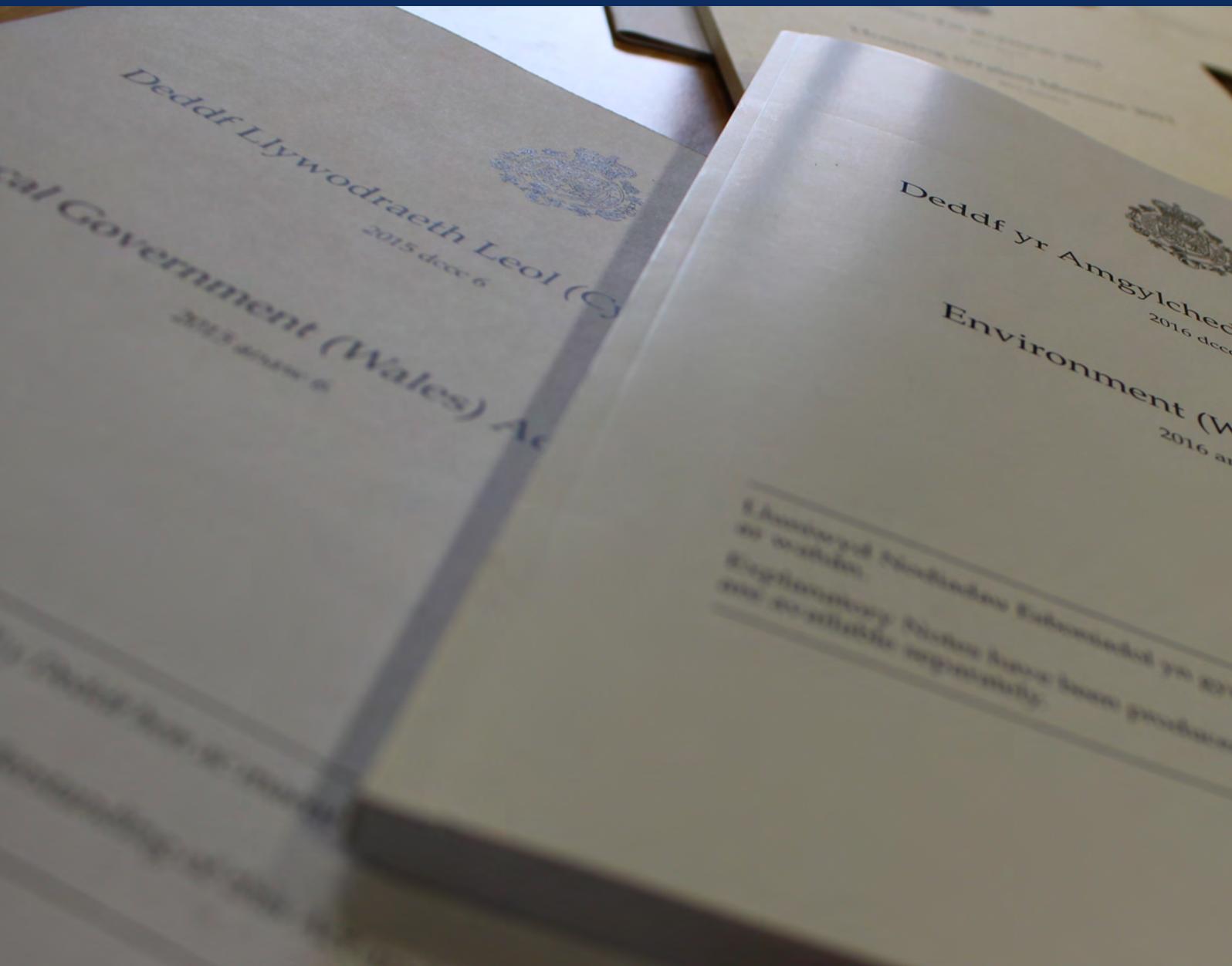


Legislation (Wales) Bill

Stage 1 Report

March 2019



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Legislation (Wales) Bill

Stage 1 Report

March 2019



About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM
Welsh Labour
Pontypridd

Current Committee membership:



Dawn Bowden AM
Welsh Labour
Merthyr Tydfil and Rhymer



Suzy Davies AM
Welsh Conservatives
South Wales West



Carwyn Jones AM
Welsh Labour
Bridgend



Mandy Jones AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West

The following Member was also a member of the Committee during this inquiry.



Lee Waters AM
Welsh Labour
Llanelli

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Recommendations

Recommendation 1. During the Stage 1 debate, or in advance of it by way of written statement, the Counsel General should provide an update on the progress of the discussions with the UK Government in relation to the National Assembly’s ability to make this legislation. Page 14

Recommendation 2. We recommend that the National Assembly agrees the general principles of the Legislation (Wales) Bill. Page 31

Recommendation 3. The Counsel General should provide further details on what non-legislative measures could and should maximise the effectiveness of the Bill. Page 31

Recommendation 4. The Counsel General should clarify how he intends to make non-legislative measures a central part of improving the accessibility of Welsh law, including:

- setting out what discussions he has had with potential legal commentators, and what the Welsh Government expects from such legal commentators;
- how he thinks that Welsh language expertise can be developed;
- how the Welsh Government will go about educating the public so that they know what their rights and obligations are in Welsh law..... Page 32

Recommendation 5. The Counsel General should:

- work with universities in Wales to encourage academic research on the law in Wales;
- work with the Welsh Research and Innovation London Office and with universities in Wales to identify and promote funding opportunities for academic research on the law in Wales and to influence UK-wide research policy to incentivise this research..... Page 32

Recommendation 6. Subject to the Bill receiving Royal Assent, the Counsel General should commit to a review of the legislation at the mid-way point of the first Assembly term in which the legislation takes effect, i.e. by the end of 2023. Page 32

Recommendation 7. The Counsel General should, during the Stage 1 debate, provide a clear explanation of what is meant by “the accessibility of Welsh law”.
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Recommendation 8. The Bill should be amended so that the Welsh Ministers and Counsel General are required to implement a programme of accessibility prepared in accordance with section 2(1).
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Recommendation 9. The Bill should be amended so that proposed activities that are intended to promote awareness and understanding of Welsh law should be included as a duty under section 2(3) rather than being discretionary under section 2(4).
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Recommendation 10. Section 2(7) of the Bill should be amended so that the Counsel General is required to report to the National Assembly on an annual basis on the progress made under a section 2(2) programme.
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Recommendation 11. The Counsel General should issue a statement clarifying his proposals and intentions for codifying Welsh law.
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Recommendation 12. The Business Committee should seek the views of the Constitutional and Legislative Affairs Committee as it prepares new Standing Orders for consolidation Bills, codification and law reform Bills.
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Recommendation 13. The Counsel General should, either in correspondence with the Committee or in a written statement to the Assembly, provide a clear explanation of how the Bill will help a person in Wales find the law (including any guidance or commentary etc. available) as it currently applies in Wales.
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Recommendation 14. The Counsel General should, during the Stage 1 debate, provide further detail and clarity on his proposals to restate in this Bill the provision in section 156(1) of the Government of Wales Act 2006, including his intentions as regards guidance that would accompany the restated provision.
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1. Introduction

On 3 December 2018, Jeremy Miles AM, the Counsel General for Wales (the Counsel General) introduced the Legislation (Wales) Bill (the Bill)¹ and accompanying Explanatory Memorandum (EM). He made a statement on the Bill in Plenary on 4 December 2018².

1. At its meeting on 27 November 2018, the Assembly’s Business Committee agreed to refer the Bill to the Constitutional and Legislative Affairs Committee (the Committee) for consideration of its general principles (Stage 1), in accordance with Standing Order 26.9. The Business Committee agreed that the Committee should report by 22 March 2019. Following a request from the Committee that more time be allowed to complete its work, due to the need to reschedule the final evidence session with the Counsel General, the Business Committee subsequently agreed that the Committee should report by 26 March 2019.

Terms of reference and the Committee’s approach

2. The remit of the Committee is to carry out the functions of the responsible committee set out in Standing Order 21 (with the exception of Standing Order 21.8) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

3. During the Committee’s standard scrutiny of Bills introduced in the National Assembly, of which it has not been designated the responsible Stage 1 scrutiny committee, the Committee’s approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;

¹ Legislation (Wales) Bill

² Record of Proceedings (RoP), Plenary, 4 December 2018

- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

4. For the purpose of the scrutiny of this Bill, the Committee considered the above-mentioned matters, in addition to agreeing the following terms of reference:

To consider—

- the general principles of the Legislation (Wales) Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives;
- any potential barriers to the implementation of the provisions and whether the Bill takes account of them;
- whether there are any unintended consequences arising from the Bill;
- the financial implications of the Bill (as set out in Part 4 of the Explanatory Memorandum);
- the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Part 3 of the Explanatory Memorandum).

5. Between 6 December 2018 and 21 January 2019, the Committee conducted a public consultation to inform its work. The Committee received 12 responses, which are published on the Assembly's website.³ In addition, the Committee heard oral evidence from a number of witnesses. The schedule of oral evidence sessions is published on the Assembly's website.⁴

6. The National Assembly's Outreach Team also interviewed a number of stakeholders, and videos of those interviews are available on the Assembly's website.⁵

³ Legislation (Wales) Bill, [consultation responses](#)

⁴ Legislation (Wales) Bill, [schedule of oral evidence](#)

⁵ Legislation (Wales) Bill, [video interviews](#)

7. The Committee would like to thank all those who have contributed to its work.

Other Committee's consideration of the Bill

8. The Assembly's Finance Committee took evidence from the Counsel General on the financial implications of the Bill on 17 January 2019. Its report is available in the Assembly's website.⁶

⁶ [Finance Committee's report on the Legislation \(Wales\) Bill](#)

2. Background

At the Welsh Government's request, the Law Commission of England and Wales (The Law Commission) included a project in their Twelfth Programme of Law Reform considering the "Form and Accessibility of the Law Applicable in Wales".

The Law Commission of England and Wales' Twelfth Programme of Law Reform

9. In its concluding report on The Form and Accessibility of the Law Applicable in Wales, published in June 2016, The Law Commission made 32 recommendations, nearly all of which were accepted or accepted in principle by the Welsh Government.

10. Among The Law Commission's recommendations were that:

- The Welsh Government should institute regular programmes of codification⁷ (Recommendation 14); and
- 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 (Recommendation 15).

The Welsh Government's policy development

11. Following publication of The Law Commission's report, the previous Counsel General made an oral statement on Codes of Welsh law on 13 December 2016.

⁷ In its report on The Form and Accessibility of the Law Applicable in Wales (see paragraphs 2.13 and 2.14), The Law Commission described codification as follows: "A code will be an Act of the National Assembly which should stand upon enactment and in the future as the only statement of primary legislation on a given topic. The process of codification encompasses production of an Act of this kind and the labelling of an appropriately comprehensive Act or Bill as a code. (...) 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."

The Committee took evidence from the Counsel General about codification on 8 May 2017.

12. On 19 June 2017, the Welsh Government launched its consultation *Interpreting Welsh legislation – considering an interpretation Act for Wales*.

13. The consultation considered whether the Welsh Government should develop a new interpretation Act for Wales or amend the existing *Interpretation Act 1978* (the 1978 Act) by reproducing Schedule 1 to that Act in Welsh. If there were to be a new Act, the policy consultation also sought views on what should be included in it.

14. Respondents expressed support for the proposal set out in the consultation to make bespoke, bilingual provision about the interpretation of Welsh legislation.

The draft Bill

15. On 20 March 2018, the Welsh Government launched its consultation on the Draft Legislation (Wales) Bill (the draft Bill).

16. The consultation set out the Welsh Government’s proposals to improve the accessibility and statutory interpretation of Welsh law and sought views on the draft Bill.

17. A total of 20 written responses were received from stakeholders. A summary of responses was published in September 2018.

18. The Welsh Government proposed in the consultation paper that recommendations 14 and 15 of The Law Commission’s June 2016 report be implemented by Part 1 of the draft Bill.

19. Part 2 of the draft Bill set out the Welsh Government’s legislative proposals for the statutory interpretation of Welsh law.

20. The Counsel General provided a technical briefing on the draft Bill to the Committee on 14 May 2018.

3. Legislative competence

The Wales Act 2017 introduced a reserved powers model of legislative competence for Wales, amending the *Government of Wales Act 2006* (the 2006 Act) to substitute a new section 108A (legislative competence) for the existing section 108 and new Schedules 7A (reserved matters) and 7B (general restrictions) for the existing Schedule 7.

Legislative competence and human rights

21. Paragraphs 61 to 63 of the Explanatory Memorandum (EM) set out the Welsh Government's position on legislative competence.⁸ The EM states:

“...none of the provisions in Parts 1 to 3 relate to any of the reserved matters listed in Schedule 7A to GoWA 2006.

The provisions of the Bill will not apply otherwise than in relation to Wales, do not breach any of the restrictions in Schedule 7B to the 2006 Act, and do not give rise to any questions of compatibility with the Convention rights or EU law.”⁹

22. In her [statement on legislative competence](#) (3 December 2018), the Llywydd, Elin Jones AM, stated that in her view all sections of the Bill would be within the legislative competence of the Assembly.

23. On 5 December 2018, in a letter to the previous First Minister of Wales, the Secretary of State for Wales, the Rt Hon Alun Cairns MP, stated that he was concerned that some provisions in the Bill raise questions relating to the devolution boundary. The Secretary of State also stated that the Bill has implications for the clarity and accessibility of parliamentary legislation given that Parliamentary Acts and Statutory Instruments made under them are within the scope of the Bill.¹⁰

⁸ [Legislation \(Wales\) Bill: Explanatory Memorandum, December 2018](#)

⁹ [Legislation \(Wales\) Bill: Explanatory Memorandum, paragraphs 61 to 62](#)

¹⁰ [Letter from the Secretary of State for Wales to the First Minister of Wales, 5 December 2018](#)

24. On 10 December 2018, we asked the Counsel General what discussions had taken place with the UK Government regarding the matter of legislative competence. The Counsel General said:

“I have had discussions, and my officials have had discussions with the UK Government and the devolved administrations. (...)”

There has been an exchange of correspondence... between the Wales Office and the First Minister in relation to discussions that have been taking place on the question of accessibility and competence generally.

...I’m satisfied that we’re within competence. (...)”

My clear view is that the purpose of the Bill is improving legislation in general rather than any particular subject matter that the Bill might attach to in future legislation.”¹¹

25. On 18 February 2019, we asked the Counsel General if there had been further discussions with the UK Government on this matter. He told us:

“...the First Minister has written to the Secretary of State confirming that we are clear in our view that the competence remains as it was. We have asked for concrete examples of where practical issues might arise and haven’t yet received anything to suggest that there are any. You’ll recall that before the Llywydd gave her determination on competence, I took the precaution of sharing the correspondence with her at that point, and there hasn’t been any development since then that suggests any change in my understanding and my view of the competence in relation to this Bill.”¹²

Our view

26. We note the evidence from the Counsel General and the information provided in the Explanatory Memorandum.

27. We note that some issues have been raised with the Counsel General by the UK Government regarding the devolution boundary in Wales.

28. In relation to the concerns raised by the Secretary of State for Wales, we consider the Counsel General’s approach to be reasonable. Nevertheless, it is

¹¹ Constitutional and Legislative Affairs (CLA) Committee, 10 December 2018, RoP [7], [8] and [10]

¹² CLA Committee, 18 February 2019, RoP [4]

difficult to determine whether the Secretary of State's concerns are still "live", and if/how the Welsh Government intends to further pursue the matter.

Recommendation 1. During the Stage 1 debate, or in advance of it by way of written statement, the Counsel General should provide an update on the progress of the discussions with the UK Government in relation to the National Assembly's ability to make this legislation.

4. General principles and the need for legislation

“The purpose of the Legislation (Wales) Bill is to make Welsh law more accessible, clear and straightforward to use. It makes provision about the interpretation and operation of Welsh legislation, and requires the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law.”¹³

The Bill as introduced

- 29.** Part 1 of the Bill (sections 1 and 2) imposes duties on the Counsel General to the Welsh Government and the Welsh Ministers relating to the accessibility of Welsh law.
- 30.** Part 2 (sections 3 to 35) makes general provision about the interpretation and operation of the Bill itself and of Welsh legislation enacted after Part 2 comes into force.
- 31.** Part 3 (sections 36 to 38) gives the Welsh Ministers powers to replace descriptions of dates in Welsh legislation and to make subordinate legislation in different forms, and provides for the combination of subordinate legislation that is subject to different procedures in the National Assembly for Wales.
- 32.** Part 4 (sections 39 to 43) contains general provisions, including consequential amendments to other legislation and provision about when and how the Bill comes into force.

The Bill’s purpose and intended effect

33. The EM notes that concerns about the complexity of UK law have been raised for many years. The EM states that much of the complexity derives from the proliferation of legislation over recent decades and suggests that the UK statute book is “vast and unmanageable”.¹⁴ It goes on:

¹³ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 1

¹⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 2

“This is a problem caused not only by the sheer volume of primary, secondary and quasi-legislation, but also because that legislation is amended, re-amended and re-made in inconsistent ways over time. This practice creates layers of legislation which may be related or interlinked in a number of different ways making the legislative landscape very difficult for lawyers to navigate let alone the affected citizen. (...)”

Given that access to justice more generally, notably through state funded legal advice, is under such threat, ensuring that people have a fighting chance of understanding the law is vital. It goes to the heart of a nation governed by the rule of law.”¹⁵

34. The EM notes that the National Assembly has passed 59 Measures or Acts since 2007 and the Welsh Ministers have made around 6,000 statutory instruments since 1999.¹⁶ It also notes that changes to law as a result of the UK’s withdrawal from the European Union have the potential to compound the existing problem, noting that the changes:

“...will leave the statute book even more inaccessible unless further action is taken to rationalise the law.”¹⁷

35. The policy objective of the Bill is to improve the accessibility of Welsh law. The EM states:

“It is intended that this be achieved by keeping it under review on an ongoing basis, and implementing a sustained programme of activity aimed at improving the accessibility of the law.”¹⁸

36. The Bill has received broad support from stakeholders, both in terms of its overall aims and objectives and its specific provisions.

37. Lord Hope of Craighead said:

“[The Bill] should go a long way towards strengthening, and improving the accessibility of, Welsh law. I welcome the fact that it will provide your law with a sound basis for its future development.”¹⁹

¹⁵ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 3 and 4

¹⁶ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 13

¹⁷ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 9

¹⁸ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 24

¹⁹ Written evidence, LW 01, Lord Hope

38. In his written evidence, Professor Thomas Glyn Watkin QC’s opening comments that the Bill’s aims are “highly laudable” were followed by a brief justification as to why, in his view, these “bold steps” should be taken towards making the law and statute book in Wales more accessible:

“Neither a bill nor an Act is structured to set out for the benefit of the citizen what the resulting state of the law is on a particular topic. Nor does the so-called statute book do that. The statute book merely records in chronological order the various changes which have been made to the law over the centuries. It is not so much that it is not designed to be a statement of the law, but rather that it is not really designed at all. It is just a chronological collection.”²⁰

39. However, Professor Watkin QC also told us that, despite being “100 per cent behind this as a first step”, it was not clear what the end point was meant to be. He said:

“[It] may be a perfectly good thing at this stage, not to commit oneself to what one particularly wants to see at the end of the process, but to keep options open. (...) but I did rather think there could have been a bit more vision as to the direction, if not the end point, that one wanted to reach.”²¹

40. Citizens Advice Cymru suggested that as long as it is clear when this legislation applies and from what point, it would be beneficial to Welsh law and its progression in the future.²²

41. The Law Society of England and Wales (The Law Society) said:

“I think the Law Society broadly welcomes the proposal to implement this piece of legislation. For those of us who practice in law, particularly in recent years with the divergences of Welsh legislation from English-and-Welsh legislation, it can at times be quite difficult to ascertain what law is in force and how to find that law. So, accessibility is very important to all of us, as it is to the public at large as well. (...) the divergence has increased, as of course Wales wants to impose its identity on its own legislation.

