

CONSOLIDATION AND CODIFICATION OF WELSH LAW

Paper presented to the Constitutional and Legislative Affairs Committee by the Counsel General for Wales

1. I consider consolidation of the existing statute book, codification of Welsh laws and improved publication and accessibility of our laws to be a necessity. It will help the citizens of Wales access and understand the law, it will bring more clarity to our highly complex system of government and make developing, interpreting and administering the law more efficient. In December 2016 I made clear my view that we should embark on a lengthy and difficult path to develop more orderly systems of law making and publishing – in fact I believe we have little choice but to do so.
2. It is tempting to see this as a technical matter, an issue of concern merely for lawyers. It is also – quite naturally – unlikely to be a task that anyone would consider a priority. But neither is it a luxury. The citizen having a fighting chance to understand the law that governs him or her is fundamental to the rule of law. Generally speaking the assistance of lawyers is out of reach for most so something else must be done about the proliferation and complexity of our laws. The complexity of our law is also one of the reasons why our devolution settlement is so difficult to understand. Establishing where power lies is not straightforward partly because the law on the subjects devolved to Wales is hard to find and because the majority of the statute book for which we are now responsible is still shared with England. European transition will exacerbate this position as the short term steps taken by necessity to transform European law to domestic law are likely bring their own problems.
3. Whilst the Law Commission's report on *Form and Accessibility of the Law Applicable in Wales* provides a light to lead the way, further thought has had to be given to exactly what steps we need to take to create codes of Welsh law. The exceptional constitutional challenges in the coming months and years also make it difficult to commit to specific action over the short to medium term at least. But I hope that – despite everything – we can continue and see the work through. We will no doubt have to divert resources to other priorities along the way but ultimately the need to improve access to our laws is something I think we should not forget.
4. I announced, therefore, that during 2017 and into 2018, we will be undertaking a pilot programme of consolidation, codification and better publication. This paper provides more detail on the work that I anticipate will be undertaken during this period.

Codification

5. It is important to be clear what is meant by “codification” of Welsh law. We are still developing our thinking about more detailed issues such as the legal nature and taxonomy of Codes, how Codes would be maintained after they are made, and how they should be published and cited.
6. However we have already determined that our vision of a Code is different to that set out by the Law Commission in the *Form and Accessibility* report. In my view the word “code”

implies something comprehensive, not one part of the legislative framework. I see no immediate reason why a Code should not be wider than a single Act, nor why it should exclude the subordinate legislation and quasi-legislation on a topic.

7. So currently, we are working on the premise that:

- a. a Code is to be comprehensive, in that it contains all the applicable legislation (primary and secondary legislation, and guidance or other similar documents made under the Acts or subordinate legislation) that falls within the subject matter of the Code¹;
- b. the existing hierarchy within, and delineation between, the legislative instruments (primary, secondary, etc.) will remain; and
- c. all legislation within the Code will be made in both English and in Welsh (both, of course, having equal standing).

8. Our current expectations for the key features of a Code are that:

- a. the legislation within the Code is collected/grouped under a unifying overarching title, and the use of this title creates a connection between its component parts;
- b. a Code may consist of one or more “principal Acts” which sets out the primary law on one or more coherent parts of the subject matter of the code (or in the case of a Code made up of one principal Act, all of it);
- c. principal Acts will contain key concepts, core matters, defined terms and “boiler plate” provisions which are likely to apply across the Code, horizontally (to any other principal Acts in the Code) and vertically (to subordinate legislation and guidance etc.);
- d. a principal Act will be judicially noticed (as an Act of the National Assembly);
- e. specifying legislation to be part of an existing Code should have procedural implications within the Assembly in terms of maintenance (including amendment) and publication (including printing)²;
- f. the specific Acts, Statutory Instruments and guidance comprising the Code are to be listed within the Code as forming part of that Code;
- g. depending on the form and nature of the Code, an individual Act or Statutory Instrument etc. which is part of the Code is likely to contain a statement to that effect³;

¹ Though this will be subject to the limitations of the legislative competence of the National Assembly and to the taxonomy we will develop for dealing with provisions that could fall within more than one subject.

² The initial creation of a Code will also, to the extent that it is a consolidation or restatement exercise, receive certain procedural protections.

