judges and members of the public should be able to refer problems experienced with Welsh legal terminology to the panel. It should also co-ordinate the terminology research being conducted by higher education institutes in Wales. Terms approved by the panel could be published on the BydTermCymru website.

An Interpretation Act for Wales?

4.9 The Interpretation Act 1978 applies to United Kingdom and Welsh legislation. Among other things, it provides standard definitions of terms used in legislation to avoid repetition and create consistency. As the law in England and Wales diverges and Welsh legal terminology develops, it is appropriate to consider whether the Assembly should follow the Scottish Parliament and enact its own Interpretation Act.

4.10 The Constitutional and Legislative Affairs Committee of the Fourth Assembly recommended in its report *Making Laws in Wales* that the Counsel General should work towards producing a Welsh Interpretation Act.[11] The Welsh Government has committed to reviewing this recommendation in light of our report. Consultees' views were mixed. While a majority saw some benefit in establishing a set of definitions of Welsh terminology, others saw benefit in waiting, suggesting that it was still too early in the development of legislative drafting in Wales.

[11] National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) Recommendation 17.

4.11 In our view reproducing standard terms from the Interpretation Act 1978 in an Assembly Act would be useful mainly in that it would also create a text in Welsh. A clear and authoritative source of definitions of Welsh language terms would facilitate consistency and provide a catalogue of equivalent expressions in Welsh and English. A Welsh Interpretation Act would also give the National Assembly the ability to create its own definitions and define additional terms. However, different definitions of terms for legislation made in the Assembly and legislation made in Parliament risk causing confusion and error.

4.12 We suggest that the Welsh Government and National Assembly keep under review the practical benefits of an Interpretation Act of the Assembly. As a first step schedule 1 to the Interpretation Act 1978 should be looked at carefully to see whether the terms defined there could usefully be given equivalent definitions in Welsh and whether there are additional terms which should be defined for the purposes of legislation in Wales. In the interim, the Welsh language terminology panel which we recommend would help to develop terminology. The terms decided on by the panel would be recorded on the BydTermCymru website, making them easier to amend than an Interpretation Act in the event that any of the terminology were revised.

Bilingual drafting

4.13 In the consultation paper we analysed the drafting practice in Wales and compared it with practices in the bilingual jurisdictions of Hong Kong and Canada. We considered that the principal objectives of bilingual drafting should be:

(1) fidelity to the intention of the promoters of the Bill;

(2) consistency of meaning between the different language texts of the same provision;

(3) clarity of communication to two audiences;

(4) efficiency in the maintenance of a bilingual legal order; and

(5) achieving effective equality between the two languages.

4.14 The aim of bilingual legislation was described eloquently by Keith Bush QC as "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", rather than "a [translation], rigidly yoked to the original, … so unnatural in its mode of expression that it becomes unintelligible to the ordinary reader".[12]

The drafting process in Wales

4.15 The current process of drafting Government Bills and amendments to Bills is for initial drafts to be produced in one language and then translated into the other. The initial text is usually, but not always, in English. The Office of the Legislative Counsel is responsible for ensuring that the Welsh and English texts are legally

[12] K Bush, "New Approaches to UK Legislative Drafting: The Welsh Perspective" (2004) 25(2) *Statute La*w Review 144 at 147.

equivalent. The Welsh text of a Bill is always produced at a stage before the English text is finally settled. Translators and legislative counsel may identify ways in which the English text could be altered in order to facilitate improvement of the linguistic quality of the Welsh. The production of the Welsh text often highlights problems with the English language version that may not otherwise have been identified.

4.16 This approach differs from the approach in the Canadian Federal Government, for example, where both the French and English language texts are developed together from the outset. We have described this approach as full co-drafting.

4.17 Some consultees wrote of an aspiration that drafting and even policy development should in general take place in both Welsh and English, but recognised that this could only happen when there was a sufficient body of policy officials and lawyers with the skills to work in both languages. Others commented that full co-drafting would be costly and the resources might be better spent on codification. Still others wanted to develop a full co-drafting process as soon as possible. The Constitutional and Legislative Affairs Committee have recommended that the Welsh Government, working with the Welsh Language Commissioner, should develop a plan for increasing the proportion of Bills co-drafted in English and Welsh.[13]

4.18 We have concluded that the current system of co-drafting works satisfactorily. It strikes a realistic balance between the practical realities of resources in the Welsh Government and the need to produce legislative texts of equal authority. It is important to build into the drafting timetable enough time to discuss, improve and amend both texts together. This iterative process of working on both language versions before the texts are finally settled is key to creating bilingual legislation which works in both languages.

