





## Foreword by the Chair

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- i. Last year I was pleased to accept an invitation from the Minister for Public Services, Leighton Andrews AM, to convene and chair a Stakeholder Group to consider the justice sector in Wales. It is a crucial time for justice in Wales, with the effects of the UK Government's far-reaching reforms of recent years being increasingly felt by people living, working and doing business in Wales. More substantial change is on the way, with current consultations on rationalising the court estate, digitising court services and reforming the civil courts structure, including proposals to launch an Online Court capable of operating without lawyers. These reforms are being developed during a period of further constitutional change, with a move to a reserved powers model of devolution for Wales and a developing debate about the need for Wales to become a legal jurisdiction distinct from England.
- ii. The Stakeholder Group has brought together academics and expert practitioners with extensive knowledge and experience of the justice sector and the legal profession in Wales. I would like to thank them for the valuable contributions they have made in our meetings since July 2015 and in bringing this report together. We have explored issues relating to the increasing divergence between the law of Wales and the law of England and considered current and future challenges facing the justice sector.
- iii. Our deliberations have focused on the practical implications for the delivery of justice in Wales of the growing body of Welsh law, proposed changes to the devolution settlement and UK Government reforms. We have pooled the Group's considerable experience during the past eight months to produce a practical analysis with recommendations to inform the Welsh Government and others in considering how to tackle key challenges resulting from devolution and reforms of the justice system.
- iv. Access to the law has been at the forefront of our thinking. As the body of Welsh law grows, it is essential that the fundamental importance of access to law and legal advice is recognised, not just for the legal profession, but for citizens and Welsh civic society. We are mindful that there are many current factors which are likely to lead to further changes to law and justice in Wales. During the next few months, we can expect to see the Law Commission's report on its consultation on *The Form and Accessibility of the Law Applicable to Wales* and the introduction of a further Wales Bill proposing a new devolution settlement.
- v. The findings and recommendations in this report are those of the Group as a whole, but in our view they reflect the views of many stakeholders in the legal and advice sector in Wales.

**Mick Antoniw AM**  
**Chair of the Justice Stakeholder Group**

**March 2016**

## Membership of the Justice Stakeholder Group

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- Mick Antoniw AM, Chair
- Cenric Clement-Evans, Association of Personal Injury Lawyers and NewLaw Solicitors
- Cathryn Davies, Thompsons Solicitors
- Emyr Lewis, Blake Morgan Solicitors
- Kay Powell, The Law Society
- Hefin Rees QC, The Bar Council of England & Wales and 39 Essex Chambers
- Fran Targett, Citizens Advice Cymru
- Professor Daniel Wincott, Cardiff University School of Law and Politics

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## Executive summary

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1. The report considers the need for the growing body of Welsh law to be easily accessible to people living, working and doing business in Wales, as well as to lawyers, other advisers and the judiciary. It looks at challenges connected with providing academic and professional training in Welsh law to law students, practitioners and judges. These issues form part of a broader set of jurisdictional issues connected with the possible emergence of a distinct and growing body of Welsh law and the possible formation of a distinct Welsh legal jurisdiction. These must be addressed in a coherent and pragmatic way to help clarify for users the law applying in cases proceeding through courts and tribunals in Wales and England. The report considers, in the context of these changes and wider reforms of the justice system and the Welsh language, how a Welsh approach to justice could be developed.
2. We make the following recommendations:
  - **Recommendation 1** – The Welsh Government should consider how it can take a greater role in ensuring the effective and comprehensive promotion of the law affecting Wales, including access to the law of Wales.
  - **Recommendation 2** – The Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of Welsh laws.
  - **Recommendation 3** – The Welsh Government should further engage with the administrators of the legislation.gov.uk website to further develop the Cyfraith Cymru/Law Wales website.
  - **Recommendation 4** – The Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of legal texts and materials that address the law in Wales.
  - **Recommendation 5** – The Welsh Government should undertake research on how codification has operated in practice in common law jurisdictions, including countries such as Canada, New Zealand and Australia.
  - **Recommendation 6** – The Welsh Government should engage with law schools and training bodies to support the development of Welsh law in education and training programmes for law students, practitioners and the judiciary.
  - **Recommendation 7** – The Welsh Government should be proactive in developing a jurisdictional solution to the accommodation of Welsh law and the distinct needs of Wales, without creating barriers for the operation of justice or the ability of practitioners to continue to work across England and Wales.

- **Recommendation 8** – The Welsh Government should consider whether there would be benefits in adopting an inquisitorial, rather than an adversarial, approach to the administration of justice in any of the devolved tribunals it is responsible for administering.
- **Recommendation 9** – The Welsh Government should ensure there is a consistent and structured approach to engagement with key stakeholders involved in the administration of justice, including legal practitioners, the judiciary and the Law Commission.
- **Recommendation 10** – The Welsh Government should consider establishing a Justice Stakeholder Group and bringing it together at least once or twice a year for a collective review of developments.

## Accessibility of Welsh law

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### *Access to justice*

3. Accessibility of law has at least three components: availability, navigability, and clarity. First, availability of the law means that the law needs to be promulgated so that those affected by the law can actually view it. Secondly, navigability is defined as ensuring users are able to find the relevant law without unnecessary difficulty. If the law on a particular subject is scattered through different legislation, this can render it unnecessarily difficult for a user to navigate. Thirdly, clarity requires that the law is not expressed in an unnecessarily complicated or obscure way.
4. We consider that there are concerns in relation to each of these three components as they apply to the emerging Welsh law; and these concerns need to be addressed imminently in order to ensure that an already challenging situation to address these points does not get worse. If action is not taken soon, the task in hand will get even more difficult to resolve.
5. This is clearly a very important issue, as access to justice is not simply about (1) the availability of legal advice and representation (at a cost that is either covered by state funding or reasonable charges by lawyers<sup>1</sup>) or (2) the location of courts at a convenient point for the delivery of local justice. Access to justice is also about (3) good, well-drafted law that is written in language that is intelligible, (4) organised in such a way that the law on a particular subject can be found in one place and in an organised manner, and (5) as the fact legislation is bilingual in Wales enhances access to justice by drafting that produces texts that read fluently in each language and are not merely a translation from one to the other.
6. It is becoming increasingly difficult for legal practitioners, other advisers and the general public to find out what the law is in Wales. This is unacceptable, as it is fundamental to the rule of law that we are all able to discover and understand the law under which we live. We are all bound by the law, whether we know what it is or not (the legal principle being ‘ignorance of the law does not excuse’). As the recent Consultation Paper by the Law Commission on *Form and Accessibility of the Law Applicable in Wales* states<sup>2</sup>:

*This is vitally important - the law can have an enormous impact on us. It can authorise severe limits on our lives and liberty by fining us, sending us to prison or imposing other obligations on us. The law also provides us with rights, which would be useless if we can neither find out what they are nor understand them. The law also provides us with methods by which we can hold our government and public bodies to account. It is therefore crucial that as citizens we are provided with an adequate opportunity to access the law.*

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<sup>1</sup> We note that The Law Society promotes “affordable access to legal advice as a basic right for everyone”

<sup>2</sup> Law Commission (July 2015) *Form and Accessibility of the Law Applicable in Wales*, at para 1.17



7. Legal practitioners have to grapple with the sheer volume of primary and secondary legislation and the frequency with which it is amended. In Wales, these difficulties have been compounded by reason of the incremental *evolution of devolution*.
8. For example, functions under a large number of Acts of Parliament have been transferred to the Welsh Ministers, but this is not apparent on the face of the Acts of Parliament in question. Further complexity is introduced by the rapidly increasing divergence of the law applicable in Wales from that applicable in England; a consequence of a different political and policy approaches between the two governments and legislatures in Cardiff Bay and Westminster. The public do not have access, free of charge, to an up to date version of the legislation applying in Wales.
9. This divergence in the applicable laws will inevitably become more pronounced over time. Now is the time to seize the opportunity to ensure that the form of Welsh law is expressed in a clear and coherent way, and to ensure that there is proper access to the law that is applicable in Wales.

### *The scale of the divergence in the law*

10. The National Assembly for Wales (the Assembly) and the Welsh Government have already created a substantial body of primary and secondary legislation, resulting in a divergence of the law applicable in England and that applicable in Wales in a number of important areas. Significant changes have been made in areas such as education, planning, social services, housing and local government. It is important to appreciate that further divergence in these areas, as well as others, is inevitable. A recent striking example is the Renting Homes (Wales) Act 2016, which radically reforms the current law of landlord and tenant insofar as it relates to short term renting, which is an aspect of land law, an area of law not generally devolved, but also properly constitutes part of the devolved subject, "housing".
11. Wales is developing a distinct legal personality. The scale of the divergence needs to be fully appreciated. Since 2011, the Assembly has passed nearly 30 Bills. In the period between 2007 and 2011, 22 Welsh Measures were passed. It is essential that there is a proper understanding what the law set out in those Assembly Acts and Measures means and how it might be different to legislation passed on similar topics by the UK Parliament. Nowhere is this conveniently set out, with the consequence that it is necessary to undertake a paper chase between primary legislation passed in Westminster, to compare and contrast how this differs from the laws of Wales. That situation is unacceptable and it would be helpful to have a comparative analysis of how Welsh law differs from the laws of England and Wales.
12. The position is, of course, even more complex when one considers secondary legislation. Since 1999, the Welsh Government (and its predecessors) has made more than 4,500 statutory instruments that apply to Wales, and a significant proportion of those instruments have created distinctive Welsh policy. Since the 2011 Assembly election, the Welsh Government has made over 2,500 Statutory Instruments (published over 10,000 pages) of which over 700 contain distinctive Welsh policy.

13. Further complications arise from the fact that Westminster statutes may now be amended both by the UK Parliament and the Assembly. For an individual in Wales to understand what the law is in a devolved area it is often necessary to read devolved Welsh legislation together with legislation in areas that are not devolved. Furthermore, the legislation that governs a devolved area may be a mixture of legislation passed by the Assembly and the UK Parliament, subordinate legislation made by Ministers in Westminster and Cardiff, as well as EU law. For example, in relation to the devolved area of local government, the Local Government Act 1972 and the Localism Act 2011 still govern aspects of local government law which are now within the legislative competence of the Assembly.
14. Owing to the different methods by which legislation can be amended, it is a particular challenge to ensure that Welsh law is kept properly up-to-date. The difficulties in accessing up to date Welsh law is caused partly by the nature of the devolution settlement itself, in that both the Welsh Government and the United Kingdom Government may have amended Westminster statutes in ways that affect how the legislation applies in Wales. It can sometimes be necessary, therefore, to consider two streams of amendment, piecing together primary and secondary legislation from two sources, in order to arrive at the applicable legislation.
15. The Law Commission has stated<sup>3</sup>:

*... A further consequence of this is that the United Kingdom Parliament and the National Assembly may be simultaneously amending the same provisions of an Act of Parliament. This makes comprehending what the law is in Wales particularly difficult, due to the divergent sources of legislation, the lack of a clear or coherent presentational structure and the infrequency of consolidation. Furthermore, there is currently no free, up to date online database containing all of the legislation applicable to Wales, in Welsh and English.*

### **Access to Welsh law**

16. There is considerable demand for greater access to Welsh law, and the Welsh Government needs to take the initiative to provide the means by which to meet this demand. Ensuring that legislation is available to the public is crucial. This is best achieved by providing free and up to date legislation online in an easily navigable way. Additionally, accurate and up to date secondary materials, such as guidance and textbooks, would provide a useful tool to help people understand Welsh law. Access to law applicable in Wales is currently deficient.