³ This may need to be a non-amendable statement in a Bill or Statutory Instrument

- h. if necessary or helpful, there will be an index (or table) of defined expressions within the Code; for example, where, in addition to the main defined terms in the principal Act(s), there are defined terms which appear elsewhere;
 - i. any cross-references to the Code in legislation outside of the Code will, without more, be treated as references to the Code in its entirety.
- 9. During the pilot programme we will be developing and testing these assumptions and key features, and I therefore caution that these could change as our examination of the issues deepens.
- 10. More generally however, if we pursue this work on a long term basis, taken collectively the Codes will establish a coherent structure setting the law out subject by subject. We would seek to ensure Codes are produced on all the major areas of devolved law: health and health services, social care, housing, education, local government and so on.
- 11. I agree with the Law Commission that the status of a Code should attract certain procedural safeguards. I wish to ensure that subsequent legislative reform on a topic that has been codified would not take place outside of the Code, but rather within it. This would avoid future fragmentation of the statute book.
- 12. Crucially, it is imperative that the Codes, once produced, are available in an easily accessible manner. We are considering therefore what publication arrangements we could adopt to supplement what is currently being done now – and will continue to be done – by The National Archives (specifically through legislation.gov.uk). Maintaining Codes and maintaining up-to-date publication of the Code are matters we will be investigating during the pilot programme.

Consolidation

- 13. To create a Code we need coherent statutes on the subject matter of the Code. In practice this means consolidating existing law. During the last Assembly the Welsh Government took the opportunity, wherever practicable, to restate existing law within the Bills it brought forward. This involved adopting existing provisions that applied to Wales and also to England or other parts of the UK set in a clearer, specifically Welsh context. We will continue to do that, as appropriate in this Assembly. However, that has its limitations and we are yet to bring forward a large-scale consolidation Bill – something that would accelerate the process of modernising and rationalising Welsh law and enable us to create Codes.
- 14. My intention is that we will take one or more existing areas of law, which are well established and relatively settled, and draft consolidated text for Wales. I say more about the actual projects that are underway below, but for the purposes of the pilot we want to understand what it takes – in practical detail – to scope and draft a consolidation Bill in both languages.

15. Scoping is the process of identifying the relevant existing statutes, understanding how they currently work (in theory and in practice) and considering how they may be unpicked and re-stitched together to create a consolidated text. This text will then be redrafted in more modern and succinct language, will (most likely) be structured more logically and coherently, and will be bilingual. (An important feature of this work is that despite both English and Welsh having equal status in law in Wales, most of our laws predate the creation of the National Assembly as a fully fledged legislature.)
16. I agree with the central premise of the Law Commission's findings that there must be a means of consolidating the law effectively, without routinely exposing the law where it is not being reformed to full political scrutiny. That is the approach taken in Westminster and the UK Parliament, and indeed in common law jurisdictions around the world. I do not believe any government would be willing to proceed with an initiative of this kind without procedures that de-politicise consolidation Bills.
17. Repealing statute law no longer in use (indeed statute law which may never have been used) and simplification and reorganisation of existing provisions, will contribute to improved readability and understanding of the law – a clear societal and economic benefit. Doing this is, however, likely to require technical changes in many circumstances. Although these would fall short of substantive policy reform they would involve minor changes to the law. The extent to which such changes can be permitted under a consolidation procedure is something that will need to be agreed. Starting the process will provide us with crucial knowledge about the type and nature of technical changes which need to be made in a Welsh context.
18. I am very pleased that the Business Committee has agreed that work can now be undertaken to develop a Standing Order on a consolidation procedure, and the Llywydd has kindly agreed that Government officials working on the pilot projects can share their learning with Assembly officials in order to aid the development of the procedure and supporting documentation.
19. Finally the consolidation work will also consider the recommendations of the Law Commission in relation to subordinate legislation. I was pleased the Law Commission considered this issue, as there are many thousands of pages of subordinate legislation on the statute book, a significant factor to the increasing inaccessibility of legislation. Further work is required to understand the technical implications of (particularly) Recommendation 12⁴ of their report, but I see much merit in this from an accessibility perspective. If the technology can adapt, and a suitable procedure be adopted, then this should save time for all involved and make for clearer legislation for the end user.