THE INTERPRETATION OF BILINGUAL LEGISLATION

How to approach the interpretation of bilingual legislation

4.19 Interpreting bilingual legislation requires account to be taken of both language versions.

4.20 The exact meaning to be given to legislation depends on the meaning of both language texts. We agree with Professor Thomas Watkin that

> the existence of two versions of a statutory text cannot be allowed to make no difference to the manner in which it is interpreted. It is not acceptable to assume or insist that one can rely on either version exclusively to determine the legislative intention. The existence of a further version must be taken into account in seeking an enactment's meaning.

4.21 Where there is a concern that there is a difference in meaning between the English and Welsh texts, detailed analysis of the two texts will need to take place. In the consultation paper and report we considered different approaches to the interpretation of bilingual and multilingual texts. The shared meaning rule

[13] National Assembly for Wales, Constitutional and Legislative Affairs Committee, Making Laws in Wales (October 2015) recommendation 16 p 55.

followed (though not absolutely) in Canada presumes that only the meaning shared by both texts reflects the legislature's intent. Alternatively, the purposive approach taken in Hong Kong adopts the meaning that best reconciles the different texts, having regard to the object and purpose of the statute. A similar approach is taken by the Court of Justice of the European Union.

4.22 We agree with the majority of consultees who considered that adopting the shared meaning rule would not be an adequate interpretative approach. It does not help to reconcile clear but opposing meanings, or two clear meanings where one is broader than the other. The shared meaning might not reflect the policy intention of the legislature. Most consultees considered that the usual process of statutory interpretation should prevail, with the aim of identifying the purpose, or object, of the legislation by reference to the legislators' intent. Most consultees also considered that no account should be taken of the drafting history.

4.23 Where inconsistencies occur, it will be for judges to reconcile them. We take the view that prescribing a particular rule would unduly restrain the courts in developing an appropriate approach for Wales. The aim of the interpretation exercise must be to determine the intention of the legislature as it objectively appears from the texts.

Expert linguistic assistance

4.24 We consider it likely that in most cases everyone will agree that the meaning of the two language versions is the same. Given the equality of the legal standing of Welsh and English versions of legislation, however, the long term aspiration must be sufficient numbers of judges with the linguistic and legal expertise to sit on any case involving comparison of language versions. This will only be achieved by legal education and the ongoing development of Welsh-speaking amongst the professions in Wales. The Judicial Appointments Commission is taking steps to assist, requiring fluency in the Welsh language for certain judicial appointments.

4.25 We considered suggestions from consultees as to how cases raising an issue of comparison of language versions should be handled where the judge to whom the case would normally be allocated was not equipped to interpret both. These ranged between the appointment of an expert such as an interpreter from the Welsh Language Unit to assist the court; the allocation of a second, Welsh-speaking, judge to assist; or the referral to a Welsh-speaking judge of the issues in the case requiring the interpretation of Welsh language texts. We were not persuaded that any of these options would resolve the problem satisfactorily. Each of them would create practical problems for the court system and risk cutting across the judge's role in principle.

4.26 We have concluded that, where an issue of possible divergence of language versions arises, rules of court should require a party to give advance notice of an intention to raise the issue. The case should be listed before an appropriate Welsh speaking judge.

PART 5
PUBLISHING THE LAW

Official publication

Recommendations

Recommendation 26: The Welsh and English language versions of legislation should be capable of being viewed side by side on legislation.gov.uk.

Recommendation 27: Online versions of legislation should identify the territorial applicability of the legislation.

Recommendation 28: We recommend that explanatory notes should be linked on legislation.gov.uk to the sections to which they relate.

Introduction

5.1 We have pointed out that there is no source of up to date legislation in the United Kingdom that is available free at the point of use. This is an important barrier to accessibility. Online sources of legislation, secondary materials and textbooks do not consistently reflect the law of Wales in an accurate or clear manner. All in all, it can be extremely difficult to determine what the law is in Wales.