**We recommend the Welsh Government should consider how it can take a greater role in ensuring the effective and comprehensive promotion of the law affecting Wales, including access to the law of Wales. (Recommendation 1)**

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<sup>3</sup> Law Commission (July 2015) *Form and Accessibility of the Law Applicable in Wales*, at para 1.53

17. The Cyfraith Cymru/Law Wales website, launched by the Welsh Government in July 2015, is a welcome start, but it is not nearly enough to ensure that Welsh law is fully accessible. It is striking to note the statistic at paragraph 1.32 of the Law Commission's Consultation Paper, which reveals that over 2 million individuals visit The National Archives' online legislation service [legislation.gov.uk](http://legislation.gov.uk) every month<sup>4</sup>.
18. The Silk Commission's report on *Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) recognised this need<sup>5</sup>: at para 10.3.45:

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

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

### **Cyfraith Cymru/Law Wales**

20. The Cyfraith Cymru/Law Wales website<sup>6</sup> is a new online service the Welsh Government has developed in association with Westlaw UK. It is designed to provide an overview of the law of the Welsh constitution and of the numerous devolved subjects. Around 200 articles are to be provided by Westlaw UK, adopted from their 'Insight' service, but many more will be required in order for the site to provide a comprehensive commentary with contributions from the legal community and academics.

**We recommend the Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of Welsh laws. (Recommendation 2)**

21. It is imperative that a momentum is created to ensure that this website is developed properly and is fit for purpose, as there is very little explanatory narrative available on Welsh laws and this website (if properly developed) could be an invaluable source for both the legal community as well as members of the public. Members of the public should be able to access legislation as a matter of principle, as it is particularly important that legislation is accessible to non-legally qualified persons due to the limited availability of legal aid. We note the recent Annual Report of the Lord Chief

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<sup>4</sup> Office of the Parliamentary Counsel (March 2013) *When laws become too complex*

<sup>5</sup> Paragraph 10.3.45

<sup>6</sup> Available at <http://law.gov.wales/?lang=en>

Justice of England and Wales, Lord Thomas of Cwmgiedd, to Parliament in December 2015 in which he points out:

*Our system of justice has become unaffordable to most. In consequence there has been a considerable increase of litigants in person for whom our current court system is not really designed. In light of the significant increase in litigants in person, any system that is established to enable better accessibility to Welsh law should be set up with a litigant in person in mind, as opposed to an experienced lawyer who is skilled in legal research techniques.*

**We recommend the Welsh Government should further engage with the administrators of the [legislation.gov.uk](http://legislation.gov.uk) website to further develop the [Cyfraith Cymru/Law Wales website](#). (Recommendation 3)**

22. The success of the [legislation.gov.uk](http://legislation.gov.uk) website, which was launched in July 2010 and provides an online service to the United Kingdom's legislation, needs to be emulated for Wales. There can be no doubt that many lessons can be learnt through active dialogue so that the website [Cyfraith Cymru/Law Wales](#) can emulate the success of [legislation.gov.uk](http://legislation.gov.uk). We welcome the fact that [Cyfraith Cymru/Law Wales](#) will link to the legislation available on [legislation.gov.uk](http://legislation.gov.uk), once the latter is up to date with incorporation of amendments. However, it will be some time before the Welsh content on [legislation.gov.uk](http://legislation.gov.uk) is entirely up to date. In the meantime, [Cyfraith Cymru/Law Wales](#) will offer access to legislation from Westlaw UK, but this will be behind a pay wall. Research conducted by The National Archives has identified the majority of users as persons who are not legally qualified and who do not have access to the law via a commercial subscription service<sup>7</sup>.
23. The [Cyfraith Cymru/Law Wales](#) website provides a unique opportunity to assist with access to Welsh laws, and needs to be properly funded by the Welsh Government and adequately supported, both administratively as well as financially. It is essential that an online legislation resource for Wales clearly identifies provisions of United Kingdom primary and secondary legislation that apply to Wales. An option might be to enable a user to view a statute or statutory instrument as it applies in Wales. This would provide users with a version of the legislation that omitted sections that do not apply to Wales and indicated to users that parts of the legislation were absent.

### ***Legal texts and materials***

24. It can be difficult for even legally trained readers to work out what law applies in Wales. There is currently a lack of textbooks that consider the law as it applies to Wales only, although some do exist. Notable examples include L Clements, *Community Care and the Law* (5<sup>th</sup> ed 2011) and J Luba QC, L Davies and C Johnston, *Housing Allocation and Homelessness* (4<sup>th</sup> ed 2015). We consider that the lack of availability of textbooks that address the law in Wales is a significant problem.

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<sup>7</sup> The National Archives, Evidence to Constitutional and Legislative Affairs Committee (January 2015)

25. Indeed, there are only a limited number of textbooks that explain the devolution settlement in any detail. Professor Thomas Glyn Watkin has drawn attention to this by noting that in one particular public law text of 870 pages published in 2013, only half a page referred to Wales<sup>8</sup>. Textbooks purporting to address the law of England and Wales frequently omit to make reference to the distinctive law applying in Wales.

**We recommend the Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of legal texts and materials that address the law in Wales. (Recommendation 4)**

26. We recognise as a welcome development the proposal by the University of Wales Press to commission the *Public law of Wales* series, which includes three books: *The Administrative Court in Wales* by David Gardner, *Planning Law and Practice in Wales* by Graham Walters, and *Legislating for Wales* by Daniel Greenberg and Professor Thomas Glyn Watkin.
27. There is a need for Welsh law textbooks and other legal materials, and more narrative on Welsh laws and on how they compare and contrast with English laws. In the modern age, the focus should be on developing online services. Hard copy textbooks are increasingly antiquated, whereas soft copy textbooks in electronic form are easy to update, access and use by practitioners and the public alike, with sophisticated search engines.

### **Codification of Welsh law**

28. The serious concerns that have been raised over the relative inaccessibility of the law in Wales means that the time has come for the Welsh Government to consider whether Welsh law should be codified. There could be benefits in introducing a code, as it would bring together the statutory law on a single subject into one instrument, without changing the boundaries between statute law and case law.
29. There is now a growing recognition of the benefits of codifying Welsh law, and we think this exciting new opportunity needs to be consulted on with a view to further understanding the benefits of codification within our present system. That consultation should include examples of the presentation of codes and the processes required to deliver codes, as well as a detailed understanding of the cost/benefit analysis. If a decision in principle is taken to begin a process of codification, we think this can be done by concentrating initially on those areas where the divergence in law is most significant, for instance: housing and local government, planning, social services, and education. In this regard, it is important to note that more than half of the Measures and Acts passed by the Assembly to date are devoted to the three subject areas of education, social welfare and local government.

