

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Bil deddfwriaeth (Cymru)

Chwefror 2019

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Legislation (Wales) Bill

February 2019



* Ar gael yn Saesneg yn ynig | *Available in English only

** Ar gael yn Gymraeg yn ynig | **Available in Welsh only

Rhif Number	Sefydliad	Organisation
LW 01*	Yr Arglwydd Hope	Lord Hope
LW 02*	Clinig y Gyfraith Abertawe	Swansea Law Clinic
LW 03*	Yr Athro Thomas Glyn Watkin	Professor Thomas Glyn Watkin
LW 04	Cymdeithas y Cyfreithwyr (Cyflwyniad Saesneg yn unig ond gydag atodiad Cymraeg)	The Law Society (Annex in Welsh only)
LW 05	Keith Bush CF	Keith Bush QC
LW 06*	Capital Law	Capital Law
LW 07**	Dr Catrin Fflûr Huws	Dr Catrin Fflûr Huws
LW 08	Comisiynydd y Gymraeg	Welsh Language Commissioner
LW 09	Comisiynydd Pobl Hŷn	Older People's Commissioner
LW 10*	Huw Williams - Geldards	Huw Williams - Geldards
LW 11*	Y Comisiwn Penodiadau Barnwrol	Judicial Appointments Commission
LW 12*	Cyfraith Gyhoeddus Cymru	Public Law Wales

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National Assembly for Wales
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CLA(5) LW 01
Ymateb gan Arglwydd Lord Hope

Evidence from Lord Hope

I was very grateful to have been given the opportunity of commenting on this draft Bill.

As you may know, I sat on two of the early cases which came before the Privy Council under the devolution legislation and was, I think, the first UK Judge to use the expression “Welsh law”. So I was particularly interested to see what you are proposing. It 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.

The Bill is so well drafted that I have only one comment to make. It relates to the definition of the words “Privy Council” in Table 1 of Schedule 1 as introduced by clause 5. As far as I can see, these words are not used anywhere in the draft Bill itself. I understand, of course, that they are being defined here for their easier use in some other Assembly Act or in Welsh subordinate legislation. But I wonder whether you have got the definition quite right. 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. I suggest that it might be best to check whether you have the right definition with the Privy Council itself before the Bill is finalised.

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Bil deddfwriaeth (Cymru)

National Assembly for Wales
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CLA(5) LW02

Ymateb gan Clinig y Gyfraith Abertawe

Evidence from Swansea Law Clinic

This submission is being made by the Swansea Law Clinic, which is part of the Hillary Rodham Clinton School of Law at Swansea University.

The Clinic is a *pro bono* service and has been operating year-round since March 2017 when a Miscarriage of Justice Project was established. Since then we have been running projects in prison law, legal aid exceptional case funding, a Litigant Helpdesk in Swansea Civil Justice Centre, and, since November 2017, we have been providing an initial advice and assistance service. The latter involves face to face client interviews mainly, but not exclusively, in the following areas of law: housing, relationship breakdown, employment, equality, and consumer issues. Our model uses undergraduate and postgraduate law students as Student Advisers. They work under supervision and following ethical training they advise our clients. We aim to complement and not replace existing legal advice services as well as complementing provision that is eligible for legal aid.

We are also involved in public legal education which involves a range of activities but mainly involves informing school students as to their legal rights and responsibilities and, from time to time, journalism on access to justice matters.

Since the Clinic was founded almost two years ago, we have assisted through our legal advice and public legal education programmes over 500 people. It is our intention to use new technologies to scale our service further. Although most of our clients are members of the public our service is also available to small businesses.

A number of our projects work in association with a number of other organisations. The Miscarriage of Justice Project works with a charity, Inside Justice, and a solicitors' regulated practice and charity, the Centre for Criminal Appeals. The Prison Law Clinic works with the charity, the Prisoners' Advice Service and PACT. The Exceptional Case Funding Clinic receives support from the charity, the Public Law Project. We have run an outreach clinic at Maggie's Swansea, Singleton Hospital. The charity, Travelling Ahead, has referred cases to us, and we have referred cases to Advocate (formerly known as the Free Representation Unit). We also receive assistance from LawWorks Cymru and the Equality and Human Rights Commission Wales's Advisers' Helpline.

Our interest in this consultation is that we find that many of our clients are either finding it difficult to afford legal services and/or find the legal system complex. As a result, we are interested in all aspects of access to justice and public understanding of the law.