5.2 It is no surprise therefore that this part of the project attracted the widest interest from consultees. What people really wanted was to be able to search online or in a book for the answer to a legal question and to be confident that the law they found was accurate, up to date and available in its entirety in one place. Consultees also wanted explanations of the law applicable in Wales, of the sort that would be found in a textbook, to be more widely available.

Who should publish Welsh legislation?

5.3 Consultees highlighted the need for legislation to be published free of charge online in an updated form. We wholeheartedly endorse that view. Whether a duty to do this should be enshrined in statute, and on whom it should be imposed, is a separate matter.

5.4 The responsibility for publishing primary and secondary legislation that applies in England and Wales rests with the Queen's Printer on behalf of the Crown. The Queen's Printer is appointed by the Queen by Letters Patent. This duty extends to the publication of National Assembly and Welsh Government primary and secondary legislation. The Constitutional and Legislative Affairs Committee recommended that the Welsh Government explore the practicalities and feasibility of establishing a Queen's Printer for Wales. The Welsh Government has said that it is doing so. We regard it as a matter for the United Kingdom and Welsh Governments to determine, as part of the devolution settlement, how responsibility for publishing legislation for Wales should be allocated. We take no position on whether there should be a Queen's Printer for Wales or on whether the ultimate responsibility for publication should be transferred from Westminster to Cardiff.

Accessing Welsh legislation online

5.5 Access to up to date legislation online was perhaps the improvement most consistently requested both in consultation meetings and in written consultation responses.

5.6 We take the view that a source of reliably updated legislation, free of charge to the reader is fundamental to making the law accessible. The printing and online publication of primary and secondary legislation are both carried out for the Queen's Printer by the National Archives. The National Archives has been working to consolidate amendments in order to create an up to date database of legislation on its website legislation.gov.uk, and is confident that this goal will be achieved reasonably soon. As of 30 May 2016, the National Archives informed us that editors had updated 80 per cent of all primary legislation on legislation.gov.uk. Once the primary legislation is up to date, work will then start on the huge task of updating subordinate legislation.

5.7 We have concluded that nothing would be gained by setting up an alternative database of Welsh legislation, but reiterate the urgency of bringing legislation.gov.uk up to date.

Accessing Welsh language legislation

5.8 The National Archives' database provides Assembly legislation in both English and Welsh, but Welsh language versions have not all been updated. Commercial databases generally only provide English language versions of legislation, so there is currently no source (whether public or commercial) of updated versions of some Welsh language legislation.

5.9 We recommend that it should be possible to read both the Welsh and the English versions of the legislation side-by-side on legislation.gov.uk. User-testing by the National Archives indicates that this facilitates bilingual interpretation of legislation for Welsh language users.

Displaying territorial application

5.10 In order to be accessible, the reader should be able to see where a piece of legislation applies.

5.11 There is an important difference between a piece of legislation "extending" to a territory and its "applying" to that territory. Acts of Parliament that have effect in any part of England and Wales "extend to" the whole of the jurisdiction of England and Wales. So do all Acts of the Assembly. This means that they are part of the law within the whole of England and Wales, and can be taken notice of as such by courts. However, Assembly Acts can only *apply* "in relation to" Wales.[14] "Applying", for these purposes, broadly means creating rights, powers or obligations. Equally, some Acts of the United Kingdom Parliament, or sections of

[14] We explain the concept of Assembly legislation applying "in relation to Wales" in the consultation paper at paras 6.29 to 6.35; in this report, as in the consultation paper, we refer to legislation applying "in" or "to" Wales as a convenient shorthand.

such Acts, only apply to England or only apply to Wales.[15]

5.12 It is often difficult to see, on the face of legislation, where it applies. For example, the Localism Act 2011 and most of the Care Act 2014 do not apply in Wales, but this is not stated expressly in the legislation. Instead it must be discerned by studying the definitions of the local authorities to which the legislation applies And appreciating that these do not include local authorities in Wales.

5.13 We recommend that databases should identify the territorial application of each section, as they currently do for the extent of legislation. This would enable users to search for legislation that specifically applies in Wales or to view only the legislation applicable in Wales. The National Archives has said that this would be a substantial task, involving a significant amount of research and resources; it would be willing to work with partners towards such a goal.