²⁰ Written evidence, LW 03, Professor Thomas Glyn Watkin QC

²¹ CLA Committee, 14 January 2019, RoP [129] to [133]

²² CLA Committee, 28 January 2019. RoP [147]

The aim of this, obviously, is to consolidate and to codify the legislation applicable in Wales, and that, to my mind, can only be to the good of both ourselves as professionals and indeed, to the broader public.”²³

42. The Law Commission described the Bill as “very clever”. Sir Nicholas Green said:

“It is not a Bill about codification; it’s a Bill about accessibility. Codification is one aspect, albeit a very important aspect, of accessibility. But accessibility is not just about bringing everything together, but it is about using the right language by making sure it’s accessible, making sure it’s navigable, by digitalising it. It’s a lot more than just bringing it together into a small clump or group of pieces of legislation, and that’s what I actually like about the Bill. It starts with a broader principle than mere codification and consolidation. The thrust is accessibility, which, to my mind, is exactly the right starting point.”²⁴

43. Dr Catrin Fflûr Huws, whilst supportive of the Bill as a whole, suggested that greater clarity is needed with regards to the interrelation between this legislation and the 1978 Act. She said:

“It appears to be simple in the way the Bill sets it out, but I do think that there is greater complexity emerging than would perhaps appear on the face of that Bill.”²⁵

44. The Counsel General told us that the principal objective of the Bill is to start to bring order to the Welsh statute book, by increasing its accessibility to professionals, advisers and to the individual on the street, so that people can better understand their rights and responsibilities and where they can find them in law.²⁶

45. The application and effect of Part 2 of the Bill are discussed later in the report.

Timing of the Bill

46. We asked our stakeholders about the timing of the introduction of the Bill.

²³ CLA Committee, 28 January 2019, RoP [7] and [12]

²⁴ CLA Committee, 14 January 2019, RoP [31]

²⁵ CLA Committee, 14 January 2019, RoP [102]

²⁶ CLA Committee, 10 December 2018, RoP [5]

47. Citizens Advice Cymru said:

“I think we’re seeing growing demand in our advice services, and with that we’re seeing more complex issues, and with those growing complexities it’s making it harder for our advisers to give good and accessible advice. So the quicker that gets fixed, or at least makes it easier, the better, from our point of view. So, in terms of ‘If not now, when?’, I’d say that people need it as soon as possible, and we’d welcome it as soon as is possible.

In terms of Welsh law, it’s relatively young. The Assembly is a young institution. Starting now makes it much easier to consolidate Acts rather than leaving it to when you’ve got more legislation to be consolidating and codifying in the future. So, you have to start somewhere. The earlier you do it is probably the easiest and most efficient point to do it...”²⁷

48. The Law Society told us:

“...it’s important to give some priority to this now, if we are serious about making accessibility of law better for everyone within Wales, and to start now.”²⁸

49. Similar views were expressed by both Professor Thomas Glyn Watkin QC and The Law Commission. Professor Watkin QC said:

“It’s something that needs to be done. There probably would never be a good time to do it, so it’s best to get on and do it. (...) I think the Law Commission recognises that here in Wales we have possibly a golden opportunity, given the size of our statute book, to undertake this work. Quite frankly, I think now is the best time; tomorrow is not a good time.”²⁹

50. The Law Commission suggested that the Bill is “an exercise in best practice”, adding that legislation is likely to get more complicated, particularly as a result of Brexit. It said:

²⁷ CLA Committee, 28 January 2019, RoP [158] and [159]

²⁸ CLA Committee, 28 January 2019, RoP [16] and [69]

²⁹ CLA Committee, 14 January 2019, RoP [192]

“If you have in place a mechanism that can deal with that now, you’re very well-prepared to make what is going to hit us all that much easier...”³⁰

51. With regards to the timing of, and timescales for, the legislation, the Counsel General said:

“...my perspective on it is that the sooner we get the process under way of making law more accessible and consolidating and codifying it, the better. We know from experience that the longer you leave it, the more of a challenge it becomes. And I think we’ve done some consolidation to date, as have all parts of the UK, on a piecemeal basis, an opportunistic basis—if I can describe it in that way. The point of the Bill is to make that a programmatic, coherent, proactive part of the Government and the Assembly’s business rather than to deal with it in a more ad hoc way. (...)

The truth of the matter is that the process of leaving the European Union is going to make the law actually even more complex and less clear than it is at the moment. To my mind, it heightens the need, really, to have a provision in place that moves us towards greater accessibility, partly in response to that, but more generally as well. (...)

...this work of consolidating and codifying law is work that will take decades. It’s not something that can be delivered within one or two Assembly terms. So, that would be true with Brexit or otherwise.”³¹

The Bill and the Welsh language

52. With regards to improving the opportunities to develop the use of the Welsh language in law, The Law Society believe that the Bill will be a “major step forward”.³² Similar views were expressed by Capital Law,³³ and Citizens Advice Cymru who told us:

“Drafting legislation bilingually from the outset makes for better legislation. If you look at the terminology in two languages, then you will look at it and consider it in more detail than you would if you were working in one language; you don’t consider every possible meaning of

³⁰ CLA Committee, 14 January 2019, RoP [63]

³¹ CLA Committee, 10 December 2018, RoP [15], [13] and [80]

³² CLA Committee, 28 January 2019, RoP [87]

³³ Written evidence, LW 06, Capital Law

the word being used. So, giving both languages equal status from the outset and then looking at the legislation in terms of how people are going to be making use of that law on a day to day basis is a positive. Also, in looking at the principles contained within the Bill, we are looking at creating resources in both languages, which will put people in a position where they will be able to use the Welsh language on a daily basis in our courts of law, and the resources will be available to support them in doing so. So, we think that the Bill improves the position of the Welsh language when it comes to application of the law on a daily basis.”³⁴

53. Capital Law described the likely increased need for Welsh-medium drafters, jurilinguists and translators as a “positive by-product” of the Bill.³⁵ In written evidence, the Welsh Language Commissioner suggested the Welsh Government needs to “plan in order to ensure that there is a source of bilingual linguists, terminologists and lawyers with the required skills to implement this programme and the aims of the Bill”.³⁶

Resourcing the Bill

54. Capital Law offered commentary on the resource implications of the Bill:

“Naturally, implementation of the Bill will result in considerable time, cost and resource implications (...) balance must be struck between ensuring that consolidation and codification exercises, which may not be political priorities, are carried into law without competing for Assembly time with other Bills. (...)”

Codification and consolidation is naturally a mammoth task – the costs involved and financial implications are likely to be huge. ... The question of allocation and extent of resource is a further key concern of the Bill – should there be, for example, a dedicated team for preserving Welsh Law codes and maintaining the Cyfraith Cymru/ Law Wales website?”³⁷

55. The Law Commission told us:

“We think that the legislative officers, or the officers who are dealing with the drafting, have got to be properly resourced. Our own

³⁴ CLA Committee 28 January 2019, RoP [172]

³⁵ Written evidence, LW 06, Capital Law

³⁶ Written evidence, LW 08, Welsh Language Commissioner

³⁷ Written evidence, LW 06, Capital Law

Parliamentary Counsel are always saying that they have far too much work and not enough people, and if you're going to embark upon a codification exercise, it's a major exercise. It's a large, resource-driven project."³⁸

56. We questioned the Counsel General on the resources allocated, and whether that differed from the resources needed, in order to meet the objectives of the Bill. He told us that the estimates within the EM were "realistic and sensible" and relate to the anticipated costs of a consolidation programme that includes four or five projects over an Assembly term; something which he described as a "significant step up from where we are today".³⁹ Nevertheless, the Counsel General did acknowledge that "Clearly, to some extent, the more resources you deploy, the faster you can achieve the objective".⁴⁰

57. The Counsel General also said:

"I do hope to have resources in place by the beginning of next year⁴¹ in order to get to grips with the task of consolidation before the statutory duty is in place for the next term. It's possible, of course, that the demands of Brexit will put a brake on that. I hope that that isn't the case. At the moment, I don't anticipate that, but I can't give you a pledge that that won't be the case."⁴²

58. We pursued the issue of resourcing the implementation of the Bill at our meeting on 18 February 2019. The Counsel General told us:

"...the financial resources are now in place for the next financial year. The question now is turning those financial resources into human resources and outputs. (...)

I had conversations with my Cabinet colleagues in relation to particular levels of financial commitment in relation to this. But, obviously, the level of ambition for that programme will be a matter for the Government in the next Assembly term. I would hope it would be ambitious. (...)

³⁸ CLA Committee, 14 January 2019, RoP [33]

³⁹ CLA Committee, 10 December 2018, RoP [178]

⁴⁰ CLA Committee, 10 December 2018, RoP [178]

⁴¹ In his [letter to us on 9 January 2019](#), the Counsel General confirmed that he anticipated having resources in place at the beginning of the next financial year.

⁴² CLA Committee, 10 December 2018, RoP [81]

The Act, the obligation to bring forward a programme, will commence in the next Assembly term. So, the budget for the next Assembly term will be a matter, as I say, for the next Assembly. The level of commitment that we've secured reflects the numbers that are provided in the previous regulatory impact assessment. Clearly, the point is to envisage that happening on a progressive basis over the course of the term. But, as you say, there'll be the need to keep the programme under review and there may need to be changes. We may want to be more ambitious at some point during the course of an Assembly term. At that point, it's a question of making the case for that level of funding, and making a persuasive case.

...I'm hoping to give the committee reassurance that at least we have that baseline level of resourcing, which happens on a year-by-year basis, of course, but an understanding that that is the baseline level to deliver a programme of consolidation that probably has within it four or five consolidation Bills over the course of an Assembly term. So, ambition is about funding, but it's also about making a start and building on that, and the capacity of Government and the Assembly generally to handle that. And I think that'll be a learning curve for all of us."⁴³

Regulation-making powers in the Bill and the balance between what is on the face of the Bill and what is left to subordinate legislation

59. The Bill contains four powers for the Welsh Ministers to make subordinate legislation. The powers are included within sections 5, 36, 40 and 42, and are summarised in Part 3 of the EM.

60. With the exception of the order making power in section 42 of the Bill, the delegated powers provided by the Bill will take the form of regulations.

61. The EM includes a statement of policy intent for subordinate legislation, which states that the powers in the Bill to make subordinate legislation are discretionary and the Welsh Minister have no plans to use these powers immediately.⁴⁴

62. With regards to consultation on future subordinate legislation, the EM states:

⁴³ CLA Committee, 18 February 2019, RoP [45], [47], [55] and [56]

⁴⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 111

“The Welsh Government consults on the content of subordinate legislation when it considers it appropriate to do so. The precise nature of any consultation in relation to exercising the powers to make subordinate legislation in this Bill will be decided at the appropriate time.”⁴⁵

63. In written evidence, Capital Law said:

“Whilst subordinate legislation to amend the Bill (when enacted) will sometimes be more appropriate than seeking to bring forward primary legislation, we urge caution on the possible overuse/ misuse of the power.”⁴⁶

64. In his letter to us on 9 January 2019, the Counsel General stated he was content that the Bill strikes the right balance between what is set out on its face and what is left to regulations and the programme (section 2). He said:

“The Bill contains only four powers for the Welsh Ministers to make subordinate legislation. (...) Three of the powers to make subordinate legislation in the Bill provide the mechanics for ensuring that the Bill works properly in the future. These are the powers to amend Schedule 1 to keep it up-to-date (section 4), to make consequential etc. provision in connections with the Bill (section 40), and to bring Part 2 fully into force by order (section 42).”⁴⁷

65. Later sections of the report consider specific regulation-making powers in the Bill.

Additional, non-legislative measures to accompany the Bill

66. In addition to the need to address the size and complexity of the statute book, as it relates to Wales, the EM notes that there has there has also been criticism of the arrangements for publishing the law in the UK. The EM states:

“The Welsh Government intends to consider the current arrangements for the publication of legislation and statutory instrument procedure in the future, with a view to establishing bespoke provision for Wales akin

⁴⁵ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 125

⁴⁶ Written evidence, LW 06, Capital Law

⁴⁷ Letter from the Counsel General, 9 January 2019

to the arrangements that already exist in both Northern Ireland and Scotland.”⁴⁸

67. Stakeholders suggested a number of additional measures that would enhance and support the Welsh Government’s legislative action to improve the accessibility and understanding of Welsh law.

68. Both The Law Commission and Swansea Law Clinic⁴⁹ suggested that the digitalisation of legislation could bring benefits. The Law Commission said:

“As a follow on from the Bill, something that we’re interested in more generally within the commission is digitalisation of legislation, making legislation, to use the Counsel General’s word, navigable and accessible through digitalisation. That is something that I think is probably implicitly covered by the Act. It’s one of those activities that the Assembly can encourage. But there’s a great deal of money that needs to be spent on the way in which legislation is implemented through digital means and then monitored.”⁵⁰

69. The Law Commission also told us that education was important in bringing rights and obligations to citizens attention:

“Legislation is the start of the process; you then have to ensure that individuals who are subject to it become aware of it. (...) So, education and making people aware of their rights and their obligations is really part and parcel of this...”⁵¹

70. Citizens Advice Cymru looked back to the *Social Services and Well-being (Wales) Act 2014* and highlighted the easy-read versions which accompanied that legislation as a good example of what can be done in order to help people who aren’t familiar with legislation to understand what it means to them.⁵²

71. A lack of academic and practitioner commentary and glossaries of Welsh law was raised by Public Law Wales, The Law Society and Professor Thomas Glyn Watkin QC.

⁴⁸ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 81

⁴⁹ Written evidence, LW 02, Swansea Law Clinic

⁵⁰ CLA Committee, 14 January 2019, RoP [22]

⁵¹ CLA Committee, 14 January 2019, RoP [26]

⁵² CLA Committee, 28 January 2019, RoP [108]

72. Public Law Wales said there is a “notable dearth of academic and practitioner commentary on Welsh law”.⁵³

73. The Law Society told us:

“It’s one thing for a lawyer to read legislation and to interpret law, and for judges to do that, but there is a huge problem in Wales in terms of providing academic material that interprets legislation and provides guidance to lawyers and members of the public on certain parts of legislation or on Acts in their entirety. It may not be the role of the Assembly to fund such a development, but what we’re facing at the moment as lawyers is a situation where there is a whole host of information on law in England and Wales available, but very little information about the law in Wales specifically.”⁵⁴

74. Professor Thomas Glyn Watkin QC suggested that the Research Excellence Framework is a “major obstacle to the development of academic commentary on the law in Wales”. He said:

“I think if the Assembly had some competence to legislate with regard to the work of the research councils that carry out those assessments, it would be beneficial, because it would allow the Government and the Assembly to put in place, for example, a duty to have due regard to the particular needs of Wales in certain areas, of which the law is one, but only one. And I think if the research councils were required to have due regard to the needs of Wales, and in the instance that we’re looking at here, the development of a legal culture within Wales, I think it would encourage academics in Wales to write about the law in Wales in English and in Welsh and thereby supply the badly needed secondary commentary that is currently lacking.”⁵⁵

75. Public Law Wales suggested that codification may “catalyse an increase in academic commentary”, but also presented a concern that codification in Wales may also prove to be another “disincentive for academics to devote time to analysing Welsh law”.⁵⁶

⁵³ Written evidence, LW 12, Public Law Wales

⁵⁴ CLA Committee, 28 January 2019, RoP [38]

⁵⁵ CLA Committee, 14 January 2019, RoP [105]

⁵⁶ Written evidence, LW 12, Public Law Wales

76. We raised some of the issues presented to us in evidence with the Counsel General. With regards to a lack of academic commentary, the Counsel General said:

“Well, I recognise the issue, and that’s certainly a great challenge, specifically in terms of publishing textbooks. The market for this kind of material in Wales is relatively small in terms of the economics of publishing. So, we can clearly see the challenge there. That’s why the opportunity to develop the Cyfraith Cymru/Law Wales website is an opportunity for us, and that perhaps could become the place where people could publish their materials and commentaries on this kind of thing.

But the other challenge, of course, is the REF system, the research excellence framework. I know that guidance has just been published for the next REF, and that was on the basis of a consultation with the sector in Wales and elsewhere. So, I do very much hope that there will be further opportunities in future for those priorities to find their way into the REF.”⁵⁷

Measuring success – post-implementation evaluation

77. The EM states that, under Part 1 of the Bill, there will be ongoing evaluation of the efficacy of the programmes developed and delivered under that Part. The Counsel General will also be required to keep the accessibility of Welsh law under review. The EM adds that this will include reviewing the efficacy of Parts 2 and 3 of the Bill also.⁵⁸

78. The EM also states:

“To the extent that it is appropriate or necessary in view of the ongoing evaluation described above, we anticipate that the legislation will be reviewed in 2026 at the end of the first Assembly term in which a formal accessibility programme has been delivered. It will not be feasible before this time to assess the effectiveness of the statutory underpinning for the programme or indeed predict the ongoing need for the legislation.”⁵⁹

⁵⁷ CLA Committee, 18 February 2019, RoP [38] and [39]

⁵⁸ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 216

⁵⁹ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 217

79. The Law Commission said:

“The question, ‘How to measure success?’ is very difficult. Assuming—as, I think, we do—that everybody thinks there is considerable value in pursuing this, then we would view, from our perspective, at least, success as including the following: making the start, not delaying it because of Brexit or other matters. (...) Having a mechanism for introducing codification legislation would also be good progress. Making progress with codes—the taxonomy drafted, we think, is an excellent start. The work that is ongoing in relation to planning law will be an acid test of how this works; it will give you an opportunity to evaluate and learn from the experience. And you should be able to gauge public reaction over time. There are increasingly sophisticated qualitative and quantitative survey techniques to find out whether citizens understand law, can use it more easily.

There may be some obvious criteria: the number of codes brought forward—their extent, whether steps have been taken to measure quantitatively or qualitatively whether they’ve been effective. (...)

...on the qualitative side, you may want to consider: how much of an improvement is this Bill on the legislation it replaces?”⁶⁰

80. Dr Catrin Fflûr Huws told us:

“...the range of what exactly is meant by ‘accessibility’ is something that needs to be defined in greater detail in terms of your concept of accessibility in order to measure success. Has the law become more accessible or not? (...)

I think the fact that the Counsel General has a duty to report on this does create some uncertainty as to what the measure of success would look like. There is a duty to keep the law under review, but the legislation doesn’t provide details as to what is kept under review, what success would look like, how that success would be measured and what accessibility means, as I mentioned earlier. In terms of measuring success, it does depend who you ask, in the sense that the measure of success can mean different things to different people. So, one of the things that I think needs to be given consideration to in this legislation is who this legislation is for. Is it for the Assembly, the public, law

⁶⁰ CLA Committee, 14 January 2019, RoP [65], [74] and [77]

practitioners? Who is this legislation for? In doing that, it'll be easier to decide what success will look like in the context of this Bill and how we can find whether the Bill has been successful.”⁶¹

81. Swansea Law Clinic told us that knowing a target end date for implementation of the Bill “even if it were 25 years hence” would give people the ability to judge the success of the Bill.⁶²

82. We asked stakeholders when would be the most opportune and appropriate point to evaluate the Bill.

83. Citizens Advice Cymru said:

“We’d agree that setting one review point wouldn’t be very helpful. It’s a moveable feast, so looking at it frequently over the next few years to see how it develops, what extra challenges we might face, I think is more beneficial than setting a single point when you want to review it.”⁶³

84. Swansea Law Clinic told us that such a significant and innovative Bill would need to be reviewed quite soon after implementation and would benefit from “frequent checks”.⁶⁴

85. In terms of review and oversight, The Law Commission said:

“We view the oversight of this by the Assembly as very important. The traditional role of an Assembly or a committee such as this is to analyse, monitor, nudge, cajole, call to account and pose the pertinently impertinent question. And that’s something that an Assembly and a committee such as this ought to be doing.”⁶⁵

86. Similarly, The Law Society told us:

“...scrutiny is always healthy in my opinion, and therefore I think there is a role for the Assembly to take in scrutinising and ensuring that this is delivered.”⁶⁶

⁶¹ CLA Committee, 14 January 2019, RoP [98] and [194]

⁶² CLA Committee, 28 January 2019, RoP [156]

⁶³ CLA Committee, 28 January 2019, RoP [168]

⁶⁴ CLA Committee, 28 January 2019, RoP [166] and [167]

⁶⁵ CLA Committee, 14 January 2019, RoP [67]

⁶⁶ CLA Committee, 28 January 2019, RoP [73]

87. With regards to who should be responsible for setting the questions against which success would be determined, both Dr Catrin Fflûr Huws and Professor Thomas Glyn Watkin QC said that should be a role for the Assembly.⁶⁷

88. The Counsel General told us that he expected the review, as required by section 7, would include “a review at some future point of whether the operation of the Act is as we hope it will be”. He said:

“There’s also the opportunity for there to be scrutiny of progress against the objectives that the Government sets itself in the fact that the Counsel General will report periodically to the Assembly on progress against the programmes that the Government of the day sets out. So, I think that presents an opportunity to review the functioning of the legislation and the programmes as well at that point in time.”⁶⁸

89. He added:

“It’s a question of whether the public feel the law is more accessible. That would be—. It’s not for me to assess that—it’s a matter for the public at large to decide whether they feel the law is more accessible. So, that’s, I suppose, the test at its most expansive. But I think it was the chair of the Law Commission who gave evidence that said there are other tests to establish progress in this area. One of them is making a start on it. And I think, hopefully, the Bill will be passed into law and we’ll be able to embark on that in short order.”⁶⁹

90. The Counsel General also stated:

“I would be very happy to respond to a process of review led by this committee or the Assembly generally, yes, of course.”⁷⁰

Our view

91. We welcome the proposals in the Legislation (Wales) Bill. We believe the Bill has the potential to contribute to the Welsh Government’s aim of improving the accessibility of Welsh law.