30. As the Law Commission's Paper states<sup>9</sup>:

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<sup>8</sup> Professor T G Watkin (2014) *Accessibility of the law: The Distinct Requirements of Wales*. Public Law Project Wales Conference 2014, 10 April 2014

<sup>9</sup> Law Commission (July 2015) *Form and Accessibility of the Law Applicable in Wales*, at para 8.1

*Codification would not just rationalise the final presentation of existing legislation, but would introduce a more rational approach to future legislation, with the aim of securing clearer and more accessible law.*

31. At the Legal Wales Conference in Cardiff in October 2013, the Lord Chief Justice suggested that Wales should look towards a codified form of legislation:

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

32. This approach would be very helpful to those seeking to access Welsh law, as currently on many subjects the legislation cannot be found in one place, but is in a patchwork of primary and secondary legislation. This impedes the understanding of what rights and obligations apply to whom in what circumstances. If Welsh law was codified, this would greatly assist in the accessibility and understanding of the law.
33. The Law Commission's Paper proposes the possibility of making legislation in new ways, which provides a real opportunity to create a novel and more embedded form for common law codification. The Law Commission's proposals seek to exploit these opportunities in the form of considering common law types of code. It is not thought appropriate for Wales to move towards a civil law system of codes of the type operating, for example, in France or Germany. Rather, it could be sensible to instead move towards codification to improve the accessibility of the law, to improve its certainty and to facilitate its updating. This would involve either bringing the common law into statutory form, and/or to reorganise statute law.
34. The drafting of the code or codes should, therefore, continue to aim for a level of specificity appropriate for a common law jurisdiction, rather than attempt to draft in the less detailed style of continental codes.
35. There are many examples of common law codes operating successfully all over the common law world, and we consider that it would be advantageous for the Welsh Government to research the potential benefits of codification of Welsh law.

**We recommend the Welsh Government should undertake research on how codification has operated in practice in common law jurisdictions, including countries such as Canada, New Zealand and Australia. (Recommendation 5)**

## Education and training in Welsh law

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### *Education in Welsh law*

36. Legal education refers to undergraduate and academic postgraduate provision. At undergraduate level, education in Welsh Law takes the form of ‘Wales-focused’ elements in large modules, including those that are required for a Qualifying Law Degree (QLD). These include what is typically an introductory module on the ‘Legal System’ or ‘Legal Foundations’ and on public law or constitutional and administrative law. So long as these elements are properly designed and implemented, all graduates will have a basic understanding of the distinctiveness of Welsh law.
37. In principle, under the current arrangements, all providers of undergraduate legal education in England and Wales ought to include elements of Welsh law in their systems of education, in particular within the QLD in the context of public, constitutional and administrative law. Optional modules, which focus specifically on Welsh law and devolution, exist in Welsh law schools. Typically, they address issues of public law. Some options are available which involve co-operation with public institutions in Wales – including the Welsh Government and the Assembly – or private institutions, including Wales-based firms of solicitors.
38. At present, there is little or no Welsh content in the majority of QLD subjects (such as tort, trusts or contract). Should the substantive range of Welsh law change, this might also have to change. Currently, many of those topics on which Welsh law is most clearly distinctive are not covered by the QLD, and certainly not in any detail.
39. Very few law Schools in England or Wales have undergraduate modules in the areas in which Welsh law is most distinctive – such as planning, housing, and education or health care. Nevertheless, a combination of compulsory and optional elements allow students to gain a good understanding of the genesis and distinctiveness of Welsh law, a strong foundation the skills to develop as an effective ‘Welsh Lawyer’ and a knowledge of some areas of substantive Welsh law.
40. It is worth noting that several Welsh Universities now make it possible to study a significant portion of an undergraduate degree through the medium of the Welsh language. Often, this involves the provision of seminar teaching through the medium of Welsh for a range of core modules.
41. Specialist taught postgraduate courses exist, which provide a higher level of legal education in Welsh law and some of its applications.

### *Legal training in Welsh law*

42. Legal training refers to the Legal Practice Course (LPC) for solicitors, followed by a professionally-based training contract, and, for barristers, the Bar Professional Training Course (BPTC) followed by pupillage. It can also refer to professional development training. Currently, at least some Wales-based providers of legal training include some

Wales-focused elements in their provision. Equally, however, LPC and BPTC provision is closely regulated by the relevant professional bodies (the Solicitors Regulatory Authority (SRA) and the Bar Standards Board (BSB)). Both reflect the character and concerns of the 'England and Wales' jurisdiction and are applicable to all providers of this professional training whether in England or Wales. The detailed content of immediate post-LPC and BPTC training will reflect, to an extent, the nature of the substantive work being undertaken in practice.

### *Legal education and training in Wales for Wales, England and internationally*

43. For both economic and pedagogic reasons, providers of legal education in Wales offer provision that attracts students who aspire to practise in Wales, England and elsewhere in the (common law) world. The shared foundations of the common law mean that an undergraduate legal education in (England and) Wales currently provides the basis for law graduates to practise in a significant number of jurisdictions, from Canada, by way of Kenya, to Malaysia.
44. Currently, at the professional training stage the LPC is almost wholly restricted to students who wish to practise in 'England and Wales'. By contrast, the BPTC can be used as a professional qualification in some other jurisdictions – notably Malaysia.
45. In the event of the creation of a distinct or a separate jurisdiction for Wales, we see no reason why the shared 'common law' foundations, which make Welsh Universities an attractive place for international students, should be altered. By offering strong educational programmes, Welsh Universities ought to be able to continue to attract students interested in practising in other parts of the world, including England.
46. Modules which include close interaction with public or private sector organisations outside the University are highly attractive to students whether or not they aspire to go on to practise in Wales or in the rest of the world, including England. For example, modules that include placements with the Welsh Government or the Assembly have an obvious attraction for students with a substantive interest in Welsh law and are also attractive to students with a more general interest in law and policymaking.
47. Alongside students from England and Wales and/or interested in practising in England and Wales, international Malaysian students are critical to the economic viability of the BPTC at Cardiff University, which is the sole provider of this course in Wales. Since Cardiff has offered the relevant training, a majority of the junior counsel joining the Bar in Wales has earned Bar Vocational Course or (latterly) BPTC qualification at this University.
48. So long as an appropriate balance can be struck between the numbers of students from a variety of parts of the world, being educated or trained in a diverse international environment offers significant benefits and attractions for students.