5.14 Legislative drafters can also help by defining the application of provisions clearly and as conspicuously as possible. Explanatory notes should also identify the application of particular sections within legislation. This would make the task of database managers significantly easier. A review of the existing legislation with a view to identifying applicability would also be worth pursuing.

[15] Government of Wales Act 2006, ss 108(3), (4)(b) and (6)(b); T G Watkin, *The Legal History of Wales* (2nd ed 2012) p 208. See also Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 1.43 to 1.46 and 6.29.

PART 6
A LEGAL WEBSITE FOR WALES

Recommendations

Recommendation 29: The Welsh Government should work with the National Archives to continue to develop Cyfraith Cymru/Law Wales into a portal through which citizens can access legislation applying in Wales.

Recommendation 30: The Welsh Government should work with the National Archives to make legislation available online by subject matter using user-tested subject matter criteria.

Recommendation 31: The Welsh Government and the National Assembly should develop access through Cyfraith Cymru/Law Wales so that citizens can find all of the law relating to a particular code in one place, including primary and secondary legislation, statutory and non-statutory guidance and other sources as appropriate.

Recommendation 32: Official guidance, including statutory guidance, should be available from the Cyfraith Cymru/Law Wales website.

CURRENT SERVICES IN WALES

6.1 The National Archives website legislation.gov.uk publishes primary and secondary legislation and explanatory notes but not other types of information about the law. The Welsh Government and National Assembly both host websites, providing users with information about Government Bills and other legislation passing through the National Assembly. The National Assembly's Research Service also provides information on the Assembly website on law, policy and legislation passing through the Assembly.

Cyfraith Cymru/Law Wales - a legal website for Wales

6.2 In July 2015 the Welsh Government, in partnership with Westlaw UK, launched a website called *Cyfraith Cymru/Law Wales*. *Cyfraith Cymru/Law Wales* aims to enable users to look at legislation in devolved fields. Each subject matter heading on the website includes a broad overview and a section on the key legislation on that subject matter. Links are provided to legislation.gov.uk. In addition, there are some articles provided by Westlaw UK from its "Westlaw UK Insight" services free of charge and articles by lawyers who have contributed to the site.

6.3 *Cyfraith Cymru/Law Wales* is still at an early stage of its development. We take the view that it could become an invaluable resource for law for Wales. *Cyfraith Cymru/Law Wales* could, with co-operation from the National Archives, provide a "portal" through which users could access legislation applying in Wales on legislation.gov.uk as well as information held on other websites.

6.4 We have noted above our firm view that legislation.gov.uk, should continue to be the main Government source of up to date, free-to-access legislation. In addition, more could be done to integrate the legislation provided by legislation.gov.uk into a more context-rich, user friendly site for users in Wales. We think that *Cyfraith*

Cymru/Law Wales provides the Assembly and the Welsh Government with an opportunity to do that.

6.5 The aim should be to provide a comprehensive and accessible summation of the relevant law. As the codification process which we recommend develops, each code could have its own section on *Cyfraith Cymru/Law Wales*. A reader should be able to see the contents of the code itself, the secondary legislation made under it and relevant statutory or other official guidance in one place.

6.6 We recommend that the *Cyfraith Cymru/Law Wales* website be placed on a robust and permanent footing. We envisage that more personnel and financial resources will need to be made available to ensure the website's success.

Accessing legislation by subject

6.7 In the consultation paper we described the database established by the Department for Environment, Food and Rural Affairs (Defra) with the National Archives on the legislation.gov.uk website, as a good example of how organising legislation by subject matter could work. This Defralex database categorises all legislation for which Defra is responsible by subject matter so that the legislation may be searched or browsed by subjects relevant to users.[16]

6.8 Defra found that the Defralex work enabled them to identify accurately and map all the legislation for which the Department was responsible. If this model were adopted across government it would facilitate better management of legislation, and the identification of opportunities for deregulation and the simplification of legislation. It would also allow a much clearer understanding of the current legislative context as a starting point for further law reform.

6.9 The Welsh Government could do further work with the National Archives to provide users of legislation.gov.uk and *Cyfraith Cymru/Law Wales* with the ability to search legislation by subject matter. Legislation applicable in Wales should also be categorised under suitable subject headings.