⁶⁷ CLA Committee, 14 January 2019, RoP [196] and [198]

⁶⁸ CLA Committee, 10 December 2018, RoP [22] and [23]. See also paragraph 143.

⁶⁹ CLA Committee, 18 February 2019, RoP [49]

⁷⁰ CLA Committee, 10 December 2018, RoP [25]

Recommendation 2. We recommend that the National Assembly agrees the general principles of the Legislation (Wales) Bill.

92. While recommending that the National Assembly agrees the general principles of the Bill, we would like to emphasise that it will be important to thoroughly scrutinise future Bills which seek to consolidate existing law as it applies to Wales. We offer further commentary on the Counsel General's consolidation proposals in chapter 5 of this report.

93. We note that the Bill contains four powers for the Welsh Ministers to make subordinate legislation, within sections 5, 36, 40 and 42. We further note that, with the exception of the order making power in section 42, the delegated powers provided by the Bill will take the form of regulations. We are content with the balance between what is on the face of the Bill and what is left to subordinate legislation.

94. We note and agree with our stakeholders who said that the task of making Welsh law more accessible will require sufficient resourcing. Doing this properly will be a very ambitious task. We believe the success of the overall objective of making Welsh law more accessible is, among other things, dependent on the resources dedicated to the task by the Welsh Government.

95. Further, we have received evidence that legislative measures such as consolidating legislation will not, on their own, be enough to make Welsh law truly accessible.

96. It is clear to us that additional, non-legislative measures such as ensuring the availability of legal commentary on Welsh law by practitioners and academics, the development of Welsh speaking lawyers, translators and interpreters, and educating the public about Welsh law and the rights and obligations in Welsh law, must form a central role in improving the accessibility of Welsh law.

Recommendation 3. The Counsel General should provide further details on what non-legislative measures could and should maximise the effectiveness of the Bill.

Recommendation 4. The Counsel General should clarify how he intends to make non-legislative measures a central part of improving the accessibility of Welsh law, including:

- setting out what discussions he has had with potential legal commentators, and what the Welsh Government expects from such legal commentators;

- how he thinks that Welsh language expertise can be developed;
- how the Welsh Government will go about educating the public so that they know what their rights and obligations are in Welsh law.

97. We note the evidence in relation to the Research Excellence Framework and the possibility that it is an obstacle to the development of academic commentary on the law in Wales.

Recommendation 5. The Counsel General should:

- work with universities in Wales to encourage academic research on the law in Wales;
- work with the Welsh Research and Innovation London Office and with universities in Wales to identify and promote funding opportunities for academic research on the law in Wales and to influence UK-wide research policy to incentivise this research.

98. We further believe that a concerted effort to make continued improvements to the clarity of language used within both primary and secondary legislation will also go some way to achieving the aim of making Welsh law more accessible.

99. The Bill has great potential to make Welsh law more accessible, clear and straightforward to use. However, as a piece of innovative legislation, robust evaluation will be critical to the success of the legislation. We note that it is the Counsel General's intention to review the legislation, if enacted, towards the end of the next Assembly term. We do not share the view that it will not be feasible to assess the effectiveness of Part 1 of the Bill nor the ongoing need for the legislation as a whole before 2026. We believe more timely reviewing of the legislation, both its implementation and effect, will be needed.

Recommendation 6. Subject to the Bill receiving Royal Assent, the Counsel General should commit to a review of the legislation at the mid-way point of the first Assembly term in which the legislation takes effect, i.e. by the end of 2023.

100. We make a number of recommendations throughout the report which we believe will strengthen the legislation and its implementation. These are detailed in the following chapters, which also make specific observations on particular sections of the Bill, and the powers within those sections to make subordinate legislation.

5. Accessibility of Welsh law (Part 1 of the Bill)

“We are conscious that there is a certain paradox in legislating to impose a duty to make Welsh law more accessible. This is because one of the means of making law more accessible is to have less of it. We should not in principle produce new law where this is not necessary.”⁷¹

What does accessibility mean?

101. The EM states:

“For Welsh law to be accessible it needs to be clear and certain in its effect, as well as being easily available and navigable. This needs to be the case not only in respect of individual Acts or Statutory Instruments, but also collectively – all of the law on a particular subject and the statute book as a whole.”⁷²

102. In its written evidence, Swansea Law Clinic said:

“The Bill does not define accessibility, which we see as a potential strength of the legislation. New Zealand’s Legislation (Act) 2012 defines accessibility narrowly and we think the accessibility programmes under s.2 of the Bill could be more wide ranging, flexible and innovative than the New Zealand model by looking at public legal education, computational law principles, participative law-making and setting standards for clear and simple legislation.”⁷³

103. Sir Nicholas Green of The Law Commission told us:

“...the central principle of accessibility found within the Bill is not one that is defined. Personally, I don’t see this as a particularly difficult problem. Both in our report on form and accessibility of the law applicable in Wales and in the Counsel General’s speeches and evidence, the basic ingredients of accessibility are described. We would summarise them as follows: first, the use of understandable language in

⁷¹ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 39

⁷² Legislation (Wales) Bill: Explanatory Memorandum, paragraph 25

⁷³ Written evidence, LW 02, Swansea Law Clinic

Welsh and English; second, the removal of out-of-date and obsolete provisions that otherwise foster confusion; third, the removal of unclear and inconsistent terms and definitions; fourth, the bringing together of legislation and, to some degree, common law rules and case law, into a single instrument or into a series of instruments; fifth, the drafting of legislation so that it can be readily amended without leading to a proliferation of different instruments on a topic or subject; and sixth, making legislation readily accessible via digital means—what the Counsel General described in one speech as ‘navigability’. Now, these are, in my view, general principles of accessibility. In Wales, there is the added important dimension of making legislation available and understood in the Welsh language.”⁷⁴

104. Dr Catrin Fflûr Huws’s evidence presented another perspective. She told us:

“The question of accessibility can mean a number of different things, and what isn’t clear and perhaps needs further consideration in this legislation is this concept of what ‘accessibility’ means and what is meant by it in the legislation. It could be in terms of the accessibility of the two versions of the legislation; it could be accessibility in terms of clarity of terms and concepts on any specific issue all brought together in one piece of legislation, rather than existing across a number of different pieces of legislation; but it could also mean the availability and concurrence of the legislation in various commercial sources, such as LexisNexis and Westlaw, but also those sources that are available free of charge to the public.”⁷⁵

105. Dr Huws also said:

“These different aspects vary in terms of the Counsel General’s ability to control them, and therefore there must be consideration of what is the meaning of success or failure to adhere to this duty.”⁷⁶

106. The Counsel General told us that:

“To paint a broad picture first, there are a number of different strands to the accessibility question, and the legislation provides one part of that, I suppose. The publication of law is obviously a critical dimension to its availability and doing that in a way that enables people more easily to

⁷⁴ CLA Committee, 14 January 2019, RoP [7]

⁷⁵ CLA Committee, 14 January 2019, RoP [98]

⁷⁶ Written evidence, LW 07, Dr Catrin Fflûr Huws

find the law as we proceed with a programme of consolidation and codification. So, I'm looking at how we can publish the law by subject matter rather than simply by date, which makes it easier to find, even for professionals."⁷⁷

107. The Counsel General also told us:

“On the accessibility agenda more broadly, of course, one of the objectives is to impose on the Government a pressure to ensure accessibility throughout the legislative process, and so I think that imposes a further obligation to make sure that Bills brought forward are the most accessible versions of those Bills that they can be. And I think there's also a dialogue then with the Assembly, between the Assembly and the Government, about what a programme of accessibility might look like over the next five or 10 or 15 or 20 years. So, there's a shared understanding of what that needs to be, because if it becomes a task solely for the Government then I think we will have failed, really. It should become part of the institutional culture of the Assembly, for us all to want Bills and statutory instruments to be as accessible as possible.”⁷⁸

108. With regards to the “exciting potential” that technology may bring, the Counsel General said:

“I've been talking to academics at Swansea University, and to Google, actually, and counterparts in other parts of the UK to discuss what they are doing. This is a long-term agenda, but it's also important to take advantage of technology during that to make as much progress as we can, and there are all sorts of potentially exciting options making technology available so that people can more readily understand the relationship between English and Welsh texts and to help people navigate around statutes when they're published and how we use technology in this place as well, although that's not a question for the Counsel General, but I think there are some very exciting opportunities. I just want to caution that I think some of these are early wins, but many of them will take longer to develop. I think it's important to be tuned into those discussions.”⁷⁹

⁷⁷ CLA Committee, 10 December 2018, RoP [49]

⁷⁸ CLA Committee, 18 February 2019, RoP [22]

⁷⁹ CLA Committee, 10 December 2018, RoP [50]

109. The Counsel General’s evidence to us also included reference to the issue of access to justice. He said:

“There is obviously a distinction, as your question highlights, between access to justice, perhaps we could describe it as on one hand, and access to law on the other. You could argue that access to law is a subset of access to justice, but the purpose and intent of this Bill is to improve access to law. We obviously have very limited competence in order to address the challenges that many people face in terms of the withdrawal of access to justice. I think there is a role for Government and legislatures in at least trying to ameliorate some of that by making access to law easier, which is the point of this Bill.”⁸⁰

The duty to keep accessibility of Welsh law under review (section 1)

110. Section 1(1) requires the Counsel General to keep the accessibility of Welsh law under review. The Explanatory Notes to the Bill state:

“The duty in section 1(1) is similar to, and intended to supplement (not replace), the obligation on the Law Commission to keep the law under review under section 3(1) of the Law Commissions Act 1965. It requires a focus on the law as a collective, be that the law on a particular subject and the statute book as a whole. It also means that the Counsel General’s obligation to keep the accessibility of Welsh law under review will be relevant when the Welsh Ministers are considering whether to propose new legislation. In such situations regard should be had to how the approach taken to legislating could impact upon the accessibility of the law. This does not, however, mean that the Welsh Ministers would have to legislate in a particular way in any individual case.”⁸¹

111. “Welsh law”, as defined in section 1(2), means:

- Assembly Acts and Measures and subordinate legislation made under them (in other words, all legislation made by the National Assembly for Wales or under its authority);

⁸⁰ CLA Committee, 10 December 2018, RoP [57]

⁸¹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 11

- other subordinate legislation made by the Welsh Ministers or the old National Assembly for Wales so far as it applies in relation to Wales (in other words, any other legislation made by the devolved government in Wales); and
- any other enactment or rule of law so far as it applies in relation to Wales and relates to subject matter for which an Assembly Act could make provision (in other words, other legislation or common law rules which could potentially be reformed or re-enacted by the National Assembly).⁸²

112. The Judicial Appointments Commission told us it supported any attempt to improve the accessibility of Welsh law and it was reasonable to require this to be a statutory responsibility on the Welsh Government.⁸³

113. Swansea Law Clinic told us that the section 1 duty “has the potential to bring about behaviour change so that all actors involved in the law-making process will think of accessibility when making laws”.⁸⁴

114. Public Law Wales said:

“We submit that a statutory duty to keep Welsh law under review is especially important here, as areas of administrative law and administrative justice are particularly susceptible to political short-termism (and so-called ‘ad hocery’), to the detriment of articulating a principled and clear approach to public administration (and consequentially to social justice).”⁸⁵

115. The Counsel General told us:

“I think that the role of the duty being placed on the Counsel General to keep the law under review and to report on that is, obviously, at the heart of what’s envisaged here, and I think that is the locus for accountability, really. (...)”

Well, the point of having a duty is to create that ongoing responsibility, and the current arrangements are very vulnerable to the appetite of any Government to do it or not. And the point of having a structured duty

⁸² Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 12

⁸³ Written evidence, LW 11, Judicial Appointments Commission

⁸⁴ Written evidence, LW 02, Swansea Law Clinic

⁸⁵ Written evidence, LW 12, Public Law Wales

and a programme is to make sure that future Governments are also committed to it.”⁸⁶

The programme to improve accessibility (section 2)

116. Section 2 requires the Welsh Ministers and the Counsel General to develop a programme of action designed to improve the accessibility of Welsh law for each Assembly term that begins after the section comes into force.

117. Section 2(3) requires each programme to make provision for measures that are intended to consolidate and codify Welsh law, maintain codified law and to facilitate use of the Welsh language. The specific content of a programme will be a matter for the Welsh Ministers and the Counsel General.

118. Section 2(3) also requires each programme to include activities intended to facilitate use of the Welsh language. The Explanatory Notes state:

“This is intended to include facilitation of the language in the law, in public administration and more generally. A key aspect of this will be consolidating the law bilingually so that much more of the law for which the National Assembly and Welsh Government are responsible is made in Welsh. Similarly, improving publication arrangements and providing more commentary on the law in both languages will make it easier for the Welsh language to be used in the law and in public administration more generally in Wales. Other projects in a future programme could include making more glossaries for legislation available and further initiatives to develop agreed terminology where this is helpful.

Section 2(4) provides that each programme may also include proposals to promote Welsh law for example by raising awareness of significant changes in the law or the existence of Welsh law more generally.”⁸⁷

119. Section 2(5) requires a programme to be laid before the National Assembly within six months of the appointment of the First Minister following a general election. The Explanatory Notes state that this provision is intended to ensure that each government can be held accountable for what its programme achieves over an Assembly term. The Explanatory Notes add:

⁸⁶ CLA Committee, 10 December 2018, RoP, [28] and [125]

⁸⁷ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraphs 20 and 21

“Although a new government is not required to inherit the programme of the previous government at the beginning of an Assembly term, in practice, projects from one programme will almost certainly continue until the next programme is prepared and laid, and there is nothing to prevent projects from an earlier programme appearing in a subsequent programme where the timeframe for completing such a project requires that. Some of the individual projects to consolidate and codify the law on a subject will be long term in nature, and could take more than one Assembly term to complete.”⁸⁸

120. Section 2(6) provides that the Welsh Ministers and Counsel General may revise a programme during the Assembly term, but that revised programme must be laid before the National Assembly and again reported against.

121. Section 2(7) requires the Counsel General to make periodic reports to the National Assembly on progress against the programme. The Explanatory Notes state that such reporting could be made through a statement to the Assembly, which would enable Assembly Members to ask questions of the Counsel General on the report.⁸⁹

122. The Welsh Government believes that only a sustained effort over the long term can solve the current problems with the UK statute book. The EM states “What is required is a permanent change to our law making processes”.⁹⁰

123. The Welsh Government issued a technical document, the Draft Taxonomy for Codes of Welsh Law,⁹¹ on 3 December 2018, alongside the introduction of the Bill.

124. The Draft Taxonomy document states:

“To assist in understanding how the law could be divided OLC [the Office of the Legislative Counsel in the Welsh Government] have developed an indicative taxonomy of possible Codes. This is not designed to cover all areas of devolved law at this time, but instead to suggest how legislation in most key areas could be organised.

This indicative division of the legislation needs further consideration, including more detailed scoping and analysis of the existing law. It will also be important to take the views of users of legislation, including

⁸⁸ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraphs 22 and 23

⁸⁹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 24

⁹⁰ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 14

⁹¹ [Welsh Government: Draft Taxonomy for Codes of Welsh Law, December 2018](#)

understanding how they decide that the ‘subject’ of their search of legislation is. The goal is to organise the statute book by reference to commonly understood subject categories. Although these categories will almost inevitably change as the detailed process of consolidation begins our intention is to set out our high-level goals within each category – and to ensure that others agree that they are broadly sensible objectives. The Counsel General intends to explore these issues in more detail [in 2019].”⁹²

125. The section 2 duty requiring the Welsh Ministers and the Counsel General to prepare a programme setting out what they intend to do to improve the accessibility of Welsh law has been welcomed by stakeholders.

126. Capital Law said that the duty on Welsh Ministers will “inject momentum” into the overall project of making Welsh law more accessible and, as a duty, it was a “way of keeping the project on track”.⁹³

127. The Law Commission told us:

“In relation to any one topic, whether it be social security or housing, there is a vast amount of complex, technical legislation, most of which is inaccessible to the ordinary person. We feel strongly that this sort of exercise of improving accessibility is intended to and should have a real impact upon individuals’ lives. So, we think it’s very important. (...)

It’s... a process that needs to be addressed pragmatically. And the speed at which accessibility can be achieved will inevitably depend on political and financial resources.”⁹⁴

128. Keith Bush QC suggested that the provisions in Part 1 of the Bill were a “small but highly significant step in responding positively to The Law Commission’s recommendations”. He said:

“They are likely to lead to a highly desirable improvement in the accessibility and effectiveness of Welsh law. The only caveat which the author would wish to enter is that the duties to be imposed by Part 1 will only be meaningful if the work of codifying, consolidating and generally improving the accessibility of Welsh law is adequately resourced. If that is not done then either the programme required by

⁹² Welsh Government: Draft Taxonomy for Codes of Welsh Law, paragraphs 6 to 9

⁹³ Written evidence, LW 06, Capital Law

⁹⁴ CLA Committee, 14 January 2019, RoP [17] and [8]

section 2 will be unambitious and ineffective or (which would be even worse) will turn out to have been overambitious and incapable of achievement.”⁹⁵

129. Swansea Law Clinic told us they were keen on accessibility programmes being defined quite widely, and that they include public and legal education components as well as collaborative methods of law making. They said:

“There were plenty of examples across the world where the more collaborative, co-operative methods of legal drafting have been used, and we think that’s something that could be considered under these accessibility programmes. That’s as well as computational law principles—where we have legislation available digitally, how can that be tailored in a way that someone can find out the legislation that applies to them and their particular problem. We see that as quite an important matter to address.”⁹⁶

130. Stakeholders raised with us the fact that the Bill, as drafted, only requires the Welsh Ministers and Counsel General to prepare a programme to improve accessibility. While acknowledging the provision in section 2(7), requiring the Counsel General to report periodically to the Assembly, the Bill does not require the Welsh Ministers and Counsel General to implement any programme of accessibility prepared under section 2(1).

131. Public Law Wales said:

“We suggest that further consideration could be given to imposing on Ministers not only an obligation to prepare a programme to improve accessibility of Welsh law, but also an obligation to give effect to such a programme (understandably this latter obligation would need to be qualified in some way). This would give greater assurance that programmes will be implemented.”⁹⁷

132. The Law Society voiced concerns that the Bill, as drafted, may mean that only one programme under section 2 would be brought forward in an Assembly term. The Law Society said:

⁹⁵ Written evidence, LW 05, Keith Bush QC

⁹⁶ CLA Committee, 28 January 2019, RoP [103]

⁹⁷ Written evidence, LW 12, Public Law Wales

“It seems to us that perhaps a little bit of scrutiny on a more regular basis like that might not be a bad idea.”⁹⁸

133. A number of stakeholders also commented on the section 2(3) and (4) provisions.

134. The Law Society said:

“...one concern that we do have is in relation to the duty, because the way Part 1 is drafted at the present time, the duty is to produce a programme that includes ‘proposed activities’ that are intended to do what’s in the section here. And we wonder whether that is strong enough, or whether, in fact, the word ‘proposed’ should perhaps be removed to ensure that some activity is carried out, not just that you put a plan forward but nothing ever gets done as a result. And, again, it’s a point of detail, but subsection 3 of section 2 talks about what the programme ‘must include’, and subsection 4 talks about what the programme ‘may also include’, and the first item there is activities...