## ***Stages of legal education and training***

49. While the legal professions are not completely graduate professions, the overwhelming majority of lawyers in practice are graduates. Notwithstanding prospective changes in the regulatory context, it seems likely that this will continue to be the situation.
50. Undergraduate legal education does not – and in our view should not – provide a detailed technical training in substantive law. Instead, undergraduate students should develop a set of skills, which include general qualities of a graduate as well as some specific law-related skills. Of course, these latter skills must be developed in the context of legal knowledge. The precise content of that knowledge is likely to date over time, while skills will have a longer currency.
51. Welsh law schools have taken significant steps to offer students the opportunity to develop their skills in the context of, and through an understanding of, Welsh law at the undergraduate stage. More could be done. The ‘educational’ character of undergraduate provision provides the scope for Welsh law schools to offer provision which includes significant elements of Welsh law while remaining attractive to students interested in practising elsewhere in the world, including England.
52. The changing regulatory context for legal education will have an impact on the scope for education in Welsh law, although neither the direction nor the magnitude of that impact can be known at present. The postgraduate stage of legal training currently develops skills and substantive knowledge. At least for solicitors, this stage of legal training may not exist for much longer.
53. After successful completion of an undergraduate education and any initial professional training stage, aspirant lawyers should have a good general knowledge of the law and a strong set of relevant legal skills. They should be ready and able actively to seek and develop the specific skills and knowledge required for a successful legal career.

## ***Legal education and training is set to change***

54. The Legal Education and Training Review (LETR)<sup>10</sup> and the responses to it from the SRA and the BSB are currently under discussion. While the response of the BSB is less well developed at the moment, some proposals from the SRA could see significant changes to the undergraduate education and postgraduate training phases of legal education.
55. At undergraduate level, the SRA proposals could see the end of the QLD structure, and its replacement with centrally administered tests of either or both substantive knowledge and legal skills. Substantive knowledge tests could take the form of multiple choice questions. The substantive areas tested may change, both in range (i.e. increase

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<sup>10</sup> Legal Education and Training Review (Solicitors Regulation Authority, Bar Standards Board and Chartered Institute of Legal Executives, 2013) *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (available at [www.lettr.org.uk](http://www.lettr.org.uk))

or decrease) and in areas covered. The SRA will control the subject areas and content to be examined, which may or may not include significant coverage of Welsh law.

56. In principle, law schools (including Welsh law schools) will be free to teach whatever they chose to teach. In practice, students are likely to prefer a degree programme that prepares them for the SRA tests. This may reduce the practical scope for law schools to cover Welsh law in the undergraduate curriculum – with possible impacts for either or both core and optional modules.
57. It is possible that the LPC stage of training for solicitors will be abolished. If so, the Period of Required Training (PRT) in a practice setting may take on an increased significance. It is possible that partnerships will develop between firms of solicitors and providers of education and training to deliver aspects of this phase of training. It is difficult to predict precisely how much demand there would be for training focused on Welsh law in an environment of this kind.

**We recommend the Welsh Government should engage with law schools and training bodies to support the development of Welsh law in education and training programmes for law students, practitioners and the judiciary. (Recommendation 6)**

## Jurisdictional issues

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Note: The Welsh Government published a draft *Government and Laws in Wales Bill* on 7 March 2015; this has not been considered by the Group, and does not feature in this report.

### *The unified jurisdiction of England and Wales*

58. It is commonly said that there is a unified or single jurisdiction of England and Wales. This arises from the concept that there is only one law of England and Wales.
59. The laws which apply in Scotland and Northern Ireland are recognised as Scottish and Northern Irish law respectively, and have been so recognised for as long as Scotland and Northern Ireland have been part of the United Kingdom. The discrete nature of the laws and legal systems within those territories is established as a matter of law.
60. In the case of Wales, as a matter of law, there is no discrete law of Wales, there is only the law of England and Wales as it applies in Wales. It makes no difference that in several areas there is increasing divergence between the laws which apply in Wales and those which apply in England. Conceptually, the situation is little different from adjacent Counties in England which decide to regulate public bathing differently through byelaws: those byelaws are still part of the laws of England and Wales which apply only in specific territories.
61. Such is the legacy of the so-called Acts of Union. When it comes to the legal system, England and Wales are, in law, one and indivisible, even though their territories are now legally distinct. This is generally held to be the case notwithstanding the repeal of the Acts of Union in 1993.

### *How the unified jurisdiction is reflected in the Government of Wales Act 2006*

62. Those who drafted the Government of Wales Act 2006 were careful to ensure that this principle was not lost. That Act drew a distinction between the *application* and the *extent* of Measures and Acts of the Assembly. These laws cannot “extend other than to England and Wales”.
63. Commentators explain that the phrase ‘extends to’ ‘is the conventional form for saying ‘forms part of the law of’. Intriguingly, and as a corollary of this ‘extent’, the Assembly is able to pass laws which apply in England, in order to enforce other laws which it makes, or where they are ancillary to or consequential on those other laws.
64. The crux of the problem can be seen as not so much about jurisdiction (meaning which courts hear which cases) but about the paradox that there is, as a matter of law only one law of England and Wales, even though the laws which *apply* in Wales and England have diverged (not just because of what the Assembly and the Welsh Ministers have done in Wales, but also because of what Parliament and UK Ministers have done in respect of England).