Commentary

6.10 Commentary can provide users with a deeper understanding of how legislation will affect them. Commentary can be provided by the Government or other public bodies with statutory responsibility, or by academics, practitioners and authors of textbooks, or non-governmental organisations. Commentary can be invaluable to practitioners and citizens in understanding how the law applies to a particular set of circumstances and how they might proceed.

6.11 In our view, *Cyfraith Cymru/Law* Wales must prioritise ensuring that the general public are able to gain an understanding of the law in Wales. The Welsh Government does not intend to publish any detailed commentary of its own, but to provide access to Westlaw UK Insight articles relating to areas of law devolved to Wales, written by independent experts in their field. We commend this approach. The inclusion of both overviews and commentary on *Cyfraith Cymru/Law Wales* enables the website to appeal to as broad an audience as possible.

[16] Form and Accessibility of the Law Applicable in Wales (2015) Law Com Consultation Paper No 223, paras 6.56 to 6.63.

LEGAL EDUCATION AND TEXTBOOKS

Legal education

6.12 In the consultation paper, we sought views on the future needs for legal education and training to include meeting the needs of a bilingual legal system.

Welsh law

6.13 Lawyers, whether they practise in England, Wales, or both, should at least have a sufficient knowledge of the diverging law to identify a possible Welsh dimension of a case on which they are advising. Welsh devolution and the powers of the National Assembly and the Welsh Government should form part of the constitutional law syllabus of a qualifying law degree. Outside the core subjects, we would encourage those designing courses in fields where the law is divergent, such as family law or housing law, to consider how much detailed teaching on the differences should be included in their syllabus.

6.14 The profession is aware of the challenges that devolution throws up for those qualifying today. The Solicitors Regulatory Authority and Bar Standards Board should consider what knowledge of Welsh law ought to be required for practitioners in England and Wales, either as part of their legal education before qualification, or as part of continuing professional development.

Welsh language

6.15 Welsh language courses are offered at all five law schools in Wales. We hope that universities in Wales will continue to cater for bilingual students wishing to study in the medium of Welsh. We welcome the creation of further opportunities for academics, legal practitioners and the judiciary to increase their awareness of divergences in the law between England and Wales, their understanding of bilingual law making in Wales and, their Welsh language skills.

6.16 Professional development opportunities should be available for legal practitioners and judges. Consultees reported a lack of training for provision in the Welsh language for solicitors and barristers. This is a matter for the Law Society Wales and the Bar Council. The Judicial College is providing some annual training for the Welsh-speaking judiciary, and might wish to consider developing more training on divergent English and Welsh law.

6.17 Currently, law courses in the medium of Welsh are offered at all five Welsh law schools. However, all those seeking to practise in the legal professions in Wales, whether fluent in Welsh or not, will require at least a basic knowledge of the operation of a bilingual legal system. In the consultation paper, we explained our preliminary view that the study of bilingual legislation and its interpretation should form part of university law degree courses in Wales.

6.18 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.

6.19 Legal education should in our view give appropriate coverage to devolution in Wales, the way that law is made in Wales and the substance of that law.

Textbooks on the law applicable in Wales

6.20 The law is complex and textbooks that dissect and explain the law in a digestible manner can be invaluable in making the law accessible. Textbooks on the law of England and Wales rarely consider the law applicable to Wales where it diverges from the law applicable in England.[17] This becomes increasingly problematic as the volume of legislation made in Wales grows.

6.21 Consultation suggested that textbooks on Welsh law were not being produced because publishers did not think they would be commercially viable. Practitioners in Wales do need textbooks, but there is a market failure. The Welsh Government could consider ways of stimulating the production of additional commentary for publication on Cyfraith Cymru/Law Wales. In addition, academics could perhaps be supported by individual higher education institutions to write legal textbooks for Wales.

[17] There are exceptions. Bangor University Law School is in the process of publishing a series of textbooks on Welsh law in the Welsh language, with support from the Coleg Cymraeg Cenedlaethol. See also, for example, J Luba QC, L Davies and C Johnston, Housing Allocation and Homelessness Law and Practice (4th ed, 2016).