We would respectfully suggest that perhaps that ought to be part of the duty as opposed to a mere discretion.”⁹⁹

135. The Law Commission made specific reference to the provision in section 2(3)(c), regarding facilitating the use of the Welsh language. The Law Commission said:

“There is a statutory duty on the Welsh Ministers and the Counsel General to include in proposed activities ‘facilitating’ use of the Welsh language. So, point 1 is that there is a statutory duty, if the Bill is enacted, to achieve that. It comes back to a discussion we’ve had earlier about the extent to which the Assembly may wish to vigorously enforce these sorts of obligations... Plainly, from the perspective of Wales, this is fundamentally important. It’s always debatable whether you want it more express, but it is there. It’s a matter for you whether the word ‘facilitate’ is sufficiently strong, perhaps.”¹⁰⁰

⁹⁸ CLA Committee, 28 January 2019, RoP [81]

⁹⁹ CLA Committee, 28 January 2019, RoP [75] and [77]

¹⁰⁰ CLA Committee, 14 January 2019, RoP [85]

136. Huw Williams expressed reservations about the ambition for an accessibility programme under section 2(1) and linked this to the uncertainty of why the power in section 2(4)(b) has been included in the Bill. He said:

“The Law Commission’s Report on the Form and Accessibility of the Law Applicable in Wales discussed the extent to which the type of streamlined legislative procedures recommended for consolidating bills could also encompass an element of reform. I note that at Westminster the availability of the special procedure for consolidation bill, which may include an element of reform, is expressly linked to bills linked to reports of the Law Commission and that the work of the Commission, in effect, determines the extent of reform thought suitable for the special procedure. It isn’t clear if similar considerations lie, at least in part, behind the inclusion of the permissive power in the Bill for a programme to include activities undertaken in collaboration with the Law Commission, on the basis that the Commission’s work would then indicate and guide the extent of reform thought permissible within the overall purpose of consolidation and codification. In view of this, I think it would be helpful if reforms to the law intended to further the purposes of accessibility through consolidation and codification were added to the activities listed in sub-section (4). I also think that while it does not require a legislative provision, there is a strong case for a degree of co-ordination of the accessibility programme with the legislative programme, so that one could see a substantive reforming bill being passed and then immediately consolidated and codified with the reforms being commended at the same time as the Code is passed into law.”¹⁰¹

137. Public Law Wales told us that the rationalisation of the Welsh statute book only goes part of the way to improve the accessibility of law. They noted that section 2(4)(a) of the Bill says the programme “may” also include proposed activities that are intended to promote awareness and understanding of Welsh law. Given its importance, they felt there is a case for saying that there should be a “must” duty to include such activities as opposed to a “may” power, if the Bill is to achieve its stated policy objectives.¹⁰²

¹⁰¹ Written evidence, LW 10, Huw Williams

¹⁰² Written evidence, LW 12, Public Law Wales

138. With regards to addressing concerns around disincentives for academics to produce materials on Welsh law (as discussed earlier in the report), Public Law Wales suggested that:

“...a specific reference could be added to s.2(4) that the programme; may include proposed activities fostering collaboration with universities and the legal profession in Wales to improve the accessibility of Welsh law, including a power to give financial support to such activities.”¹⁰³

139. Public Law Wales further suggested that the Bill should contain a duty to consult, in particular when preparing an accessibility programme under section 2(1).¹⁰⁴

140. With regards to section 2(7), The Law Commission noted that the Bill does not include a duty on the Counsel General, or the Ministers, to report on the operation of the Act on a continuing basis, and suggest that the obligation to report on progress “could be beefed up”, perhaps by adding substance to the word “report”.¹⁰⁵

141. Further, and similar, to this issue, The Law Society raised concerns about the lack of external control of and influence on any future accessibility programme. It said:

“Whilst ‘consolidating and codifying Welsh law’ is the aim of the Bill the interpretation of the duty is left to the government of the day. It is a particular concern that the timing and progress of codification is a matter for the government of the day.”¹⁰⁶

142. In relation to Part 1 of the Bill, the Counsel General told us:

“I think it’s incumbent on Governments and legislatures to take steps to make law as available to members of the public as possible, partly in response to that. There’s a democratic accountability justification to it, but there’s also a social justice justification to it, and I think those two things are brought together in the Bill.”¹⁰⁷

143. The Counsel General went on to say:

¹⁰³ Written evidence, LW 12, Public Law Wales

¹⁰⁴ Written evidence, LW 12, Public Law Wales

¹⁰⁵ CLA Committee, 14 January 2019, RoP [67]

¹⁰⁶ Written evidence, LW 04, The Law Society

¹⁰⁷ CLA Committee, 10 December 2018, RoP [44]

“...the existence of that duty, I think, is the catalyst that moves the process of consolidation from being, as I described earlier, something that is reactive and piecemeal into something that is systematic, and also attracts the resources that you’d need in order to be able to maintain a programme of accessibility, rather than doing it as and when. (...)”

Additionally, it also provides, as I mentioned in my response to the Chair, a mechanism by which the Government can be held accountable for driving this agenda forward.”¹⁰⁸

144. With regards to the sorts of activities anticipated under section 2(3), the Counsel General said:

“Well, there’ll be a range of activities, I envisage. The principal activity, of course, is the consolidation of the law, and I would envisage any programme containing several consolidation projects over the life of an Assembly, and in fact perhaps extending even beyond the life of a particular Assembly term—it’s clear that the scale of the task in some areas will certainly extend beyond one Assembly term. So, I would expect there to be timescales set out in the programme and for the Counsel General to report on progress periodically as the legislation itself envisages.”¹⁰⁹

145. In his letter to us on 9 January 2019, the Counsel General stated:

“The programmes prepared under section 2 will set out the detailed steps that the Welsh Government intends to take in each Assembly term to improve accessibility. That is entirely appropriate because the duty will be ongoing. It would be impossible for the Bill to specify all of the detailed steps that should be taken to improve accessibility in all future Assembly terms.”¹¹⁰

146. On 18 February 2019, the Counsel General added:

“...the kind of thing that I have in mind is firstly a significant development of the Law Wales website, which is an online resource for commentary on the law in Wales by Government, by the Assembly, by commentators, academics, practitioners and so on. So, a significant

¹⁰⁸ CLA Committee, 10 December 2018. RoP [46] and [47]. See also paragraph 88.

¹⁰⁹ CLA Committee, 10 December 2019, RoP [70]

¹¹⁰ Letter from the Counsel General, 9 January 2019

upgrade of what we currently have in relation to that, which, to be honest, is, I think at best described as a ‘work in progress’ at the moment. We’re also working with the National Archives to update the basis on which Welsh law is updated and published. There’s a significant amount of work to be done there, so advances in that programme will be the kinds of things I would envisage.”¹¹¹

147. In terms of the content of a future accessibility programme, the Counsel General said:

“...the first formal programme under the Bill when it becomes, as we hope, an Act, will be in the next Assembly term. And, obviously, we will be looking at that point—or the Government of the day will look, at that point, at what the state of the law is and what are the areas that most need consolidating. And I dare say that they will have in mind, at that point, the impact that Brexit’s had to date. (...)

...the Government will consult on the content of a programme. Given the purpose of the programme—the accessibility of law—I think it’s going to be very important to make sure that the programme reflects the urgency for doing that in particular areas and the public interest in and appetite for doing it. So, absolutely at the heart of this is taking the views of the public about what should be contained in the programme in any one Assembly term. That’s part of the reason for providing that the programme is laid out for a six-month period from the election, the first election of the First Minister after the new Assembly is elected, so that it gives a period of time in which to undertake that consultation.”¹¹²

148. The Counsel General told us that the content of the programme and the appetite of the Government to bring forward consolidation Bills are matters for the Government of the day.¹¹³

149. The Counsel General later added:

“...the programme is an indication of what the Government intends to do over the course of an entire Assembly term. And so, it really is a matter of political pressure, it seems to me, to ensure that that is done. There are opportunities in the Chamber, as the Counsel General gives a

¹¹¹ CLA Committee, 18 February 2019, RoP [7]

¹¹² CLA Committee, 10 December 2018, RoP [19] and [68]

¹¹³ CLA Committee, 10 December 2018, RoP [125] and [178]

report, and other opportunities for scrutinising the Government in meeting its stated ambition...”¹¹⁴

150. With regards to the timescales of future programmes and the timescales for the broader ambitions for the consolidation and codification of Welsh law, the Counsel General said:

“...this is a programme of many years, and that there would be areas that remain, by definition, uncodified and unconsolidated for some time in that period.”¹¹⁵

151. The Counsel General also told us:

“The way I envisage it working in practical terms is that it’s possible to consolidate either as part of a piece of law reform or during periods of policy calm, if I can describe it in that way—you know, after a period of law reform. So, it’s intended to be flexible so that you can look at the Government’s legislative programme after an Assembly election and identify where the opportunities might be and then supplement those or do them in a way that is most likely to lead to consolidation and codification. So, it’s meant to be a flexible tool in that sense.”¹¹⁶

152. With regards an accessibility programme and the role of the Assembly, the Counsel General told us:

“...the Assembly will also have a role, I hope, in influencing the content of that programme by making suggestions about what the Government might wish to include in them.”¹¹⁷

153. The Counsel General also confirmed that discussions with the Assembly were underway about Standing Orders that would enable the appropriate scrutiny of consolidation Bills.¹¹⁸

154. We asked the Counsel General to explain his thinking with regards to future processes for law reform Bills, and the relationship with processes for Bills that would consolidate existing legislation. He told us:

¹¹⁴ CLA Committee, 18 February 2019, RoP [12]

¹¹⁵ CLA Committee, 18 February 2019, RoP [31]

¹¹⁶ CLA Committee, 10 December 2018, RoP [181]

¹¹⁷ CLA Committee, 10 December 2018, RoP [76]

¹¹⁸ CLA Committee, 10 December 2018, RoP [76]

“Although they both require different kinds of Standing Orders, they’re both separate in a sense. So, the consolidation Standing Orders clearly are about consolidation. The law reform one will be predicated on a piece of law reform, on work that the Law Commission would have undertaken, usually. So, there’s a conceptual difference, I think, in how to approach them and the needs of the Assembly will be different in either case, I think.”¹¹⁹

The meaning of consolidation and codification

155. The Counsel General’s plan for improving the accessibility of Welsh law involves both the processes of consolidation and codification (as per section 2(3)(a) of the Bill). The Explanatory Notes to the Bill provide an explanation of both processes:

“Consolidating the law generally involves bringing all legislation on a particular topic together, better incorporating amendments made to legislation after it has been enacted and modernising the language, drafting style and structure. This involves no or only minor amendments to the substance of the law consolidated. In Wales consolidation of the law will involve for the most part re-enacting laws previously made by the UK Parliament, and doing so bilingually.

Codifying the law is intended to bring order to the statute book. This involves organising and publishing the law by reference to its content (and not merely when it was made), and maintaining a system under which that law retains its structure rather than proliferating. A ‘Code’ of Welsh law would generally be published once some or all of the primary legislation on a particular subject (taking account of the legislative competence of the National Assembly) has been consolidated, or has been created afresh following wholesale reform. This should usually be accompanied by a process of rationalisation of subordinate legislation made under the primary legislation. The existing hierarchy within, and delineation between, legislative instruments (primary and secondary legislation, and guidance or other similar documents made under the Acts or subordinate legislation) would remain. All the legislation within a Code will be made in both English and in Welsh.

¹¹⁹ CLA Committee, 18 February 2019, RoP [109]

Therefore a Code would not (generally) be one legislative instrument but rather a collection of enactments under a unifying overarching title. Those enactments which make up the Code on any particular subject would be made available together. Similarly these enactments will remain the means by which the law is formally articulated. The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively.”¹²⁰

156. The Explanatory Notes further explain that, although a Bill that codifies statute law might incorporate the effect of case law on the meaning of the legislation being consolidated and codified, or rules of common law that are closely related to that legislation, “the Welsh Government does not intend to undertake wholesale codification of the common law”.¹²¹

157. Professor Thomas Glyn Watkin QC told us:

“Given the relative youth of its devolved legislature and the still manageable quantity of its statutory output, Wales is well-placed to take bold, first steps towards codifying its legislation as proposed by the bill’s provisions.”¹²²

158. Citizens Advice Cymru were of the view that a process of consolidation with the final output being consolidated legislation will not only help the citizen but it will also help their advisers give the best possible advice.¹²³

159. Public Law Wales raised some concerns about the potential pitfall of seeing consolidated and codified law as a singular way of making the law more accessible. They said:

“There is great value to legal professionals in having a collection of legislative sources, and this could over time begin to compensate for the difficulties of having few academic and practitioner texts across the topics of Welsh law. However, based on our collective research into the experiences of ‘users’ of the administrative justice system in Wales, this would not on its own render the law more accessible to many groups of non-professionals – especially for example homeless persons and some social housing tenants, or parents of children with additional learning needs and healthcare needs. One reason for this is legislative language,

¹²⁰ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraphs 16 to 18

¹²¹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 19

¹²² Written evidence, LW 03, Professor Thomas Glyn Watkin QC

¹²³ CLA Committee, 28 January 2019, RoP [98]

another is that users of the administrative justice system tend to have multiple problems that could easily cut across for example, Codes of Education, Health, Housing and Public Administration. (...)

There is potential for codification to reduce costs by making the law more accessible to professionals, but for individual people the need for assistance, advice and advocacy will still be very real. (...)

...the Welsh Codes will not seek to codify case law, yet they risk being seen as a fully comprehensive statement of the law on a particular subject area.”¹²⁴

160. We asked our stakeholders what consolidation and codification meant to them. We also asked for their views on the Counsel General’s current intentions regarding both processes.

161. Professor Thomas Glyn Watkin QC told us:

“My understanding of consolidation is that it brings together under one roof, as it were, the relevant legislation on a particular topic, and in so doing would obviously remove the things that were no longer pertinent. It would revise the language in order to bring the thing into an integral whole, but of itself, would not, as it were, design the structure under the roof within which the consolidated law would fit. And codification is one choice of how you then systematise and rationalise what you have consolidated. So, consolidation brings things together; codification is the choice you make about how you then order it. To a certain extent, although the two things go hand in hand, it is necessary to consolidate before you can really see how, if at all, you wish to codify.”¹²⁵

162. Citizens Advice Cymru said:

“From our understanding of the Government proposals to date, it is clear to us what a code is. I’ve looked at the taxonomy. It does look clear; it’s been presented in a clear and accessible manner that would be understandable to the public. Perhaps lawyers would want to look in more detail at some of the issues that we’ve raised today, but for the

¹²⁴ Written evidence, LW 12, Public Law Wales

¹²⁵ CLA Committee, 14 January 2019, RoP [118]

public, I think this version is clear for them so that they can understand what a code is and where law would sit within that code.”¹²⁶

163. The Law Commission told us:

“There’s no definition of codification or accessibility, and that, I think, is a legislative choice. There is sometimes a danger in being too prescriptive too early, and trying to define terms might actually limit them. If this were a court and I were a judge looking at the interpretation of this, I would be looking at what was the admissible extraneous material—you know, what had the Counsel General said, what had the Law Commission said. I think you would find agreement that codification is intended to be a streamlined process of bringing everything together, not a cataloguing, and I think a court would work out pretty quickly what was meant by those terms.”¹²⁷

164. The Law Society suggested that what the Counsel General is proposing will not create codes as per the current understanding in civil law. For that reason, The Law Society said:

“The Bill refers to ‘codification’ and the Explanatory Memorandum to Codes of Welsh law but as we know from the Law Commission’s report on the Form and Accessibility of the Law Applicable in Wales there are versions of codification and what is proposed for Welsh law does not create a ‘Code’ in the civil law tradition. Viewed from a wider perspective the proposals could lead to confusion. It is proposed, therefore, that the codes which result from this activity of ‘consolidating and codifying Welsh law’ be referred to as ‘Welsh Law Codes’ to identify them as specific, novel and unique.”¹²⁸

165. We asked The Law Society whether a code on the classic civil law lines would be easier to operate than a version where all current legislation is gathered together in catalogue-fashion. The Law Society said:

“I think in terms of clarity and ease of finding the information, the code where everything is there in place has to be the favoured option. Having said that, one can understand that that is a slightly more difficult and, certainly, a more resource-intensive approach to take. But I think as far

¹²⁶ CLA Committee, 28 January, RoP [115]

¹²⁷ CLA Committee, 14 January 2019, RoP [83]

¹²⁸ Written evidence, LW 04, The Law Society

as we are concerned as practitioners, if we can find the source readily and haven't got to go searching elsewhere for things, that is a very beneficial approach to take."¹²⁹

166. We asked the same question of Citizens Advice Cymru, who told us:

"I'd say they both play to different audiences. So, I'd say the catalogue version probably suits lawyers more, in that it's split into Acts, and then you need to look at which Act applies to the situation you're looking at, whereas the one code would apply more to the citizen being able to understand, so it's all in one very contained space, whereas the catalogue is still something that professionals would handle more easily than the citizen. (...)

I think it's a balancing act... Whichever way you do it, it's going to suit one group more than another. And if you are trying to make the law more accessible, I'd say focus on getting it to the citizen and letting lawyers then work with it as they would anyway, whereas if you focus the practice of codification on being for the lawyers, you'll lose out on making it more accessible to the citizen. So, focus on the citizen side of it, because lawyers will find a way of working with the law anyway."¹³⁰

167. The Law Commission indicated that a catalogue system of codification is not its preferred approach. It said:

"I don't think a catalogue makes it more accessible, because that's simply an index. You go to it, you see that item No. 17 is to be found somewhere else—you go to item No. 17 and it starts, in the traditional way, cross-referring to five other pieces of legislation. You've then got the problem of proliferation, which we're in fact trying to solve."¹³¹

168. Both Professor Thomas Glyn Watkin QC and Huw Williams noted concerns that the ambition for codification is unclear. They both also highlighted a conflict between the EM and the Explanatory Notes with regards to what codification will entail, which appears to "roll back" on the broadest vision.

169. Professor Watkin QC said:

¹²⁹ CLA Committee, 28 January 2019, RoP [35]

¹³⁰ CLA Committee, 28 January 2019, RoP [129] and [131]

¹³¹ CLA Committee, 14 January 2019, RoP [50]

“The importance of maintenance [of the statute book] is recognized in the Explanatory Memorandum to the Bill ... However, the Explanatory Notes which accompany the Bill are less clear in this regard... [and] appears to roll back on the broader vision of the EM (...)

...if, as is stated, ‘The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively (EN ¶17)’, it is difficult to see how this can effect ‘a permanent change to our law making processes’ (EM ¶14).

If the codes merely collate and publish primary and secondary legislation which continues to be enacted and made as at present, the only change to existing law-making processes that may be required may be the addition of an opportunity for the legislature to scrutinize how such legislation is being incorporated into the codes. Without such a stage, the exercise will be entirely the preserve of the executive and will be conducted, albeit more thoroughly and more regularly, in much the same way as legislation.gov.uk is currently revised and updated. However, unless some role is accorded to the legislature in this process, it is difficult to see how the content of non-government bills could be fairly accommodated. At the very least, an expedited legislative process might need to be introduced to deal with post-enactment revision of the codes. It might also be asked where the drafters producing those revisions should be located – in the government, the legislature or at arms length to both. (...)

Greater clarity is needed with regard to these issues.”¹³²

170. Huw Williams said:

“While I do not underestimate the task involved in adopting a largely codified statute book for Wales, I share the concern voiced by Professor Thomas Watkin QC that the Explanatory Memorandum ‘appears to roll back on the broader vision’ by explicitly discounting in most cases an approach where the Code itself is a legal instrument. ... While I can now see that such an approach would explain the Welsh Government’s response to the Recommendations 8 and 9 in the Law Commission’s Report on the Form and Accessibility of the Law Applicable in Wales, which stated that the Welsh Ministers envisaged secondary legislation and quasi legal material, such as statutory guidance should also stand

¹³² Written evidence, LW 03, Professor Thomas Glyn Watkin QC

as part of the Welsh Law Codes, I question whether such an approach will in the long term impose the degree of discipline required to maintain an orderly and thus accessible series of Codes. The notion that a Code once assembled should enjoy a protected status that ensures that amendments to a topic within the purview of a Code should be subject to a presumption that the law will only be changed through amendments to the Code, seems to me to be essential if codification is to be seen over the longer term to have been worth effort involved. Protecting the status of the Codes in this way requires the executive and legislature to collaborate and it is disappointing that the Bill is before your Committee for consideration, without any indication of the type of Standing Orders that might be adopted by the legislature to facilitate consolidation and to maintain the Codes..."¹³³

171. Mr Williams added:

"...speaking from a practitioner's perspective, I would like to see a system of codification with two components: (a) A 'Code Act' for each of the major topic areas with the individual Acts forming parts and chapters of the Code and 'protected' by the legislature's standing orders. (b) A co-ordinated publication process that would marshal the secondary legislation and the quasi legislative materials along the lines envisaged in the Government's response to the Law Commission. I also believe that such an approach will create a more robust model of codification with consequent advantages to the accessibility of the codes for the ordinary citizen."¹³⁴

172. Mr Williams concluded:

"To confine the projected codification to the bringing together of legislation and quasi legislation as a publication exercise and designating it as a Code seems to me to be of questionable value."

173. We raised with stakeholders the Counsel General's proposal that his codification ambitions will not involve the codification of common law. In the main, this was supported by stakeholders.