Better publication

20. During the pilot programme I want to consider how we can better use the Cyfraith Cymru/Law Wales website. Our website currently acts as a portal to legislation.gov.uk for some Acts, and I would like to see this expand further once Codes are developed. We are

⁴ Recommendation 12: When secondary legislation is amended, the updated text of the statutory instrument should then be laid before the National Assembly, rather than an amending statutory instrument. (Law Commission (2016) *Form and Accessibility of the Law Applicable in Wales*)

also looking to make improvements by encouraging more contributions of explanatory material on Welsh law, and whether we have the resources available to develop an information service. It is certainly the case that the Law Commission's recommendations in relation to the website are consistent with our wider and long-term ambitions.

21. In so far as legislation.gov.uk is concerned I strongly believe the law needs to be promulgated so that those affected by it can actually view it; and for us that means it is in an up-to-date form (in both English and Welsh where it has been made bilingually) and viewable without charge. This principle should apply to both primary and subordinate legislation.
22. The Law Commission's recommendations and findings in relation to the Cyfraith Cymru website and legislation.gov.uk will, therefore, be evaluated as part of the pilot.
23. As part of the 'better publication' aims for the pilot, we will also fully explore the practicalities and feasibility of establishing a Queen's Printer for Wales. This was a matter considered in both the Law Commission's report, albeit they viewed this as outside the remit of the project, as well as the *Making Laws in Wales* report. However our work on the benefits and costs has only just begun, and as such I am not yet in a position to provide more detail to the Committee on this now.

Historic environment and planning projects

24. For the purposes of this pilot programme, we have chosen to scope and draft consolidated text in relation to the historic environment in Wales. We have chosen it for a number of reasons:
 - a. the Assembly recently agreed new legislation in this area, and indeed had we been able to in the last Assembly we would have ideally consolidated the legislation for Wales at that time, so the legislative field in this area is relatively settled;
 - b. the existing legislation is predominantly only available in the English language;
 - c. the law in this area, although not lengthy, has expanded significantly over the years to incorporate different provisions for England, Scotland and Wales often within the same statute; and
 - d. much of the existing legislation was originally passed a number of years ago, and in many aspects does not reflect modern drafting approaches.
25. A further reason for choosing this project is the relationship – both practical and legislative – between historic environment and planning. As the Committee will be aware we are working with the Law Commission on a planning code for Wales and the Commission will be publishing a consultation document in the summer. That project will continue beyond the life of the pilot programme. I should make clear that although work will continue throughout 2017 on the historic environment exercise, the Government will consider in due course the most appropriate time to bring forward any consolidation legislation. It

may be more appropriate for the historic environment work to wait until the planning work is more advanced or even ready for introduction to the Assembly.

26. The inter-relationships between areas of the law, and individual projects, are an important aspect of any long-term programme. The lessons we will learn during the pilot programme in this regard will be important for our future approaches.

Welsh Interpretation Act

27. During the pilot programme, I will be considering the arguments for and against developing an Interpretation Act for Wales. This was a matter considered in the *Making Laws in Wales* report, and the Committee supported such a development. I see particular merit in ensuring there is proper provision in the Welsh language for key terminology, but there are other matters which also need to be considered. I therefore hope to publish a policy consultation document on this matter in the early summer, which will set out some of the possible approaches that could be taken and seek views on the merits of the issue.

EU transition

28. Responding to EU transition, as well as the legislative reform programme of the Government will be the Welsh Government's priority. That is clear.
29. The result of the referendum on the UK's membership of the European Union occurred after the publication of the Law Commission's final report, and the influence of European law on our constitutional arrangements was not directly considered. The likely need over coming years to repatriate and amend or replace European law is, however, relevant to any future longer-term commitment to codify Welsh law. Maintaining a system of saved (former) European law alongside domestic law will be particularly complex, and probably not sustainable over the long term. There is clearly an overlap between our aspirations to codify the law and what may become an unavoidable need to rationalise European law. This represents both a risk and an opportunity: on the one hand it significantly increases the size of the task, but on the other it would enable us to create more coherent and complete codes of domestic law within the devolved areas, by incorporating provisions currently set out in European law.

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