### *The jurisdiction question since 2006 – the problem of parity*

65. Most of the discussion of a Welsh legal jurisdiction has taken as its starting point that because laws which apply in Wales diverge from those which apply in England, it may be necessary to establish for Wales (and consequently also for England) a 'separate' jurisdiction analogous to the jurisdictions of Scotland and Northern Ireland.
66. The assumption has been that a Welsh jurisdiction would necessarily involve a more or less one-to-one mapping on to the Scottish or Northern Irish system. While there has been vocal support for such a move, involving full parity with Scotland and Northern Ireland, it has also been the subject of scepticism and concern.
67. The concept has caused alarm among some practitioners and others, both in Wales and in England, who are concerned at the prospect of a separate system for the administration of justice in Wales, with separate institutions, a separate judiciary and separate professions. Law firms operating from Wales and who do business in England have been wary of the possible loss of that business if a separate jurisdiction means that they are (or are perceived as being) precluded from practising in England. The converse is also true.
68. The Welsh Government in its evidence to Part II of the Silk Commission gave tentative support to the idea of a separate jurisdiction for Wales, but framed it as part of the gradual devolution of the administration of justice to Cardiff from London. The anticipated costs and challenges of such a move were perceived as being such as to make a separate jurisdiction for Wales a long-term project.

### *The Draft Wales Bill and a distinct jurisdiction*

69. The issue of a Welsh jurisdiction has emerged again in the discussions surrounding the Draft Wales Bill published by the Secretary of State for Wales last autumn. In its evidence on the Draft Wales Bill to the Assembly's Constitutional and Legislative Affairs Committee and the House of Commons Welsh Affairs Committee, the Welsh Government put forward the case for a distinct Welsh legal jurisdiction.
70. The Draft Bill has been criticised for many reasons. One of the principal criticisms is that it would prevent the Assembly from enacting any provision which changes private or criminal law unless the provision in question meets what has been called a 'necessity test' (the tests are in fact different for private and criminal law and involve more than 'necessity'). There is no such restriction on the Assembly's current legislative competence, or on that of the Scottish Parliament or of the Northern Ireland Assembly.
71. The justification given by the Secretary of State for this approach is that there is a unified England and Wales jurisdiction, and (implicitly) it cannot be right that there should be too much divergence in the 'general law' between the two territories. (One might comment that this seems like trying to shut the stable door after the horse has bolted, given the extent to which there has already been legal divergence between England and Wales, and given that the Assembly has passed law amending the criminal

law, in particular by creating new offences (and, for instance in the case of organ donations, new defences), since it gained powers to do so.)

72. The Welsh Government's response to this has been to propose a *distinct* jurisdiction for Wales. It has published draft provisions to be inserted in the Draft Bill which indicate what it means by a distinct jurisdiction. This proposal builds on a suggestion made in the paper *Delivering a Reserved Powers Model of Devolution For Wales* published by Cardiff University's Wales Governance Centre and UCL's Constitution Unit (pp24-27) and a follow up paper *Challenge and Opportunity: The Draft Wales Bill 2015*.

### **What characterises a 'distinct' as opposed to a 'separate' jurisdiction?**

73. 'Separate' and 'distinct' are not words which immediately or intuitively convey different meanings, but the phrase 'distinct but not separate' jurisdiction has emerged as a way of describing a particular way of organising things for Wales (and for England) which is in some respects different from how they are organised for Scotland and Northern Ireland.
74. While the detail of what this phrase means varies according to who is using it (it is not yet a fully thought-out concept, see next section), the essential features common to all descriptions of it are:
- a. England and Wales become distinct legal territories
  - b. Assembly laws extend only to Wales (i.e. the Assembly loses its power to legislate across the border)
  - c. While there will be formally distinct Courts of Wales and of England, they will have the same judges
  - d. The administration of justice in both England and Wales remains (for the time being at least) not devolved
  - e. Solicitors and barristers entitled to practise in England will be entitled to practise in Wales and vice versa, with the same rights of audience as they currently have
  - f. The Supreme Court will remain the final court of appeal, as it is for Scotland and Northern Ireland
75. This approach would not involve establishing for Wales a separate system for the administration of justice, with separate institutions, a separate judiciary and separate professions. In other words, there is no assumption of parity with Scotland and Northern Ireland.
76. While in *formal* terms there would be Courts of Wales and Courts of England, in *practical* terms judges could sit as judges of either court and anyone able to practise law in England and Wales now would be able to do so in England or in Wales in future.

77. These features should help address some of the concerns relating to the establishment of a separate jurisdiction, namely (a) the need on occasions for specialist judges; (b) the fear that lawyers' freedom to practise in both territories might be restricted; and (c) the fear of increased costs arising from separate institutions and departments of justice.

### *A distinct jurisdiction – work in progress*

78. The Welsh Government has been candid about its draft proposals. They are proposals. It is recognised that they will need discussion and refinement.
79. For example, the Welsh Government's drafting establishes a discrete law of Wales and a discrete law of England, which apply from a particular point in time. Most of the law of Wales and the law of England will of course be identical (common law, UK statute law and European law). This raises particular questions relating to (say) the status in a 'Welsh' case of decisions made by an 'English' court about the common law. Would they be binding precedents (unless distinguished), or would they be 'foreign' authorities and only persuasive in nature?
80. Another set of questions relates to how cross-border issues might be managed. While there would be no separate machinery of justice for Wales, there would need to be certain formal distinctions within the machinery of justice, to determine what is or is not a 'Welsh' or 'English' case, and whether the applicable law was the law of Wales or of England (i.e. choice of forum or conflict of laws in civil cases, the enforcement of judgments, warrants or orders across the border and bringing persons in England accused of crimes in Wales before the court and vice versa). The ready (perhaps too ready) answer to this set of questions has been to assume that rules applying between the current territorial jurisdictions within the UK will apply between England and Wales. Little work has been done, however, on what this might mean in practice, or (for instance) on whether it might be possible to simplify or streamline the rules in the case of the England/Wales border.
81. Another area that needs to be addressed (regardless of whether there is a distinct Welsh jurisdiction) is that of competence to practise. Having the same judges able to hear Welsh or English cases would enable the same court to reconstitute itself as a court of England (or Wales) if necessary, and hear a case without having to remit it to another place because the wrong forum had been chosen. It may be, nevertheless, that for certain areas of law, it would be necessary for judges and/or practitioners to pass some kind of competency test to show that they are suitable to deal with particular types of cases in either jurisdiction (as is already common for judges hearing or handling particular types of cases). For instance, it would seem sensible that judges and practitioners dealing with cases involving Welsh law should have some understanding of the devolution settlement and in particular the legislative competence of the Assembly. In areas such as housing law (where there is considerable divergence and more to come), there might be arguments for competency-based gateways in both jurisdictions.