174. The Law Society said:

¹³³ Written evidence, LW 10, Huw Williams

¹³⁴ Written evidence, LW 10, Huw Williams

“At the moment, I think we’d have to say that we agree with the suggestion made, namely that common law isn’t considered because historically that is law that has changed over a period of many years. And of course, the whole point of this legislation is to consolidate written legislation, rather than law that has developed and evolved over a period of years. So, time will tell. Perhaps we will need to look at that in future. But, at the moment, I would say that this is the correct approach.”¹³⁵

175. Citizens Advice Cymru told us:

“Our concern would be if you do codify, the common law principles then become fixed and that’s beneficial in some cases and not in others. But we can see that it has its benefits if you do it, but it’s a massive step just to codify the legislation in the first place, and that would be beneficial for citizens without the common law element being incorporated. So, we’re supportive of the stance being taken currently.”¹³⁶

176. Swansea Law Clinic suggested that simplification and codification of common law judgments would be useful.¹³⁷

177. The Counsel General told us:

“...consolidation, and the accessibility agenda more broadly, isn’t about what the law says, but where it says it, if I can put it at its most simple.”¹³⁸

178. During the Counsel General’s first appearance before us, he summarised his intended approach to codification. He said

“The basic idea of the code is that the law is organised by subject matter, by subject heading, and within each code you could expect to see one or more consolidated primary Acts and then, published with that, consolidated statutory instruments and, importantly, and importantly for the person in the street, I think, all the guidelines, codes

¹³⁵ CLA Committee, 28 January 2019, RoP [44]

¹³⁶ CLA Committee, 28 January 2019, RoP [140]

¹³⁷ CLA Committee, 28 January 2019, RoP [136]

¹³⁸ CLA Committee, 10 December 2018, RoP [123]

of practice... the soft law, and the secondary legislation, in one place so that you know where to find it, essentially.”¹³⁹

179. We suggested to the Counsel General that there are two competing visions emerging for what a code will look like. We asked him to confirm his vision. He said:

“Well, it’s more than a catalogue; it’s more than a gathering together, because it involves remaking the law in a consolidated form. So, it involves a legislative process in the way that the Assembly legislates in any way, but governed by particular Standing Orders. And the reason I mention that is because there’s been some discussion in the evidence about whether the code should be a legal instrument—a thing that is separate from an Act of the Assembly. I don’t see that as a way through it. At the end of the day, the Acts that form the foundation of a code will be Acts of the Assembly, so I don’t think it’s particularly meaningful to characterise them as something else. However, the critical thing is that those codes are maintained; that the structure that is settled upon is maintained, and that, I think, is the role of the Standing Orders in protecting those principal Acts within the codes.”¹⁴⁰

180. The Counsel General gave the example of the field of social care as one area where there has already been a “significant amount of consolidation in primary legislation”. He told us:

“...effectively, the combination of the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016 together form what you might expect to be the building blocks of a code, really, because they cover the primary ground very extensively. But there are between 30 and 40, I think, statutory instruments and codes of practice and so on that underpin, or rather flow from, those two statutes. And so a code of social care would include all of those.

As it happens, in this particular field, Social Care Wales have already been doing a very significant amount of work in co-locating on their website the legislation, both primary and secondary, and the codes of

¹³⁹ CLA Committee, 10 December 2018, RoP [84] and [86]

¹⁴⁰ CLA Committee, 18 February 2019, RoP [17]

practice and so on, and also have been providing explanatory memoranda and overviews of how the law works.”¹⁴¹

181. We asked the Counsel General to expand on his reasoning for not proposing to include the common law in his codification plans. He said:

“The challenge, I suppose, that we face if you look at the common law as opposed to statute is that common law in our jurisdiction is developed across both England and Wales, and so the means by which, I suppose, we would have the capacity to bring order to common law, which is, as you say, judge-made and not made by a legislature, is by turning it into statute, really. (...)”

What I would say though is that... as we roll out the further developed Law Wales website, that will be a place where commentary and analysis of the common law in relation to devolved law in Wales will be located and that that will become a resource that will help accessibility to the common law in that sense.”¹⁴²

182. The Counsel General provided an explanation of how he hoped the framework of a code would work. He said:

“...the establishment of the code is significant, but the first step, really—it’s the culmination of a huge process—in terms of codification, setting the code is the foundation, really. The value is derived by maintaining the code so that any reform to the law takes place—you know, whatever the actual substance is—within the framework of the code. So, this isn’t about what the law says but where you find it, basically. And I would expect that the Assembly Standing Orders, in due course, will require legislation being brought forward to reform a particular area of law to maintain the code in doing so. Obviously, a law reform proposal brought forward by Government or a backbench Member could include provisions that reform law that appears in more than one code. And so, it’s not a question of whether that individual provision is appropriate or not, it’s about where it ends up going, if you like, and so the task of allocating it is the bit that maintains the code.”¹⁴³

¹⁴¹ CLA Committee, 10 December 2018, RoP [88] and [89]

¹⁴² CLA Committee, 10 December 2018, RoP [61] and [62]

¹⁴³ CLA Committee, 10 December 2018, RoP [104]

183. In his statement to Plenary, on the introduction of the Bill, the Counsel General said:

“...Part 1 of the Bill will not of itself deliver the reform that we desire. That depends on the detailed and painstaking work of consolidating the law; rationalising it into a structure of codes. We will in future, therefore, start to see the production of Bills designed not to reform the law, but to bring order to it by remaking existing legislation afresh for Wales in a modern, bilingual and accessible form. Once enacted, these laws will then need protection from any future political desire to make law that does not fit structurally within the new established codes. While, clearly, there is no desire to impinge upon the content and effect of the law, and the instinct to reform the law, we have a collective responsibility to constrain how that is done so that the impact upon the accessibility of the statute book is always taken into account.”¹⁴⁴

184. We asked the Counsel General for reassurance that amendments to future Bills would not be rejected on the grounds that those amendments could not fit in a rigid code. He told us:

“The Government certainly isn’t advocating that-that an amendment should be ruled out for not having selected the right code. Ultimately, the principal point is that the law should be reformed by the Assembly in the way the Assembly wants to reform the law. The question then is: where does that law appear? And that’s really a question of allocation, isn’t it? So, as I say, you can have a proposal that touches on a number of codes, and so the effect of each of those law changes will end up being in different codes, potentially.”¹⁴⁵

185. We asked the Counsel General what he meant by the phrase “future political desire to make law that does not fit structurally within the new established codes”. He told us:

“I guess that the reference is to the Government bringing forward law reform outside the context of a code, and the point I’m making is that I would anticipate that the Assembly will, obviously, not want that to happen. I can’t imagine the Government will want that to happen, but it’s to reflect that. At the end of the day, it’s just reflecting the principle

¹⁴⁴ Plenary, RoP, 4 December 2018 [380]

¹⁴⁵ CLA Committee, 10 December 2018, RoP [108]

that whatever the law reform is, it's about where it sits, and it's that question that determines the accessibility of it, really."¹⁴⁶

186. The Counsel General, in his later evidence session, said:

"...the Assembly will be presented with consolidation Bills, those Bills will be scrutinised, debated, and hopefully passed, and I would expect and hope that these Standing Orders of the Assembly would then protect those primary Acts as the foundations of the code so that the Member in charge of future legislation would have to justify departure from that, if they were trying to legislate outside, by way of amendment, those primary Acts."¹⁴⁷

187. Following the concerns raised by stakeholders regarding the Counsel General's preferred approach to codification, we asked the Counsel General how he believed his approach would result in a permanent change to the law-making processes, as stated in the EM. The Counsel General emphasised the role of the Assembly's Standing Orders. He said:

"If they play the role of protecting the status of those primary Acts, then, I think that will affect the way in which we legislate, because there'll be an assumption that future reform legislation happens within the parameters of those existing Acts. So, that's one way in which it would affect our law making."¹⁴⁸

Cross-cutting legislation

188. A number of stakeholders raised concerns about how cross-cutting legislation would be dealt with during the process of consolidation and codification.

189. Swansea Law Clinic told us:

"We're very concerned about the cross-cutting legislation... There's no real easy answer to this. I think we want people alerted to the fact that there is cross-cutting legislation, whether it's in user guides or explanatory memoranda or some other ways—that it's signalled to people, 'You may have to read certain overarching legislation in conjunction with this code.' The problem with repeating it in different

¹⁴⁶ CLA Committee, 10 December 2018, RoP [113]

¹⁴⁷ CLA Committee, 18 February 2019, RoP [18]

¹⁴⁸ CLA Committee, 18 February 2019, RoP [21]

codes is—I think one priority should be to try to make the code as short as you possibly can, and as far as is appropriate to make it short, because sometimes you need length for precision. But, again, in terms of making it user friendly for citizens, I think we need to make the codes as short as is appropriate but with reference to, in some way, shape or form, these overarching pieces of legislation.”¹⁴⁹

190. The Law Commission suggested there would not be an easy solution to how cross-cutting legislation is handled. It said:

“I’m not certain there’s an easy answer. It may be that, in code B, you would simply have ‘For subject matter relating to children, please see chapter x of code A or statute A’; you could have a cross-reference.”¹⁵⁰

191. The Law Society equally agreed that this was “quite a difficult conundrum”. It said:

“I can see there are arguments for both ways of dealing with that. I think if something like the well-being legislation was to be referred to in each of the codes, it’s possible that could become somewhat confusing, and so, perhaps I—and this is from a personal perspective now—would err on the side of allocating it somewhere and ensuring that everybody realised that it was allocated, with links through to the other codes as and when they apply. But, you know, there are a number of such pieces of legislation—social well-being as well—that have impact beyond just their own location. So, I suppose I would perhaps err on the side of deciding where it is to reside and then putting the links through to the others.”¹⁵¹

192. We raised with the Counsel General the issue of cross-cutting, and broad-scope legislation. He told us:

“There are some examples, by the way—you mentioned the future generations legislation—which is an underpinning legislation, really, which doesn’t fit easily into a code. So, there will potentially be other circumstances where it isn’t evident what code a particular initiative would sit in. There would need to be enough flexibility to

¹⁴⁹ CLA Committee, 28 January 2019, RoP [133]

¹⁵⁰ CLA Committee, 14 January 2019, RoP [46]

¹⁵¹ CLA Committee, 28 January 2019, RoP [40]

accommodate that, clearly, but the principle would be that, whatever the law reform is, it's done within the framework of a code."¹⁵²

Draft Taxonomy for Codes of Welsh Law

193. Stakeholders provided their views on the Welsh Government's Draft Taxonomy for Codes of Welsh Law.

194. The Law Commission suggested that, while it could be subject to further refinement, the Draft Taxonomy represented a "sophisticated piece of work".¹⁵³

195. Professor Thomas Glyn Watkin QC told us:

"...I was somewhat disappointed by what was presented in the draft taxonomy, because that did seem to be a plan for how you consolidated and what needed to be consolidated under certain topics, and didn't take that further step of how you then rationalise and systematise it into a form that is readily accessible, a form that one assumes would be rolled out then across all of the relevant codes so that there would be a common approach, which would, in itself, lead to greater understanding and accessibility. But it may be that this is an early point, and people don't want to commit too soon to where they want to go. (...)

I would like to see some more information about the direction of travel. I think, beyond that point, it won't be, 'This is what it would look like'— there would be choices about what it would look like. And I think what's been avoided at the present time is making those choices upfront. I think, possibly, that's a sensible choice."¹⁵⁴

196. Huw Williams said that the Draft Taxonomy represents a useful starting point, however he sensed "the ghost of executive devolution within the structure".¹⁵⁵ Similar views were expressed by Professor Watkin QC.¹⁵⁶

197. During our consideration of the Bill, the Older People's Commissioner for Wales and the Children's Commissioner for Wales wrote to the Counsel General. They said:

¹⁵² CLA Committee, 10 December 2018, RoP [116]

¹⁵³ CLA Committee, 14 January 2019, RoP [45]

¹⁵⁴ CLA Committee, 14 January 2019, RoP [130] and [144]

¹⁵⁵ CLA Committee, LW 10, Huw Williams

¹⁵⁶ Written evidence, LW 03, Professor Thomas Glyn Watkin QC

“In the Welsh Government’s recently published Draft Taxonomy for Codes of Welsh Law, the legislation that established both the Children’s Commissioner for Wales and Older People’s Commissioner for Wales has been categorised under the Code of ‘Health and Social Care’. As you will be aware, both younger and older people access a range of other public services beyond health and social care, including education, justice, employment and housing. Likewise, our offices conduct a significant amount of work beyond health and social care. We believe that it would be more appropriate to reclassify the legislation that established our offices under the Code of ‘Public Administration’ alongside the Public Services Ombudsman for Wales. Whilst this codification does not affect our ability to discharge our statutory functions, it is important to show those that are making use of the Taxonomy, including the public, that our work extends beyond health and social care.”¹⁵⁷

198. We asked stakeholders whether it would have been helpful if the Welsh Government had produced a draft of a Code to assist understanding.

199. Dr Catrin Fflûr Huws agreed that this would have been helpful.¹⁵⁸

200. The Law Society said:

“...we’ve yet to see what a code might look like, and it’s difficult to be specific in relation to inputting to that until we’ve seen an example of what the code may look like. (...) At the moment, the taxonomy shows the areas of legislation that might be covered on a particular aspect but doesn’t go into any more detail at the present time. I think we will need to see that. (...)

It would be useful to see an online version...

...we’re very keen as well that we are able to engage and work very early on in the process so that it’s not treated as the usual, ‘It’s a Bill and it’ll be consulted upon.’ (...)

...it’s going to be really important when the code starts being developed that you do have members of the judiciary, you have the Law Commission... and ourselves as the representative body, and bringing

¹⁵⁷ Written evidence, LW 09, Older People’s Commissioner for Wales and the Children’s Commissioner for Wales

¹⁵⁸ CLA Committee, 14 January 2019, RoP [142]

practitioners to the table so that we can work together on the development of it, and not just see the almost cooked product of what's happening."¹⁵⁹

201. The Counsel General gave the example of planning and how that would be dealt with using consolidation and codification processes. He said:

“...in the [draft] taxonomy, we've suggested a planning land use code, so one of the primary building blocks of that would be the Planning (Wales) Act 2015, and we would consolidate all the existing planning legislation—primary legislation—into one Act, and then all the SIs would be consolidated beneath that.”¹⁶⁰

202. In a letter to us, the Counsel General provided a diagram, using planning law as an example, illustrating the complex nature of legislation currently, and how this will be consolidated and codified into a future Code of Welsh Law. The Counsel General's letter also provided an indication of how the Cyfraith Cymru/Law Wales website could be used to publish Codes and explanatory material in the future.¹⁶¹

Our view

203. We are generally content with the provisions in Part 1 of the Bill regarding the accessibility of Welsh law.

204. However, we agree with the view expressed by some stakeholders that a clearer narrative is needed regarding the meaning of “the accessibility of Welsh law”. We believe this will be vital in facilitating robust and transparent evaluation of the success of Part 1 of the Bill.

Recommendation 7. The Counsel General should, during the Stage 1 debate, provide a clear explanation of what is meant by “the accessibility of Welsh law”.

205. We believe a number of improvements could be made to the Bill in order to ensure future Welsh law is more accessible to all those whom it affects.

206. We note that section 2(1) of the Bill requires the Welsh Ministers and the Counsel General to prepare a programme of accessibility. In our view, a duty to also implement such a programme would be an appropriate provision to include

¹⁵⁹ CLA Committee, 28 January 2019, RoP [21], [23], [25] and [30]

¹⁶⁰ CLA Committee, 18 February 2019, RoP [26]

¹⁶¹ [Letter from the Counsel General, 8 March 2019](#)

in the Bill. While we acknowledge that a duty to prepare a programme will ensure that future governments will give due regard to considering what may be done as regards the accessibility of Welsh law, an accompanying requirement on the Welsh Ministers to implement that programme will provide the necessary impetus and safeguards that some definitive action will be taken.¹⁶²

Recommendation 8. The Bill should be amended so that the Welsh Ministers and Counsel General are required to implement a programme of accessibility prepared in accordance with section 2(1).

207. We note and welcome the Counsel General's commitment to consult in advance of the preparation of a programme under section 2(1). We agree that it will be important to make sure that a programme is informed by those people and groups who are best placed to advise where there is the greatest need for actions such as the consolidation of a particular subject area of law.

208. We note that section 2(2) of the Bill requires the Welsh Ministers and the Counsel General to prepare at least one programme, in accordance with section 2(1), in each term of the Assembly, and that the programme must be laid within six months of the appointment of a First Minister following a general election. We further note the power in section 2(6) that will enable such a programme to be revised by the Welsh Ministers and the Counsel General.

209. With regards to section 2(3)(c), we note that this provision in the Bill requires that the programme developed in accordance with section 2(1) facilitates the use of the Welsh language.

210. We note that section 2 provides for activities that must (section 2(3)) and may (section 2(4)) be included in a programme. We believe that activities that are intended to promote awareness and understanding of Welsh law (section 2(4)(a)) must be a key part of any accessibility programme. For that reason, we believe this type of activity should be included in section 2(3).

Recommendation 9. The Bill should be amended so that proposed activities that are intended to promote awareness and understanding of Welsh law should be included as a duty under section 2(3) rather than being discretionary under section 2(4).

¹⁶² See also earlier section in the report on resourcing the Bill.

211. With regards to section 2(4)(c), we are of the view that other appropriate activities that may be included in an accessibility programme should include the non-legislative measures we highlighted in the previous chapter of this report.

212. We note that, under section 2(7), the Counsel General must report periodically to the Assembly on progress made under the programme. Given that the section 2(2) duty only requires one programme per Assembly term (although we acknowledge that more than one may be prepared), we believe the current duty under section 2(7) is not sufficient. In our view, the Counsel General should report to the Assembly on progress made under the programme on an annual basis. This would provide the Counsel General not only with an opportunity to update the Assembly on proposed activities which are progressing well, but also those activities that have not or will not be taken forward. We believe an annual reporting cycle may have the potential to inform any decision to revise the programme (which is permitted under section 2(6)).

Recommendation 10. Section 2(7) of the Bill should be amended so that the Counsel General is required to report to the National Assembly on an annual basis on the progress made under a section 2(2) programme.

213. Following the laying of such a report, as required by section 2(7) (and as amended as recommended above), we envisage that we would invite the Counsel General to attend a meeting of the Committee, at which the report could be considered and scrutinised.

214. Our recommended amendments to section 2 would, in our view, ensure that the bold steps this current Welsh Government has taken towards achieving a more accessible Welsh statute book are not in any way diminished in the future.

215. The Counsel General's plans as regards beginning a programme of consolidation are welcome. We agree with the Counsel General and stakeholders that consolidated legislation will not only help the people of Wales to understand Welsh law, in particular their rights and obligations, but it will also help those practising law.

216. We heard extensive evidence from stakeholders about what consolidation and codification means to them. While the notion of consolidated law and the Counsel General's ambition for a consolidation programme are both clear, the same cannot be said for codification.

217. As regards codification, we believe the evidence from stakeholders is potentially at odds with the Counsel General's vision as set out in his evidence to us. As we understand it, the Counsel General intends for the process of

codification to involve bringing order to the statute book by organising and publishing Welsh law by reference to its content. However, the evidence we have received from some stakeholders suggests that this plan will be of questionable value.

218. We acknowledge the evidence from some stakeholders who suggested that it may be best not to set in stone the plans for codification at this point in time because it would allow for further discussions with relevant stakeholders, including the Assembly.

219. In view of the uncertainty that exists, we believe clarity from the Counsel General on this matter is needed, particularly as any potential confusion may become a barrier to implementation.

Recommendation 11. The Counsel General should issue a statement clarifying his proposals and intentions for codifying Welsh law.

220. We note the Counsel General's evidence that work on Assembly procedures for dealing with consolidation Bills is ongoing. We are unclear about the Counsel General's comments regarding procedures for codification in Standing Orders. We believe our views should be sought before Standing Orders relating to consolidation, codification and law reform are finalised.

Recommendation 12. The Business Committee should seek the views of the Constitutional and Legislative Affairs Committee as it prepares new Standing Orders for consolidation Bills, codification and law reform Bills.

221. To conclude our remarks on Part 1 of the Bill we make the following observations and recommendation.

222. It seems to us that there are many situations the public face in everyday life where they would like to know (and, of course, have a fundamental right to know) what the relevant law is in Wales. For example, a person visits a relative in a care home in Wales and the person has concerns that the care home is not providing the relative with proper equipment. How does the person find out what the law is in this area?

223. A person with experience of social care legislation in Wales will know that care homes are regulated in Wales under the *Regulation and Inspection of Social Care (Wales) Act 2016*, and that requirements around care home premises, facilities and equipment are set out in Part 12 of the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (the 2017 Regulations). Regulation 44(4)(c) of the 2017 Regulations state that premises used

by registered care home service providers must be suitably furnished and equipped.

224. It is unrealistic to expect people who do not have experience of social care legislation in Wales to find that specific law. Further, an internet search of terms such as “care home not providing proper equipment in Wales law” returns results that relate to outdated legislation (namely the Care Homes (Wales) Regulations 2002 which were revoked in April 2018). We see this as a significant hurdle to the accessibility of law as it applies in Wales. We believe more could be done, in conjunction with The National Archives, to ensure legislation that is no longer in force but which still can be located on legislation.gov.uk is clearly marked as such.

Recommendation 13. The Counsel General should, either in correspondence with the Committee or in a written statement to the Assembly, provide a clear explanation of how the Bill will help a person in Wales find the law (including any guidance or commentary etc. available) as it currently applies in Wales.