82. During a speech at the Legal Wales conference in October 2015, the Lord Chief Justice commented that he saw no reason why a unified court system encompassing England and Wales could not serve two legal jurisdictions. A distinct legal jurisdiction for Wales would provide a way of bringing greater clarity to the growing divergence between the law of England and the law of Wales. The existing administration and operation of the England and Wales court system would remain with the Ministry of Justice and Her Majesty's Courts and Tribunals Service. All that would change would be that if a matter before the courts involved an issue of Welsh law, it would be administratively allocated to a Welsh court, e.g. the High Court of Wales, for adjudication by a Welsh judge, e.g. a Judge of the High Court of Wales, familiar with Welsh law. There would be no barriers for lawyers practising across England and Wales to bring or defend proceedings in a Welsh court or appear before a Welsh judge in a Welsh court; nor would there be anything to prevent any judge from the relevant part of the England and Wales judiciary operating in the Welsh jurisdiction, other than a requirement to have a knowledge of Welsh law.

**We recommend the Welsh Government should be proactive in developing a jurisdictional solution to the accommodation of Welsh law and the distinct needs of Wales, without creating barriers for the operation of justice or the ability of practitioners to continue to work across England and Wales. (Recommendation 7)**

## Developing a Welsh approach to justice

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### *Principles of administrative justice in Wales*

84. While consideration can be given to developing a Welsh approach to justice across the justice system, administrative justice and tribunals provide a useful starting point. The issues under consideration relate specifically to matters where the individual citizen has a relationship with the state, for example where public bodies deliver poor services, make incorrect decisions or where decisions are poorly administered. It is essential that any system proposed drives improved decision making and internal redress systems within public service in Wales with an approach of 'right first time' so that the feedback loops between the justice system and public service delivery drive improvement.
85. Increasingly, the divergence of law between England and Wales has led to consideration being given to systems of redress and there are already a number of tribunal and ombudsman functions operating in Wales which relate to Wales specific law that are devolved in appointment and function to Wales. At present, these operate differently from some non-devolved tribunals and in some cases differently from each other.
86. There are some basic principles which it will be important to adopt before considering the next steps in terms of the practicalities of any changes which may be needed in either the short or long term.
87. Research carried out for the Committee for Administrative Justice and Tribunals, Wales by Bangor University, *Understanding Administrative Justice in Wales (2015)*<sup>11</sup> identifies that access to justice is variable and that there is a lack of understanding of the processes and lack of advice and representation for individuals.

### *Devolved tribunals, functions, delivery and funding*

88. If there is to be any coherence to a Welsh approach to the administration of justice going forward, it will be necessary to review each of the devolved tribunals and ensure that they follow this set of principles in the appointment of their members, their methodology for operation and their approach to individual complainants. It is recommended that once the principles have been agreed, the devolved tribunals are reviewed against them and that when any new devolved legislation is envisaged the principles are taken into account in the drafting and the setting up of any new redress or appeal systems. In undertaking such a review, it will be important to reflect on the approach and principles envisaged and to reflect on the impact of the differences in devolved and non-devolved tribunals, including accessibility, digitisation of operation and services and approach.

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<sup>11</sup> The report (available at <http://adminjustice2015.bangor.ac.uk/documents/full-report.pdf>) proposes some core principles which could be adopted in Wales



89. Whatever the outcome of the review, it will be necessary to ensure that devolved redress systems themselves are scrutinised from the perspective of the citizen and that the establishment of a body encompassing the functions of the Committee for Administrative Justice and Tribunals, Wales is considered.
90. Consideration could be given to whether it would be appropriate for the Wales approach to the administration of justice to move to an inquisitorial rather than an adversarial approach; whether in relation to some or all aspects of administrative justice in Wales. While much of the current non-devolved tribunal system, relating to areas such as employment and benefit law, have been set up with that principle in mind, over time the system has operated in effect much more as an adversarial system, with evidence appearing to show that unrepresented litigants receive considerably worse outcomes. This means that careful consideration will need to be given to whether a move to an inquisitorial approach will deliver improved outcomes for individuals and what the impacts may be, including for legal education.

**We recommend the Welsh Government should consider whether there would be benefits in adopting an inquisitorial, rather than an adversarial, approach to the administration of justice in any of the devolved tribunals it is responsible for administering. (Recommendation 8)**

91. Issues for consideration would include whether an inquisitorial system could be applied across all devolved administrative justice functions in Wales or there could be a hybrid system applying to certain devolved tribunals and administrative justice functions. There would be considerable impacts on the training regime for tribunal judges who would require specific training. An inquisitorial system might lead to an increase in the cost and number of judges needed. The likelihood of an increased inquisitorial approach to justice may result from the current *Civil Courts Structure Review* being led by Lord Justice Briggs (see below). If so, the effect may be that the cost consequences of such a move might not fall so heavily upon Wales.
92. It will be essential to consider the need for appropriate access to information and advice, and representation for individuals to the justice system in Wales, however it develops. Given the move away from support for vulnerable individuals for representation or advice through the legal aid system, tribunals and courts need to be made more accessible for individual litigants and access to appropriate support to be funded.

### ***Devolved and non-devolved functions***

93. There are considerable issues arising from the current devolution settlement in terms of access to justice. There are potential impacts of changes to the devolution settlement, including proposals related to the devolution of administration of welfare benefits being suggested in some areas. It will be important to give consideration to the impacts on the delivery of Wales-specific access to justice of changes in delivery methods for tribunals and civil justice proposed and in place for non-devolved matters, including the introduction of digitally-based redress processes and the closure of court

and tribunal buildings. The impact of some of these changes in a broadly dispersed rural population across the majority of Wales may result in different and potentially more costly solutions which ensure access will have to be found in the medium term.