6. Interpretation and operation of Welsh legislation (Part 2 of the Bill)

“Statutory interpretation is the process of determining the meaning and effect of legislation, and how it operates. This can be a complex process. Acts prescribing rules on how laws are to be interpreted are a typical feature of legal jurisdictions across the common law world. Their purpose is to shorten and simplify legislation and promote consistency in its language, form and operation.”¹⁶³

225. All legislation applicable in Wales is presently interpreted by reference to the 1978 Act, an England and Wales Act. Scotland and Northern Ireland have made statutory provision on how their own legislation is to be interpreted.¹⁶⁴

226. The EM states:

“The 1978 Act is now 40 years old and is not as clear and accessible as it could be. Some of the provisions are ambiguous or have caused problems in practice, some are arguably redundant, and some are simply out of date. It would therefore benefit from modernisation.

This is especially true in a Welsh context as the Act predates the devolution settlement for Wales. Some of the rules and definitions in the 1978 Act are not relevant to law applying to Wales only (for example, a number of the words and terms defined in Schedule 1 to the Act such as, ‘London borough’). Several provisions in the Act do not apply at all in relation to legislation made by the National Assembly.”¹⁶⁵

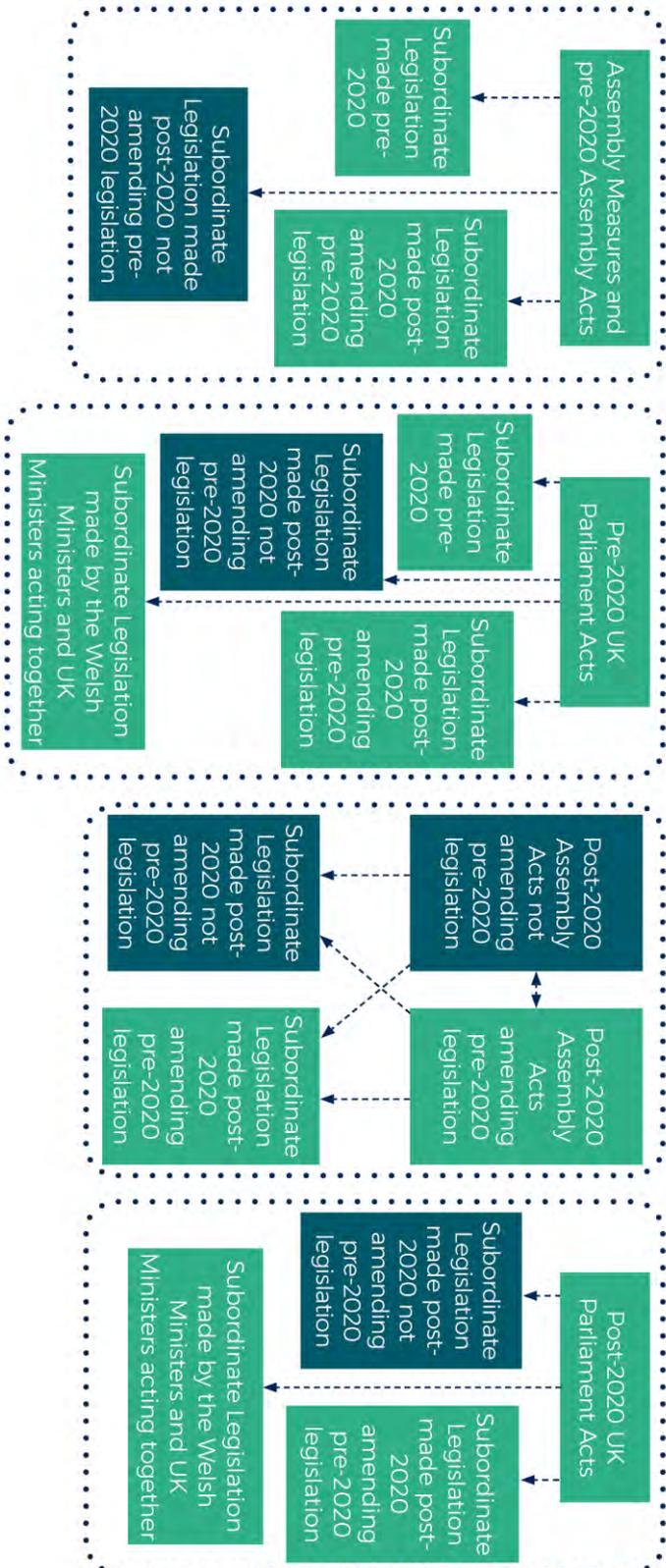
¹⁶³ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 17

¹⁶⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 18

¹⁶⁵ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 19 and 20

Application and effect of Part 2 (sections 3 and 4)

Summary of whether Part 2 of the Bill or the Interpretation Act 1978 will apply to legislation in devolved areas*



Key:
Subject to the Interpretation Act 1978
Subject to Part 2 of the Bill

* Subject to express provision to the contrary or the context requiring otherwise (see section 4(1) of the Bill) References to 2020 are references to 1 January 2020
References to subordinate legislation are references to subordinate legislation made by the Welsh Ministers acting alone (unless otherwise stated)

The diagram demonstrates that post-2020 legislation can still be subject to the *Interpretation Act 1978*, but only where the post-2020 legislation is amending pre-2020 legislation. This is set out in section 30 of the Bill (but is subject to express provision to the contrary or the context requiring otherwise, see section 4(1) of the Bill). The Explanatory Notes to section 30 say:

“The general position at common law is that the effect of an amendment is to be determined by interpreting the legislation that has been amended, rather than the amending legislation. Section 30 makes express provision that is intended to reflect this common law position, for cases where an amendment is made by or to (or by and to) an Assembly Act or a Welsh subordinate instrument.”

The 1978 Act will not apply to the Bill itself, despite the expectation that the Bill will become an Assembly Act before 1 January 2020. Therefore, the Bill will be one example of pre-2020 legislation that will be interpreted in accordance with Part 2 of the Bill (see section 3(1)(a) of the Bill, but again subject to section 4(1) of the Bill).

227. Part 2 of the Bill makes provision about the interpretation and operation of primary legislation passed by the National Assembly for Wales and subordinate legislation made by the Welsh Ministers and other devolved Welsh authorities. At present, the 1978 Act governs the interpretation of legislation of these types. The 1978 Act will continue to apply to legislation that has been made before Part 2 comes into force. Part 2 will apply only to legislation made after Part 2 comes into force (and to the Bill itself).¹⁶⁶ The Explanatory Notes also explain that:

“The 1978 Act will also continue to apply to some very limited categories of instrument that are made by the Welsh Ministers and other devolved Welsh authorities under certain powers after Part 2 of the Bill comes into force, if those instruments also contain provisions that are made by bodies that are not devolved Welsh authorities or provisions that apply otherwise than in relation to Wales.”¹⁶⁷

228. Section 3(1) sets out the legislation to which Part 2 of the Bill applies. Part 2 applies to the Bill itself, to Assembly Acts that receive Royal Assent after Part 2 comes fully into force, and to Welsh subordinate instruments made after Part 2 comes fully into force. Part 2 will be brought fully into force by an order made by

¹⁶⁶ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 27

¹⁶⁷ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 28

the Welsh Ministers under section 42(2). A “Welsh subordinate instrument” is defined in section 3(2).¹⁶⁸

229. Section 4 of the Bill makes provision about the operation of the rules in Part 2 of the Bill in relation to a particular Assembly Act or Welsh subordinate instrument.

230. The EM states:

“The aims of the provisions on interpretation in the Bill are that:

- a. they are as simple as possible to navigate, understand and apply;
- b. they exist in the ‘background’ (in the same way as other interpretation Acts), as a part of the machinery of law that the average reader will not regularly need to have recourse to;
- c. they provide bilingual interpretation rules which apply to the wide range of bilingual legislation made by the National Assembly, the Welsh Ministers and Welsh devolved authorities, and accommodates the continuing growth in this body of legislation;
- d. any operational tensions between the Bill and the 1978 Act are minimised, and ideally avoided;
- e. the reader should be able to easily determine which interpretation Act applies to the legislation they are reading (because the existing 1978 Act will, inevitably, continue to operate in relation to some of the law applying in Wales; most notably, all law found in Acts of the UK Parliament).”¹⁶⁹

231. Annex A to the EM provides a table of comparisons between provisions in Part 2 of the Bill and in the rules of interpretation in the 1978 Act.

232. The overall aim of Part 2 of the Bill was welcomed by our stakeholders. Concerns about the continued application of the 1978 Act and the potential for confusion, and other issues regarding specific provisions within Part 2 are commented on later in this chapter.

¹⁶⁸ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 31 and 32

¹⁶⁹ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 45

233. Swansea Law Clinic told us that Part 2 of the Bill will be helpful because of its potential to reduce the length of statutory instruments, and said:

“And of course, the Interpretation Act 1978 is quite old and that predates devolution, so there are a number of terms that it would not cover because of its age.”¹⁷⁰

234. The Law Society said:

“...quite rightly, you as a legislature want to stamp your authority on the way law develops in Wales in the devolved areas. I think it’s important to have that ability to interpret your law in the way you see fit...”¹⁷¹

235. The Law Society went on to say:

“[we are] mostly very supportive of the proposals that the Counsel General is putting forward as areas for interpretation. We feel that it could, in some areas, go a little further, but broadly I think it is important. I think it’s also important in the Welsh context, because we are a bilingual country and it’s important that we’ve something that also deals with interpretation in the light of the Welsh language.”¹⁷²

236. We asked stakeholders for their views on the anticipated commencement date for Part 2 of the Bill, that date being 1 January 2020.

237. Professor Thomas Glyn Watkin QC said:

“Well, given that there are going to be statutes that will continue to be governed by the Interpretation Act 1978 and the new Welsh interpretation rules, a line has to be drawn somewhere. I think the reason for drawing it at the start of a year is a good one, insofar as you’ve only got to look at the date in order to know which interpretation Act will apply. (...)

It adds an element to the difficulty of interpreting legislation. It’s a necessary step, I think. As time goes by, the balance between what is governed by the 1978 rules and what is governed by the Welsh rules will change, and there may well come a time when you can totally abandon one, and consolidation and codification will obviously

¹⁷⁰ CLA Committee, 28 January 2019, RoP [142]

¹⁷¹ CLA Committee, 28 January 2019, RoP [51]

¹⁷² CLA Committee, 28 January 2019, RoP [52]

advance that cause further. But I think, insofar as there has to be a dividing line, the start of a year is a better one than, let's say, the end of March."¹⁷³

238. The EM notes that the approach proposed by the Counsel General will require the reader of an Assembly Act or subordinate legislation “to be aware of the significance of when the legislation they are reading received Royal Assent or was made”. The EM goes on to say:

“However, it is intended that Part 2 will be brought into force on 1 January 2020. This will mean that the titles of legislation (which always include the year in which the legislation was made) will suffice to indicate whether the 1978 Act or the Bill applies to that legislation.

Although this approach means that there will be two interpretation Acts operating in relation to legislation in Wales, that was always inevitable to some extent (as is the case in Scotland, the 1978 Act will continue to have at least some effect in relation to the law in Wales).¹⁷⁴

239. We asked the Counsel General why 1 January 2020 has been chosen as the commencement date of the Part 2 provisions in the Bill. The Counsel General told us:

“The key point is, as a practitioner, or a member of the public, how do you know which law applies? And they will not be overlapping. There will be—the 1978 Act will apply to some, and the new Act will apply to others. And the mechanism the Bill includes to do that is a very clear date on which the new Part 2 comes into effect, so that you could look at an Act and tell by the date of it whether the old Interpretation Act provisions apply, or the new provisions apply. And you do that by setting 1 January, effectively, as the date by which Part 2 comes into force. So, it should be clear if we're able to do that—which applies when. (...)

If the date was midway through the year, you wouldn't be able to use the title and date of an Act as a kind of ready reckoner for which law applies. So, it's about making it crystal clear which interpretation provisions apply, and you can only do that, or you can best do that by having 1 January. I mean, obviously, 1 January 2019 is too soon. The next available one is 2020, but I was anxious not to include that on the face

¹⁷³ CLA Committee, 14 January 2019, RoP [172] and [174]

¹⁷⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 48 and 49

of the Bill, just in case there's a delay, effectively, in bringing the legislation forward. However, there are provisions in the Bill, as you will know, in Part 3, which enable Acts to be amended to include dates when the date is certain, and I would envisage doing that for this Act in due course, so that it's clear then on the face of the Bill."¹⁷⁵

240. We asked the Counsel General how Part 2 of the Bill will affect the interpretation of a Welsh subordinate instrument made by the Welsh Ministers in a reserved areas. He told us:

“Part 2 of the Bill will apply to a Welsh subordinate instrument made by the Welsh Ministers in a reserved area in the same way that it applies to an instrument they make in a devolved area. (...)

...the way in which Part 2 of the Bill applies to an individual Welsh subordinate instrument will not be affected by whether the subject-matter of the particular instrument is reserved or devolved. (...)

Part 2 will therefore apply to Welsh subordinate instruments even in cases where it does not apply to the primary legislation under which they are made, as explained in paragraphs 26 to 40 of the Explanatory Notes. That approach is intended to ensure that Part 2 applies to as much of the subordinate legislation that is made bilingually in Wales as possible.

We do not expect any difficulties to be caused by the fact that Part 2 of the Bill will apply to a Welsh subordinate instrument even though the Interpretation Act 1978 may continue to apply to the primary legislation under which it was made.

The fact that Part 2 of the Bill applies to a Welsh subordinate instrument will not change the meaning of the primary legislation under which it is made, nor will it affect the scope of any powers conferred by the primary legislation. Part 2 simply creates presumptions about how the Welsh Ministers (or other devolved Welsh authority) intend the instrument to operate. Section 4 makes clear that those presumptions are subject to the provisions of the Welsh subordinate instrument itself and any other provisions to the contrary. This means there will not be any conflict between Part 2 of the Bill and the parent Act or Measure, because the presumptions in Part 2 will

¹⁷⁵ CLA Committee, 10 December 2018, RoP [134] and [144]

always give way wherever it is clear that something different is intended.”¹⁷⁶

241. We asked the Counsel General whether we would see fewer composite statutory instruments being laid before the Assembly in the future, given that Part 2 of the Bill will not apply to subordinate legislation made by the Welsh Ministers and UK Ministers on a composite basis. The Counsel General said:

“The fact that Part 2 of the Bill will not apply to composite instruments will not necessarily mean that fewer composite instruments are made in future, because other considerations may affect that decision.

One of the disadvantages of making a joint or composite instrument is that it involves making legislation in English only, and in future this disadvantage will be compounded by the fact that the legislation will be subject to a slightly different set of interpretation rules which also exist in English only.

However, as at present, these disadvantages will have to be weighed against the comparative ease of having all the relevant provisions across territorial boundaries in a single instrument; and there will continue to be cases where the extent of devolved powers means that a stand-alone instrument for Wales is not a realistic option.”¹⁷⁷

242. As previously mentioned in the report, in his letter to us on 9 January 2019, the Counsel General stated the regulation-making power in section 4 provides the mechanics for ensuring that the Bill works properly in the future.¹⁷⁸

243. The issue of unintended consequences and the potential for confusion as a result of having two interpretation Acts applicable to Welsh law is addressed in the EM.

244. The EM states that the continued application of the monolingual 1978 Act to existing bilingual legislation is “perhaps the most significant drawback of the approach taken”. The EM states:

“The existence of the Bill, which contains a number of provisions which are equivalent to (though not always the same in substance as) the provisions in the 1978 Act, might help to reduce the impact of this issue

¹⁷⁶ Letter from the Counsel General, 9 January 2019

¹⁷⁷ Letter from the Counsel General, 9 January 2019

¹⁷⁸ Letter from the Counsel General, 9 January 2019

in practice, though as a matter of law the Bill will not apply retrospectively to this legislation.”¹⁷⁹

245. Swansea Law Clinic said:

“Yes, there is scope for confusion, and I think probably on balance, the benefits outweigh the disadvantages. And, of course, one of the current disadvantages is that the Interpretation Act doesn’t have terms in the Welsh language and there are accessibility issues that are specific to the Welsh language, and Part 2 will help with that.”¹⁸⁰

246. The Law Society told us:

“I’m not sure I’d describe it as a recipe for confusion. It is a truism to say that it would be easier if everything was in one piece of legislation, but that would then require there to be retrospective application to definitions, and I think that might create some confusion in its own right. So, so long as we are clear about where the demarcation point is—and the suggestion is that the Welsh interpretation would apply from 1 January 2020, I think—then I think we can live with the difficulties that might occur.”¹⁸¹

247. Capital Law suggested that the potential for confusion and misapplication of the 1978 Act and this legislation should be alleviated by guidance for drafters of legislation on how and when both Acts apply, Explanatory Notes to the relevant Acts, and general information on interpretation which could be made available on the Cyfraith Cymru/Law Wales and other relevant websites.¹⁸²

248. Keith Bush QC, in his written evidence, comments extensively on the interrelation between the 1978 Act and the Bill. The interrelation, he says, is more close and complex than in the case of the other devolved nations. He states:

“The approach taken in relation to new subordinate legislation made under existing primary legislation is, in the view of the author, one which alters the approach to interpreting that subordinate legislation in a way that is in danger of creating a confusing divergence between the rules for interpreting a large body of existing primary legislation

¹⁷⁹ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 54

¹⁸⁰ CLA Committee, 28 January 2019, RoP [144]

¹⁸¹ CLA Committee, 28 January 2019, RoP [56]

¹⁸² Written evidence, LW 06, Capital Law

applicable to Wales and that for interpreting subordinate legislation made under it. (...)

The fact that the Bill, as it stands, will still mean that two sets of rules for interpreting Welsh subordinate legislation will continue in existence opens up the possibility that there may be an alternative approach dual approach (but [differently] framed) which, whilst sharing the disadvantage that it would not embrace all Welsh subordinate legislation may be free of certain other complexities inherent in the current proposal. The [alternative] would be to apply the Bill only to subordinate legislation made under primary legislation to which, itself, the Bill is to apply. Welsh subordinate legislation made under Acts of Parliament would continue to be subject to the Interpretation Act 1978 (as would that made under Welsh primary legislation prior to the Bill coming fully into force). (...)

In the interests, therefore, of safeguarding the principle of promoting certainty and consistency when interpreting and applying Welsh legislation, the author proposes that the Bill should not apply to subordinate instruments made under Acts of the UK Parliament, so that these will continue to be interpreted in accordance with the Interpretation Act 1978.”¹⁸³

249. We questioned the Counsel General on the specific points raised by Keith Bush QC. The Counsel General said:

“...the basic point from my point of view is this: the argument around complexity, to my mind—. The key point is that we have a clear date, which is clear to everybody, of when the new law bites and on what it bites, and the way that—. By having the law come into force, or, at least, this part of the law come into force, hopefully, on 1 January in any given year, it’s very clear for the reader then that any SIs, any law passed after that date, are subject to the new interpretation Act, and any before then are subject to the previous interpretation Acts. So, I think, far from adding to the complexity, that increases the straightforwardness of understanding from the point of view of the user of legislation.”¹⁸⁴

250. Dylan Hughes, the Welsh Government’s First Legislative Counsel, added:

¹⁸³ Written evidence, LW 05, Keith Bush QC

¹⁸⁴ CLA Committee, 18 February 2019, RoP [72]

“I think the starting point is that we’ve always acknowledged that this is an issue. It’s something that we referred to in considerable detail when we first consulted on the issue. So, the question of, ‘To which legislation should Part 2 apply?’ is a difficult one. I think that’s our starting point.

The second point is that there are pros and cons to different ways of tackling it, but, as the Counsel General said, we think that the approach that we’ve taken, which is, essentially, that, if the law has been made in Wales after a particular date, then our Act, hopefully, as passed, will apply, and we think that’s the most straightforward way of dealing with this, and most of the stakeholders have agreed with that approach. I think one of the things that Keith Bush is saying is that—he argues that, essentially, there is a degree of connection between subordinate legislation and primary legislation that is such that we shouldn’t sever that so that the Welsh legislation applies to a different interpretation Act, and we don’t agree with that. We think that that level of closeness doesn’t exist and that the subordinate legislation can stand in its own right, and it does. The mere fact that the subordinate legislation is made by different people—. Because this is of course an element of devolution, so on the one hand you will have an instrument made by the Welsh Ministers and you will have an instrument made by the Secretary of State. So, that’s your starting point: they are already different. We don’t think that there’s anything fundamentally wrong with what we’re doing. And in any event, we’ve also got to remember that, in practice, most of the rules in the 1978 Act and in our Bill are the same. So, there’s unlikely to be a difference.

We’re looking at it from the perspective of Welsh legislation and we will want to apply our Act. We want to apply it partly of course because we’re making the legislation bilingually, and the Interpretation Act 1978 is monolingual. We will also provide a lot of explanation that doesn’t frankly exist at the moment as to how this system will work, but we don’t think there’s anything wrong fundamentally in the system.”¹⁸⁵

251. The Counsel General went on to say:

“In the evidence, people did refer to the fact that you may have the same words used in instruments that have been made by the Secretary of State in England and by the Welsh Ministers in Wales, and they could

¹⁸⁵ CLA Committee, 18 February 2019, RoP [75] to [77]

end up with a different meaning. Now, that is theoretically true, but in practice we don't think it's likely to arise that often. (...)

One of the things that's important to remember here is that a majority of the legislation that we make in Wales is still made under Acts of the UK Parliament. So, if we were to follow what Keith Bush is suggesting, we would be disapplying a majority of Welsh legislation from the ambit of our Bill, and that's something that we don't want to do, because we want it to apply to Welsh legislation in the way that we've set out, and that's partly because it's bilingual as well, which is the secondary issue.”¹⁸⁶

Meaning of words and expressions used in Welsh legislation (sections 5 to 11)

252. Section 11 of the 1978 Act provides that words and expressions used in subordinate legislation have the same meaning as in the Act under which the subordinate legislation was made. The Bill contains no equivalent to section 11 of the 1978 Act. The EM states that this is for two reasons:

- “a. it is intended help to improve the accessibility of Welsh subordinate instruments to which Part 2 of the Bill applies (and to which section 11 of the 1978 Act does not);
- b. it helps to facilitate the application of the Bill to subordinate legislation made by the Welsh Ministers made under Acts of the UK Parliament.”¹⁸⁷

253. The EM further states:

“We have considered what the effect of removing the ‘trap’ created by section 11 will be and have found that although it requires drafters of legislation to make provision on a case-by-case basis, any interpretative provision made will result in subordinate legislation which is more readily understandable and accessible without recourse to the Act or Measure under which it was made.

Drafters of subordinate legislation to which Part 2 of the Bill will apply will need to actively consider how best to alert the reader to the

¹⁸⁶ CLA Committee, 18 February 2019, RoP [82] and [83]

¹⁸⁷ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 56. See also paragraphs 57 and 58.

meaning of key words in the legislation. If a large amount of defined words and expressions appear in both the instrument and the Act or Measure, or if it is in any event necessary for a reader of the instrument to have regular recourse to the Act or Measure, it may be appropriate to add words to the instrument reproducing the effect of section 11 to the 1978 Act. This may also be appropriate if something outside the Act or Measure affects the meaning of the words or expressions used in it; the common law or another Act, for example. On the other hand, it should often be possible for the definition of words or expressions to be set out in full in a Welsh subordinate instrument, meaning that the reader does not have to refer to the Act or Measure under which it was made in order to understand the instrument. This will also mean, in the case of subordinate legislation made under Acts of the UK Parliament, that the definition will be available in English and in Welsh.”¹⁸⁸

Section 5

254. Section 5 provides that the words and expressions set out in Schedule 1 (as introduced by section 5) have the meaning given in that Schedule where they are used in Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill applies.

255. The terms listed in Schedule 1 are ones that are expected to be used in Welsh legislation. Where Schedule 1 to the Bill defines a word or expression that is also defined in Schedule 1 to the 1978 Act, the Explanatory Notes states that the definition given in the Bill is usually intended to have the same effect as that in the 1978 Act even if it appears different from the equivalent definition in the 1978 Act.¹⁸⁹

256. Section 5(2) provides for a power to amend the Schedule. Under section 41 of the Bill, this power would be subject to the affirmative procedure.

257. The EM states:

“It is intended that this power will be used to ensure the Schedule reflects current requirements; for example, if further definitions are required relating to the UK’s exit from the European Union, amendments to Schedule 1 may be made. (...)”

¹⁸⁸ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 59 and 60

¹⁸⁹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 46 and 49

Although there is no immediate intention to use the power in section 5(2), there needs to be an appropriate mechanism available to enable the Schedule to be updated when it is considered necessary to do so.”¹⁹⁰

258. Schedule 1 contains a list of definitions which would not necessarily be included in future Bills where the defined term is used. We asked stakeholders for their views on this approach.

259. Two options were put to Citizens Advice Cymru. The first being an encyclopaedia of definitions in one Bill, i.e. the approach taken in the Bill, and the second option being the defining of each necessary term in each future Bill that uses that term. Citizens Advice Cymru said:

“I think if we go for the second option that you’ve given there you are making it more accessible for those infrequent users. They’ll have a list of everything that’s in front—what x means, what y means, what z means—and that’ll make things a lot easier from their point of view than having to cross-reference an encyclopaedia. That said, I can see the arguments for both, but I think in terms of—if you’re looking at the citizen’s point of view, we’d go with the second option there.”¹⁹¹

260. Similar views were expressed by The Law Society who said:

“I think, for ultimate ease of access, you’d have to say that having it on the face of the Bill is the preferable source. Certainly, it helps us as practitioners, but, for members of the public, who are perhaps not familiar with finding interpretation Acts, it’s got to be easier for them to understand if the information is contained on the face of each of the Bills.”¹⁹²

261. Swansea Law Clinic suggested that more potential would be found as law becomes digitised. They said:

“As law is digitised, there would be potential, I’d have thought, as you hover over a term for the definition to come up. That’s obviously only available for digitised versions of legislation. Again, if it’s not included in the Act, then obviously that shortens the Act, so we would see

¹⁹⁰ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 112 and 114

¹⁹¹ CLA Committee, 28 January 2019, RoP [152]

¹⁹² CLA Committee, 28 January 2019, RoP [62]

advantages with that, as making it as appropriately short as you possibly can.”¹⁹³

262. This view was shared by Professor Thomas Glyn Watkin QC, who told us:

“The other thing as well, with modern technology, is that it should be possible, when you turn to legislation online, to have a hyperlink that takes you to the definition immediately. That’s the kind of thing that one should see for accessibility in future—ensuring that all legislation has that kind of link to the definition that has been decided upon.”¹⁹⁴

263. Professor Watkin QC also said:

“In having the definitions in legislation of this kind and not listing them every time, we close down the possibility of people changing the definition in one place and not in another. So, there is an advantage in having them in one place.”¹⁹⁵

264. Some stakeholders offered comments about specific definitions within Schedule 1.

265. In written evidence, Lord Hope drew attention to the definition of the Privy Council. He said:

“It all depends on what the Privy Council is expected to do. The body on which I sat, which is the judicial arm of the Privy Council, is usually referred to as the Judicial Committee of the Privy Council: see, for example, sections 32 and 33 of the Scotland Act 1998, c 46, as originally enacted. The devolution functions have now been transferred to the UK Supreme Court, but you may have other functions of that kind in mind in which case you might like to follow that example. For other purposes the broader definition you have used may be the right one.”¹⁹⁶

266. The Law Society said:

“There are some issues that maybe we have not included. For example, there is a definition of county courts and various things of that nature,

¹⁹³ CLA Committee, 28 January 2019, RoP [153]

¹⁹⁴ CLA Committee, 14 January 2019, RoP [183]

¹⁹⁵ CLA Committee, 14 January 2019, RoP [183]

¹⁹⁶ Written evidence, LW 01, Lord Hope

but there is no definition... of a community council, and a community council is peculiar to Wales...

In addition to that... in Wales now we have a number of tribunals that are unique to Wales. For example, we could do with a definition of the Welsh agricultural tribunal, the Welsh education tribunal, the Welsh language tribunal, and I don't see that there is a definition of any of those contained here."¹⁹⁷

267. In his letter to us on 9 January 2019, the Counsel General stated;

“We considered carefully which general definitions to include in Schedule 1 to the Bill, and retained only those that were likely to be relevant and helpful in Welsh legislation. As a result, Schedule 1 to the Bill defines significantly fewer terms than Schedule 1 to the Interpretation Act 1978 (60 terms in the Bill, compared with over 90 in the 1978 Act following amendments made by the European Union (Withdrawal) Act 2018). In our view these definitions will promote several of the aims of Part 2 (see paragraphs 44 and 45 of the Explanatory Memorandum).

First, they will remove doubt about whether certain terms need to be defined, which will help to shorten Welsh legislation and improve consistency in its drafting. (...)

Secondly, the definitions in Schedule 1 will also remove doubt for certain readers of legislation while generally operating ‘in the background’. (...)

Thirdly, there are definitions in Schedule 1 that may be more significant, at least in some cases, such as ‘land’ and ‘person’. However, these terms are already defined in Schedule 1 to the 1978 Act. We have included them in Schedule 1 to the Bill, and kept changes to the minimum, in order to ensure continuity and consistency between the two Acts while also providing bilingual definitions of the terms for Welsh legislation. As with the other definitions, their inclusion in Schedule 1 will also help to shorten legislation and enable its drafting to be more consistent.”¹⁹⁸

¹⁹⁷ CLA Committee, 28 January 2019, RoP [64] and [65]

¹⁹⁸ Letter from the Counsel General, 9 January 2019

268. We asked the Counsel General about Lord Hope’s concerns regarding the definition of the Privy Council. The Counsel General said:

“That’s intended to capture the wider Privy Council, which still has some ongoing functions in the field of education and some other areas. So, I’m satisfied that’s the right definition.”¹⁹⁹

269. We asked the Counsel General if he could give an example of when the Welsh Ministers would use the power in section 5(2) to make supplementary, incidental, consequential, transitory, transitional or saving provision. He told us:

“Well, it’s difficult to be specific here, because we are talking here about changes to the Schedule, which create a new definition for future use. So, it isn’t exactly clear where I could give you a specific example. But the kind of thing that you may see, perhaps, is, once you have amended, and that’s gone through the affirmative procedure in the Assembly, you could then ensure that you put signposting in the legislation. So, it would be that kind of thing, which would be outwith an amendment to the Schedule, but would be useful in general.”²⁰⁰

Section 7

270. The Explanatory Notes state that section 7 of the Bill is equivalent to section 6(a) and (b) of the 1978 Act. However, as it does not refer expressly to the male and female genders, it has a wider scope than the 1978 Act.²⁰¹

271. The Explanatory Notes further state:

“Section 7 means that words in Assembly Acts and Welsh subordinate instruments which could be read as being limited to persons of a specific gender are not to be read as being limited in that way. The purpose of the section is to ensure that legislation is not too narrow in its application, and that even wording and phrasing which might traditionally have been considered gender-neutral (such as ‘he or she’) does not exclude anyone, regardless of their gender identity.

Section 7 has effect except to the extent that express provision is made to the contrary or the context requires otherwise, so it will not be

¹⁹⁹ CLA Committee, 18 February 2019, RoP [102]

²⁰⁰ CLA Committee, 10 December 2018, RoP [155]

²⁰¹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 58

relevant where an Act or instrument clearly intends to refer to persons of a particular gender.”²⁰²

272. With regards to section 7, the Welsh Language Commissioner said:

“Section 7 states that ‘words denoting a gender are not limited to that gender’. I understand the intention of this section. There is no provision in the legislation however, that makes it clear that Welsh nouns have different grammatical genders which are not equivalent to gender/rhywedd that the legislation provides for. This has both grammatical consequences and also in relation to meaning that could be relevant with regards to this section. Reference was made to my comments in the summary of responses to the Counsel General’s consultation but I would welcome that further consideration is given to this either in the legislation or in guidelines or provisions resulting from the Bill.”²⁰³

273. We asked the Counsel General about the concerns expressed by the Welsh Language Commissioner. He told us:

“Section 7 is about, as you say, human gender. I think her point is broader than that; it’s about gender of nouns. I think the issue there should be, and the test to apply is: do those issues throw up questions of interpretation? So, if you look at questions of mutation, the word looks different on the page, doesn’t it, so there is an issue there to address, but, with the gender of nouns, I can’t foresee circumstances where there are interpretation questions that arise from that, so I’m not sure why we would then address that question in the Act. That’s the rationale.”²⁰⁴

Section 8

274. Section 8 of the Bill makes general provision about the application of definitions. The Explanatory Notes state:

“Section 8 makes clear that, where an Assembly Act or Welsh subordinate instrument defines a word or expression, parts of speech relating to the word or expression also carry the definition. For example, if the word ‘walk’ is defined, then the parts of speech relating to ‘walk’,

²⁰² Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 56 and 57

²⁰³ Written evidence, LW 08, Welsh Language Commissioner

²⁰⁴ CLA Committee, 18 February, RoP [86]

such as ‘walking’ and ‘walker’, are to be interpreted in the light of that definition.

Section 8 will also put beyond doubt that a definition of a word or expression applies despite any variation of that word or expression arising due to the operation of rules of grammar. In relation to the Welsh language text of legislation, this section will make it clear that a definition or meaning applies regardless of any mutations of a word, or variations of an expression arising due to rules about word order and sentence structure.

Section 8 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It has no equivalent in the 1978 Act.”²⁰⁵

275. Professor Thomas Glyn Watkin QC raised concerns about section 8. He told us:

“I think the problem here is that if you look at [section] 8, section 8 states where a word is used. Then there are other words that are ‘grammatical forms and modifications’—that’s the terminology used—that are interpreted in accordance with that meaning. What you need, of course, is that they’re interpreted in that way when they are intended to be interpreted in that way. If you use a noun such as ‘baker’ or ‘undertaker’ then you perhaps wouldn’t use it in the same way as you would use the verb. So, the clause as it is creates a problem, but the context would resolve the problem on almost all occasions. But why create that problem in the first place? Because there’s a way of solving it? And isn’t it better avoided in the first place? (...)”

I think something has gone amiss here in this clause and we need to restrict that clause slightly to make it clearer. It works fine if you look at things in Welsh such as soft mutations and so on, and I think that’s perhaps the intention underpinning this particular clause, but I do think it goes a step too far, and not just that section, but also the explanatory notes. (...)”

If you were to limit it to say things such as verbs, then it would be more effective in my view.”²⁰⁶

²⁰⁵ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 59, 61 and 62

²⁰⁶ CLA Committee, 14 January 2019, RoP [153], [159] and [161]

276. In a letter to us on 8 March 2019, the Counsel General told us:

“It was suggested in evidence that any problem with the application of section 8 might be ‘resolved by interpretation’ and that the intended meaning would usually be clear from the context. We agree that there may be cases where a statutory definition does not apply to a related term because the context makes it clear that a different result is intended. However, we do not see this as a weakness; rather, it is an integral feature of how Part 2 of the Bill is intended to operate. (...)

...we consider that the linguistic issues that have been mentioned in evidence are of limited relevance to terms that are defined in Welsh legislation. We do not believe that they demonstrate that section 8 of the Bill will cause any problems.”²⁰⁷

Service of documents (sections 12 and 13)

277. Section 12 contains provisions about the service of documents by post and electronically. It applies only where an Assembly Act or a Welsh subordinate instrument provides for service by either or both of those methods.

278. The Explanatory Notes state:

“It is for individual Acts and instruments to determine whether those methods of service, or any others, are permitted in particular contexts.

This section provides for the day on which a document served electronically or by post is deemed to be served. It creates a presumption that the document was served on that day, but this can be rebutted by evidence to the contrary.”²⁰⁸

279. According to the Explanatory Notes, section 13 relies on the concept of “the ordinary course of post” for the purposes of deeming when service by post is effected.²⁰⁹

280. The Explanatory Notes state:

“This section also deals with the deemed date of service of documents served using electronic communications. In order to reflect the near

²⁰⁷ Letter from the Counsel General, 8 March 2019

²⁰⁸ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 68 and 75

²⁰⁹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 76

instantaneous nature of most electronic communication, the document is deemed to be served on the day it is sent.”²¹⁰

281. The Law Society questioned whether section 12 was consistent with civil procedure rules, and said:

“...there is a presumption that a party is willing to receive a document by fax or e-mail. In civil law, a party must make a statement as to whether he or she is content to receive documents via fax or e-mail, and in that regard you could find yourself in a situation where there is uncertainty as to which piece of legislation is superior.”²¹¹

282. Dr Catrin Fflûr Huws told us that section 12 needs greater consideration. She said:

“...[section] 12 does raise questions about what law is relevant in terms of submitting documents. Is the relevant law the place where the document is sent from or where it’s received?”²¹²

283. We raised these issues with the Counsel General. He said:

“...my starting point is: because civil procedure rules aren’t devolved to Wales, the legislation that we pass here isn’t going to be able to cut across the Civil Procedure Rules effectively. That’s the big-picture point from my point of view...”²¹³

284. Dr James George, Welsh Government legislative counsel, added:

“Well, I think the main point is that section 12 doesn’t apply to the Civil Procedure Rules as the Counsel General said, so there won’t be any conflict in practice, simply because they don’t interact formally. But I think the more general point is that even if section 12 did apply to the Civil Procedure Rules, it wouldn’t conflict anyway, because everything in Part 2 of the Bill is subject to what the individual pieces of legislation it applies to actually say. So, section 4 says it’s subject to any express provision or anything in the context that requires you to read the legislation differently. So, whenever there was a difference, it’s very clear from Part 2 of the Bill that it’s the individual piece of legislation on the

²¹⁰ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 77

²¹¹ CLA Committee, 28 January 2019, RoP [58]

²¹² CLA Committee, 14 January 2019, RoP [168]

²¹³ CLA Committee, 18 February 2019, RoP [94]

particular topic that always takes precedence. (...) Sections 12 and 13 are really minimal default rules that will apply if legislation doesn't say anything else, just about what you have to do to serve a document. And actually, that's the position at the moment, because sections 12 and 13 of our Bill are based on section 7 of the Interpretation Act, which does apply to the Civil Procedure Rules but is subject to contrary intention. (...)

I think some of the evidence maybe suggested that the Civil Procedure Rules are the be-all and end-all of service of documents. Of course, they're not. There are lots of other rules. Even in court, there are criminal procedure rules, family procedure rules. We have tribunal procedure rules and so on. But it is important with electronic service to say that there is nothing in sections 12 and 13 that would require anybody to agree to receive a document electronically. Those sections only apply where the specific legislation allows or requires a document to be served electronically.”²¹⁴

Powers and duties (sections 15 to 19)

285. Sections 15 to 19 of the Bill include provisions relating to powers and duties, including the exercise of power or duties that are not in force (section 15) and the amendment of subordinate legislation by an Assembly Act (section 18).

286. Section 16 of the Bill makes provision for the inclusion of sunset provisions and review provisions in subordinate legislation.

287. We asked the Counsel General if he could provide an example of when the Welsh Ministers may use the power to make supplementary, incidental, consequential, transitory, transitional or saving provision in connection with a sunset clause. The Counsel General said:

“Well, the same kinds of things would be given consideration there—it's difficult to predict any specifics. But that clause does stem from a similar clause in the 1978 legislation, which allows that kind of use when required.”²¹⁵

²¹⁴ CLA Committee, 18 February 2019, RoP [95] and [97]

²¹⁵ CLA Committee, 10 December 2018, RoP [157]

Application to the Crown (section 26)

288. The Explanatory Notes state that the question of whether an Act or subordinate legislation binds the Crown can be problematic in practice.²¹⁶ The common law rule is that Acts and subordinate legislation do not bind the Crown unless:

- a. the Act expressly provides that it binds the Crown;
- b. the Crown is bound by necessary implication (though what amounts to a “necessary implication” for the purposes of the rule is not wholly certain); or
- c. other exceptions to the rule apply (for example where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that the Crown will be bound by all relevant statutes relating to civil proceedings).

289. Section 26(1) replaces the common law rule with a statutory rule. In relation to Assembly Acts to which Part 2 applies, it reverses the common law position so that the rule is that an Assembly Act does bind the Crown. This statutory rule is not subject to the exception in section 4(1). Instead, section 26(4) provides that the rule has effect except so far as the Assembly Act expressly provides otherwise.²¹⁷

290. According to the Explanatory Notes, “the situation is more complex in relation to subordinate legislation”, suggesting a particular issue would arise if a Welsh subordinate instrument was subject to the rule in section 26 of the Bill, but the Act under which it was made was not. The Explanatory Notes state:

“Section 26(2) deals with the issue by providing that a Welsh subordinate instrument to which Part 2 applies binds the Crown if it is made under an enactment which binds the Crown or which confers a power to bind the Crown. The rule for Welsh subordinate instruments is therefore that they bind the Crown wherever it is possible for them to do so. Section 26(4) means that this rule has effect except to the extent that the Welsh subordinate instrument expressly provides otherwise.”²¹⁸

²¹⁶ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 124

²¹⁷ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 126

²¹⁸ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 127

291. Section 26(3) makes provision regarding criminal liability. The Explanatory Notes state:

“Where legislation provides that it binds the Crown, it usually also includes provision making clear that it does not make the Crown criminally liable, but that this does not prevent persons in the service of the Crown being criminally liable.”²¹⁹

292. The Law Society told us that section 26 of the Bill is a “very welcome” provision.²²⁰

293. In December 2018, the Counsel General told us:

“Well, the ‘Crown’ generally means the sovereign personally, or servants or agents, Government, of the Crown, but it’s not entirely clear in the common law what the parameters of that definition are. So, I felt it was problematic to have an exemption so that the law didn’t apply to that category, which is an important part of reversing that presumption. I should make it clear—I’m sure it is already clear—that that just sets a new default position; it doesn’t prevent the Assembly making its own decisions at any future point about whether a particular Act should apply to the Crown or not, it just needs to spell it out. (...)”