94. While the Draft Wales Bill is indicating that the proposals will ensure that the separation between devolved and non-devolved matters will be distinct, the current and future situation is likely to remain less than clear-cut. This will mean that individuals and legal representatives in Wales will have to deal with accessing justice through both England and Wales tribunals and courts and Wales courts. The greater the divergence of the systems, the more it will be necessary for legal education and public information to be clear about any differences in approach and ensuring that access to redress is enhanced.
95. Where legislation or policy is being considered which will have any redress function in either jurisdiction, it will be essential to clarify the devolved/non-devolved aspects, their impact on the administration of justice and the proposed access route for individuals.

### ***Welsh language***

96. It will be vital that in ensuring access to justice due consideration is given to the right of individuals to have their case heard and to give evidence in either Welsh or English, or indeed a combination of both. While this may be of prominent importance in the court and tribunal system in Wales, it remains vital that this same access is made possible in the England and Wales systems. There are implications for legal education, court and judicial appointments, and for the development of any alternative redress systems, which need to account for the linguistic requirements, including in particular the differences between oral and written Welsh and for plain language to be adopted wherever possible. This needs to include any digital or remote systems developed or developing across England and Wales.

### ***Civil Courts Structure Review: Interim Report by Lord Justice Briggs***

97. No consideration of administration of justice in Wales, including a Welsh approach to the administration of justice, can be undertaken without having regard to justice reforms being presently contemplated. One such review is the Civil Courts Structure Review commissioned by the Lord Chief Justice and the Master of the Rolls in July 2015, which Lord Justice Briggs is conducting.
98. There are matters under review, such as digitisation of court services, including the launch of an Online Court, and 'Reform Principles', which are relevant to the question of developing a Welsh approach to justice.

99. Lord Justice Briggs published his *Interim Report*<sup>12</sup> in January 2016. It raises issues about the boundaries between civil courts and tribunals, the launch of an Online Court, the affordability of access to justice and the integration of the Welsh language into digitised systems, but it does not take account of the divergence between Welsh law and English law.
100. We welcome the call by Lord Justice Briggs for a civil justice system that provides access to justice which is affordable to all citizens of Wales and England. The same should apply when considering a justice system (including civil justice) for Wales. There will be areas for which an Online Court is simply not suitable, but at the same time there is no reason why such an online approach should not be extended to tribunals where appropriate.
101. It is essential, however, that any digitisation of court and tribunal services is adequately resourced and that those dispensing and administering justice are properly trained. Without the involvement of lawyers, judges will have to be much more proactive and inquisitorial in their approach. Furthermore, there has to be full and fully funded support for those using the services of any Online Court, who will include the most vulnerable in Wales. An appropriate infrastructure for access to an Online Court, providing advice, digital access and support for digital literacy, is essential.
102. Being able to administer more justice with geographic freedom is an advantage. It would allow certain specialisations to develop, rather than a pan court approach. However, in return there should be the commitment that when there is the need for a 'face-to-face' hearing judges will travel to meet the needs of the parties rather than the parties travelling to meet the needs of the judges. In other words, there will need to be a great deal more flexibility built into the system, coupled with creativity in the housing of courts, albeit on a more temporary basis.
103. When considering a Welsh approach to justice, an Online Court for the citizens of Wales must be considered including some or all of the factors set out above.

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<sup>12</sup> Available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>

## Areas for further research

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104. As part of the work of the Group, there is a need for a strong knowledge and evidence base to be developed to support decision making in relation to justice in Wales, be that by Welsh Government or the UK Government. The Group and other contributors have raised concerns about access to justice issues arising from the impact of the UK Government's justice reforms and funding cuts (court closures, court and tribunal fees and increasing online dispute resolution). Issues of access to justice potentially affect the Welsh public differently to their English counterparts given the demographic differences.

105. Such research could include:

- a. the cost of administering justice under devolution both as the jurisdiction operates at present and under any proposed further devolved model.
- b. the effects of the unintended consequences of devolution.
- c. the effects on access to justice of the UK Government's justice reforms and funding cuts.
- d. the effects of increasing reliance on IT in the delivery of justice services.
- e. the implications of moving to an inquisitorial system for the administration of justice in certain devolved tribunals and other aspects of the justice system and how such changes could be made.
- f. the impacts of these changes on the economy and including legal and financial services in particular.

## Recommendations

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106. As set out in the body of this report, the Justice Stakeholder Group recommends:

- **Recommendation 1** – The Welsh Government should consider how it can take a greater role in ensuring the effective and comprehensive promotion of the law affecting Wales, including access to the law of Wales.
- **Recommendation 2** – The Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of Welsh laws.
- **Recommendation 3** – The Welsh Government should further engage with the administrators of the legislation.gov.uk website to further develop the Cyfraith Cymru/Law Wales website.
- **Recommendation 4** – The Welsh Government should seek consequential funding from the UK Government to support the publication, promotion and accessibility of legal texts and materials that address the law in Wales.
- **Recommendation 5** – The Welsh Government should undertake research on how codification has operated in practice in common law jurisdictions, including countries such as Canada, New Zealand and Australia.
- **Recommendation 6** – The Welsh Government should engage with law schools and training bodies to support the development of Welsh law in education and training programmes for law students, practitioners and the judiciary.
- **Recommendation 7** – The Welsh Government should be proactive in developing a jurisdictional solution to the accommodation of Welsh law and the distinct needs of Wales, without creating barriers for the operation of justice or the ability of practitioners to continue to work across England and Wales.
- **Recommendation 8** – The Welsh Government should consider whether there would be benefits in adopting an inquisitorial, rather than an adversarial, approach to the administration of justice in any of the devolved tribunals it is responsible for administering.

107. Additionally, the Justice Stakeholder Group recommends:

- **Recommendation 9** – The Welsh Government should ensure there is a consistent and structured approach to engagement with key stakeholders involved in the administration of justice, including legal practitioners, the judiciary and the Law Commission.

- **Recommendation 10** – The Welsh Government should consider establishing a Justice Stakeholder Group and bringing it together at least once or twice a year for a collective review of developments.