I’ll be writing to the Queen, as a courtesy, to alert the Crown to the fact this is happening. But there isn’t in this law anything that substantively changes the law as of today to bind the Crown; it just sets a set of presumptions for the interpretation of future legislation.”²²¹

294. In his letter to us of 9 January 2019, the Counsel General told us that Crown bodies will not be required to take any practical steps as a result of section 26. He said:

“The section does not have any immediate effect on Crown bodies, but simply creates a presumption that future Assembly Acts and Welsh subordinate instruments will bind the Crown. It will be those Acts and instruments that change the substantive law. If they impose new duties

²¹⁹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 128

²²⁰ Written evidence, LW 04, The Law Society

²²¹ CLA Committee, 10 December 2018, RoP [161] and [167]

that affect the Crown, Crown bodies may need to make arrangements at that time.”²²²

Interpretation of bilingual Welsh law

295. In accordance with section 156 of the 2006 Act, the Welsh language and English language are of equal standing in Assembly Acts and Measures and subordinate legislation enacted or made in both English and Welsh.

296. The EM notes that some stakeholders, in response to the Welsh Government’s policy consultation, commented that the absence of bilingual provisions on interpreting legislation means that the Welsh language is being treated less favourably.²²³

297. The EM also notes that the implications of Welsh legislation being bilingual were considered in some detail by The Law Commission in its Form and Accessibility consultation paper and report.

298. The EM, laid before the Assembly in December 2018, states:

“We continue to consider whether anything should be done to further clarify the relationship between the two language versions when interpreting legislation.”²²⁴

299. When the Counsel General first provided evidence to us on 10 December 2018, he said:

“...one of the questions I’m looking at at the moment, as I mentioned during my statement in the Chamber, is the question of interpreting in two languages. We already, in our constitutional settlement, have a statutory principle that ensures that Welsh and English are treated equally in terms of authority within the system, and we’re looking as to how we could or whether we should ensure that that principle is included in this Bill too. The question of how both languages are treated in legislation and interpretation is something that the Government internally is well used to because of the process we have of legislating in two languages. Perhaps our awareness of what’s happening on the ground and that broader understanding as to how to interpret in two languages, where there is some doubt, maybe that is

²²² Letter from the Counsel General, 9 January 2019

²²³ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 23

²²⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 77

less developed, perhaps. So, my founding principle at the moment is to consider whether we should restate that clause in this Bill and use the explanatory notes to promote an understanding of what happens when this question does arise in the courts. But we would be interested in hearing the committee's view on that in due course."²²⁵

300. The Counsel General wrote to us in January to provide further details on how the Bill may present an opportunity to make provision about the interpretation of bilingual legislation:

“Section 156(1) of the Government of Wales Act 2006 (GoWA 2006) makes clear that the English language and Welsh language versions of legislation passed by the National Assembly for Wales or made by the Welsh Ministers are equal. (...)

Although the meaning of section 156(1) is relatively well understood in the abstract, the practical effect, in particular on the courts and on practitioners, may not be. If there is any doubt about the meaning of Welsh legislation you need to consider both languages – not just one – and some may be under the misapprehension that you can work with one language only.

The implications of the equal status of the English and Welsh languages have been considered in some detail by the Law Commission. Chapter 12 of its consultation paper, written personally by Lord Lloyd Jones, analyses the meaning and practical implications of section 156(1) of GoWA 2006 and considers how discrepancies between languages are dealt with in other jurisdictions. (...)

The Law Commission for their part eventually concluded that this was an issue best left to the courts, determining that judges should not be fettered in their application of the ordinary rules of construction. This is something with which we agree in principle but wonder whether there is scope for retaining this discretion while at the same time clarifying certain fundamentals such as the need to understand both texts not merely one. (...)

... my thinking at present is that we should restate section 156(1) so that it can be found in our legislation on the interpretation of legislation, rather than in what is essentially our constitutional document. This

²²⁵ CLA Committee, 10 December 2019, RoP [37]

would in turn facilitate the production of guidance, possibly in the explanatory note to the restated section 156(1), which would clarify the issues highlighted above. The aim would be to guide the courts and other users of legislation rather than attempting to be prescriptive.”²²⁶

301. On this matter, Dr Catrin Fflûr Huws said:

“It must also be considered whether certain rules are required as to what should happen when there is a dispute between the Welsh and English versions of an act law – should there be a declaration of inconsistency as is contained in section 4 of the Human Rights Act 1998.”²²⁷

302. In oral evidence, Dr Huws added:

“It’s strange that it’s not included in this particular legislation in terms of the way of interpreting and what the attitudes towards interpretation are when there are inconsistencies between the two versions of the legislation.”²²⁸

303. Professor Thomas Glyn Watkin QC told us:

“I feel quite strongly that the right bodies to determine how to interpret bilingual legislation are the bodies that interpret it, and that it should be left to the courts to work out how they will respond to those challenges as they will be doing the work, as it were, at the coalface.”²²⁹

304. The Law Commission expressed similar views:

“There was one fairly technical question that was posed to us about whether within the Act there should be some provision addressing the question of judicial interpretation when there is a conflict between an English language and a Welsh language version. That’s something that we addressed in our formal report, and we were against including anything specific on that. We actually think that judges are pretty good at getting to the bottom of what the legislature intended, when you’ve got conflicting words or conflicting texts. And, after all, we’ve had some 40 to 50 years’ experience of this with legislation from the EU. As

²²⁶ Letter from the Counsel General, 9 January 2019

²²⁷ Written evidence, LW 07, Dr Catrin Fflûr Huws

²²⁸ CLA Committee, 14 January 2019, RoP [202]

²²⁹ CLA Committee, 14 January 2019, RoP [204]

judges, we've become well used to looking at a French version or an Italian version and being given guidance by the parties as to what different language versions mean. I think that it would be dangerous to try and prescribe in advance what techniques a judge should or should not use. I think one trusts the judges to get to what the legislature intended by use of a particular word."²³⁰

305. Professor Thomas Glyn Watkin QC also raised the issue of consolidating existing laws and the question this raised about the status of the two language versions in such circumstances. He said:

"The Government of Wales Act 2006 provides that 'The English and Welsh texts... [of Assembly Measures, Acts and any subordinate legislation] are to be treated for all purposes as being of equal standing' (GoWA 2006, s. 156(1)). Such equal standing, however, only applies to legislation 'which is in both English and Welsh when it is enacted, or... when it is made'. Given that, as quoted above, consolidation 'involves no or only minor amendments to the substance of the law consolidated', the question arises as to when provisions which have been consolidated are to be treated as having been enacted or made."²³¹

306. The Welsh Language Commissioner referenced the concerns of Professor Watkin QC in her written evidence and encouraged this matter to be considered further.²³²

307. We raised this issue with the Counsel General. He told us:

"So, Acts that existed previously, one would expect to be repealed in full or in part, and we would be remaking law in Welsh and in English, and both versions would be equally authoritative. (...)

At the point of being passed by the Assembly as new Acts, just like any other Act It's not just a question of tidying up the English version and translating it. It's a question of making the law new, and in a way that is accessible. So, it could look, actually, quite different. The language could look different in the English versions, and, obviously, there'll be a new, Welsh version. So, you approach that Act by saying, 'How do I interpret these statutes?' and you interpret them on the face of the Act as they are passed by the Assembly as consolidated law. If there's a level of

²³⁰ CLA Committee, 14 January 2019, RoP [88]

²³¹ Written evidence, LW 03, Professor Thomas Glyn Watkin QC

²³² Written evidence, LW 08, Welsh Language Commissioner

uncertainty around that, then it would be open for you in some circumstances to look at the law that was in existence before that, but only, really, if you couldn't work that out from looking at the two Acts passed authoritatively, in two languages, by the Assembly. So, I doubt if this should be a particularly significant issue."²³³

Our view

308. We are generally content with provisions in Part 2 of the Bill regarding the interpretation and operation of Welsh legislation, subject to our concerns expressed below.

309. We acknowledge the evidence from some stakeholders that the application of Part 2 of the Bill may lead to some confusion as to whether it or The Interpretation Act 1978 applies. However, on balance, we believe the Bill's intended application has been drawn appropriately.

310. Nevertheless, because of a potential for confusion, we believe there will be merit in evaluating the impact of Part 2 of the Bill. This evaluation should form a key part of the review which the Counsel General has committed to undertake and which we discussed earlier in this report (see recommendation 6).

311. We note the evidence from the Counsel General and stakeholders regarding section 5 of and Schedule 1 to the Bill. We are content with the Bill making provision in this regard.

312. However, with regards to the power in section 5(2), it is disappointing that the Counsel General did not provide an example of how this power could be used by the Welsh Ministers.

313. We note the evidence from the Counsel General regarding the power to make regulations under section 5. We note that regulations made under section 5 are subject to the affirmative procedure and we are satisfied with this.

314. We note the evidence from stakeholders regarding sections 7, 8, 12 and 13 of the Bill. We acknowledge the views of the Counsel General on these matters and are content with the explanations provided.

315. With regards to the power in section 16(5), again it is disappointing that, despite there being a legislative precedent established in the 1978 Interpretation

²³³ CLA Committee, 18 February 2019, RoP [62] and [64]

Act, the Counsel General did not provide an example of how this power could be used by the Welsh Ministers.

316. We note the evidence from the Counsel General regarding section 26 of the Bill. We are content with the Bill making provision in this regard.

317. As we started scrutiny of this Bill, the Counsel General asked for our views on how the Bill may present an opportunity to make provision about the interpretation of bilingual legislation. We acknowledge the evidence received from stakeholders and agree with a number of them who suggested that the interpretation of bilingual legislation should be a responsibility of the courts.

318. The Counsel General has said that it is his preference to restate the provision in section 156(1) of the 2006 Act in this Bill. We see no reason for us to disagree with this approach, particularly as the Counsel General has indicated that restatement of the 2006 Act provision would then facilitate the production of guidance for the courts and for other users of legislation.

319. However, more detail is needed on what will be included within the guidance, particularly as regards the Counsel General's comments about "certain fundamentals such as the need to understand both texts not merely one". It is also unclear what the status of the guidance would be.

Recommendation 14. The Counsel General should, during the Stage 1 debate, provide further detail and clarity on his proposals to restate in this Bill the provision in section 156(1) of the Government of Wales Act 2006, including his intentions as regards guidance that would accompany the restated provision.

7. Part 3 of the Bill

Part 3 of the Bill gives the Welsh Ministers powers to replace descriptions of dates in Welsh legislation and to make subordinate legislation in different forms, and provides for the combination of subordinate legislation that is subject to different procedures in the National Assembly for Wales.

Power to replace descriptions of dates and times in Welsh legislation (section 36)

321. Section 36(1) provides the Welsh Ministers with a power to amend Welsh legislation which contains a description of a date or time, by inserting a reference to the actual date or time once it is known.

322. The Explanatory Notes states:

“Section 36(2) therefore enables regulations under section 36(1) to add an explanation of the date they insert. For example, it might sometimes be helpful to replace ‘the day on which section 10 comes into force’ with ‘1 January 2018 (the day on which section 10 came into force)’.

Subsection (2) also confers a power to make consequential amendments, repeals and revocations. For example, if Welsh legislation contained references to an ‘appointed day’, which were replaced with references to the actual day that was appointed, an amendment might be made to remove the definition of the ‘appointed day’.

Subsection (3) identifies the Welsh legislation that may be amended under this section, to include primary and secondary legislation made by the National Assembly for Wales and the Welsh Ministers. The power may be used to amend both existing legislation and legislation enacted after this section comes into force.”²³⁴

323. The EM states that, in respect of this power, there are no plans for a programme of tidying up the statute book, and that the power is more likely to be used in conjunction with other powers. It adds:

²³⁴ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 172 to 174

“For example, a commencement order which appoints the day on which a section comes into force could at the same time amend any other legislation that refers to the day on which that section comes into force.”²³⁵

324. In written evidence, Huw Williams told us:

“The power to add in the actual date of commencement in to the text of the primary legislation when a provision is commenced will result in material savings of time effort (and thus cost to the client) on the part of practitioners in establishing if provisions are in force. It will be of even greater help to ordinary citizens who will no longer have to grapple with commencement order to find out is a specific provision is in force.”²³⁶

325. In his letter to us on 9 January 2019, the Counsel General stated:

“...section 36 confers the power to amend legislation to spell out dates and times. This power could be used to amend not only existing legislation but also future legislation. It would therefore be impossible to set out all the relevant amendments on the face of the Bill.”²³⁷

Power to make subordinate legislation in different forms (section 37) and Combining subordinate legislation subject to different Assembly procedures (section 38)

326. Since 2014, Assembly Acts and Acts of the UK Parliament have usually given the Welsh Ministers powers to make subordinate legislation in the form of regulations rather than orders or rules. However, the Welsh Ministers still have many powers to make orders and rules under earlier legislation. Section 37 enables the Welsh Ministers to exercise powers to make regulations, rules or orders by making any other of those forms of subordinate legislation.

327. The Explanatory Notes state:

“Section 37 is intended to remedy the situation where it is necessary to make a number of different regulations, rules or orders to give effect to a single policy. It applies to subordinate legislation that is made by statutory instrument, and its purpose is to enable different forms of

²³⁵ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 116

²³⁶ Written evidence, LW 10, Huw Williams

²³⁷ Letter from the Counsel General, 9 January 2019

subordinate legislation to be combined in the same instrument. Making a single statutory instrument may not only be administratively convenient but may also enable the legislation to tell its story more coherently.

Subsection (2) makes clear that making subordinate legislation in a different form under this section does not affect the procedure for making an instrument. For example, if an order-making power in an Act is used to make regulations in reliance on this section, the procedure that would apply to orders under the Act still applies.

Section 37 applies regardless of the source of the Welsh Ministers' power or duty to make subordinate legislation, and regardless of when the power was conferred or the duty was imposed. However, subsection (4) provides that the power in this section cannot be used where the Welsh Ministers make subordinate legislation that applies otherwise than in relation to Wales under an Act of the UK Parliament or retained direct EU legislation. In other words, the power can be used where the Welsh Ministers make subordinate legislation under an Assembly Act or Measure, and where they make provision that applies only in relation to Wales under an Act of the UK Parliament or retained direct EU legislation."²³⁸

328. Section 38 makes provision about the combination in a single statutory instrument of subordinate legislation made by the Welsh Ministers using different powers to which different Assembly procedures apply. The statutory instrument will be subject to the most stringent of the procedures that would otherwise apply.

329. According to the Explanatory Notes, the purpose of section 38 is to facilitate the combination in a single statutory instrument of provisions that are subject to different procedures, whether they are made under powers in the same Act or different Acts, and to avoid any procedural difficulties that would be caused by combining provisions in this way.²³⁹

330. Huw Williams told us that he was pleased to see the inclusion of sections 37 and 38 in the Bill as it would mean that secondary legislation can be prepared in

²³⁸ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraphs 176, 177 and 179

²³⁹ Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes paragraph 182

a co-ordinated fashion that reflect the subject rather than the method by which the provisions must be made.²⁴⁰

331. We put a practical example to the Counsel General, asking the following.

332. If Regulations A are subject to affirmative procedure, and Regulations B are subject to negative procedure, section 38 allows Regulations A and B to be made in a single instrument, subject to the stricter of the two procedures (i.e. subject to affirmative procedure). What if Regulations A were subject to the negative procedure and required consultation, and Regulations B were subject to affirmative procedure and did not require consultation. What procedure would apply?

333. The Counsel General said:

“Section 38 deals only with differences in the Assembly procedures that would otherwise apply to different types of subordinate legislation; it does not affect any requirements for the Welsh Ministers to undertake consultation before making subordinate legislation. The reason for this is that the application of multiple Assembly procedures can give rise to greater difficulties and uncertainties where Ministers wish to combine provisions in a single statutory instrument.

In the example given by the Committee, Regulations A will be subject to negative Assembly procedure and Regulations B will be subject to affirmative Assembly procedure. If they are combined in a single statutory instrument, section 38(1) of the Bill will mean that the combined instrument is subject only to affirmative procedure.

Before making the combined instrument, the Welsh Ministers will be required to consult on the proposal to make Regulations A. Section 38(1) will neither remove that requirement in relation to Regulations A, nor extend it so that it applies in relation to Regulations B. There is no need for it to do so. The fact that the Welsh Ministers are not required to consult anyone before making Regulations B does not conflict with their duty to consult before making Regulations A, and does not prevent them making Regulations B in the same instrument as Regulations A.”²⁴¹

²⁴⁰ Written evidence, LW 10, Huw Williams

²⁴¹ Letter from the Counsel General, 9 January 2019

Our view

334. We note the evidence from stakeholders and from the Counsel General regarding Part 3 of the Bill. We also acknowledge the information contained in the Explanatory Memorandum. We are content with the Bill making provision in this regard.

335. We further note the evidence from the Minister regarding the power to make regulations under section 36. We note that regulations made under section 36 are subject to no procedure. Regulations that are subject to no procedure are considered by the Assembly's Legal Services and can be scrutinised by this Committee if an issue arises. For that reason, we are satisfied with this provision in the Bill.

8. Part 4 of the Bill

“Part 4 of the Bill amends the 1978 Act to ensure that it does not apply to legislation to which Part 2 applies, and to deal with some of the interactions between legislation to which the 1978 Act applies and legislation to which Part 2 applies.”²⁴²

Power to make additional provision to give full effect to this Act (section 40) and Coming into force of this Act (section 42)

337. The power in section 40 enables the Welsh Ministers to make further provision in consequence of, or to give full effect to, the Bill.

338. The EM states:

“This power could be used, for example, to make consequential amendments to other legislation should this be found to be necessary at a future point in time.

There are no immediate plans for its use, and Schedule 2 to the Bill includes amendments to other legislation in consequence of the Bill.”²⁴³

339. Section 42 of the Bill provides that, with the exception of the statutory interpretation provisions (insofar as they apply to Welsh subordinate instruments and to Assembly Acts other than the Bill itself), the rest of the Bill will come into force on the day after Royal Assent.

340. The power at section 42(2) provides for a commencement order to be made by the Welsh Ministers to bring the statutory interpretation provisions (i.e. Part 2 of the Bill) into force on a particular date. The EM states that the current intention is that these provisions will come into force on 1 January 2020.²⁴⁴

341. The EM states:

“Consideration has been given to stating the date of 1 January 2020 on the face of the Bill, but on balance commencing this provision by order

²⁴² Legislation (Wales) Bill: Explanatory Memorandum, Explanatory Notes, paragraph 29

²⁴³ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 117 and 118

²⁴⁴ Legislation (Wales) Bill: Explanatory Memorandum, paragraph 121. See also evidence at paragraphs 236 to 239.

provides flexibility in case there is any delay in obtaining Royal Assent or any change of circumstances that makes the date of 1 January 2020 inconvenient.

In order to provide clarity, it is also intended that the powers provided at section 36(1) will also be used so that the commencement order would amend Part 2 of the Bill to insert '1 January 2020' (or any later commencement date fixed by the order) in place of reference to the day on which Part 2 comes into force.

It is also intended that the commencement order will amend section 23B of the 1978 Act to replace references to the day on which Part 3 comes fully into force with references to the date appointed by the order – this is expressly provided for at section 42(3)(c) of the Bill.²⁴⁵

342. As previously mentioned in the report, in his letter to us on 9 January 2019, the Counsel General stated the regulation-making powers in section 40 and 42 provide the mechanics for ensuring that the Bill works properly in the future.²⁴⁶

Our view

343. We note the evidence from the Counsel General and the information contained in the Explanatory Memorandum regarding Part 4 of the Bill. We are content with the Bill making provision in this regard.

344. We note that the power at section 42(2) provides for a commencement order to be made by the Welsh Ministers to bring Part 2 of the Bill into force on a particular date. We further note that it is the Counsel General's intention to bring Part 2 into force on 1 January 2020. We are content with this approach.

345. We note the evidence from the Minister regarding the power to make regulations under sections 40 and 42.

346. We note that regulations made under section 40 are subject to the affirmative procedure if those regulations amend, repeal or otherwise modify primary legislation and the changes may substantially affect that primary legislation. We welcome the use of the affirmative procedure in these circumstances.

²⁴⁵ Legislation (Wales) Bill: Explanatory Memorandum, paragraphs 122 to 124

²⁴⁶ Letter from the Counsel General, 9 January 2019

347. We further note that the regulations made under section 42 are subject to no procedure. We repeat a point made in the previous chapter. Regulations that are subject to no procedure are considered by the Assembly's Legal Services and can be scrutinised by this Committee if an issue arises. For that reason, we are content with this approach.