Executive Summary

We fully support the imposition of a statutory obligation on future governments in Wales to improve the accessibility of Welsh law under Part 1 of the Bill.

In our experience, our clients are not always aware of their rights and obligations under Welsh law and we believe this duty will enhance their awareness.

There is evidence that individuals, small businesses and the voluntary sector find Welsh law difficult to access and navigate. We think organising legislation by subject matter will assist them, as will the publication of up to date legislation online.

We hope that the accessibility programmes under section 2 of the Bill will take a broad approach to accessibility and it will not be confined to moving all legislation on a topic to legislative Codes. The accessibility programmes should also think about clarity of language, the removal of overlapping and inconsistent provisions, computational law principles, as well as new approaches to law making. We are also concerned to see the development of Codes being accompanied by explanatory texts.

The Housing (Wales) Act 2014 is an example of legislation that we use in our casework where the statutory language is clear, and is an example that could be followed in Codes.

The Bill, if enacted, will enhance access to justice in the Welsh language.

A broad and successful approach to accessibility programmes will be world-leading with economic as well as citizenship benefits.

Duty to keep accessibility under review

1. We would like to see a statutory obligation on future governments in Wales to keep the accessibility of Welsh law under review. This will create a discipline to ensure that the subject is periodically revisited, as a result, we feel the duty in section 1 of the Legislation (Wales) Bill (the Bill) 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.
2. We know of few international precedents for a duty on government to keep the accessibility of law under review. Section 3 of New Zealand's Legislation Act 2012 contains an analogous duty, but we are not aware of any others. Therefore, we think that Part 1 of the Bill affords the potential not only to make the law more accessible for individuals in Wales but also to make Wales more economically competitive by making it easier for businesses to know their legal rights and obligations thereby reducing compliance costs. According to the University of Cumbria's Centre for Regional Economic Development (CRED), SMEs often do not have the expertise or resources to

keep track of legislation and this increases their apprehension about having to deal with legal requirements.¹

3. Lord Lloyd Jones, a senior jurist and UK Supreme Court judge, has said that ‘the complexity of [Welsh law] is now a huge problem’.² The complexity will only get worse: more primary and secondary legislation will be passed, laws will have to be domesticated following Brexit, and the current practice of passing amendments to legislation without accompanying text adds to the accretion of the problem. As a result, action needs to start to be taken at the earliest possible opportunity.
4. In our experience, our clients are not always aware of the rights and obligations which arise out of Welsh law and that are increasingly relevant to their day to day lives. In part, this could be to do with the difficulties inherent in accessing Welsh law with its different sources and confusing differences in terminology such as Measures and Acts, etc. Codes will have a tidying up effect, which will make it easier for them.
5. There have been reports that the voluntary sector finds the current system of accessing Welsh law burdensome.³
6. From our casework we have found that there could be more awareness of important Welsh legislation such as the Housing (Wales) Act 2014. In particular, our clients do not seem aware of when landlords need to be registered and licensed under the Act. Equally, they do not seem to be aware when agents need to be licensed under the Act. In addition, we have heard from other practitioners specialising in the area that there is a lack of awareness of the Social Services and Well-being (Act) 2014.
7. There are other indicators that there is a specific Welsh dimension to access to justice issues. A report by Dr Nason of Bangor Law School found that:

¹ CRED, *Business Perception of Regulatory Burden*, May 2012

² Lord Lloyd Jones, ‘Codification of Welsh Law’ Lecture delivered to the Association of London Welsh Lawyers on 8 March 2018, https://docs.wixstatic.com/ugd/ab7491_8c924cda0b7e4312b1e10fe9b8e7d501.pdf accessed on 16 January 2019

³ BBC Radio 4, *Law in Action*, (10 March 2011)

“Based on claims we know to be Welsh, there were 1.8 civil judicial review claims per 100,000 Welsh residents in both 2013/14 and 2014/15. On the other hand the number of claims per head of population in other locations has been consistently substantially higher, but has been falling in recent years.”⁴

8. The lack of judicial review claims in Wales relative to England is even more surprising when it is taken into account that: ‘The Welsh approach to regulation of public governance is distinctive; introducing new and unique duties on Welsh Ministers and public bodies...Social rights have been woven to the framework of public governance, with potential to ensure good governance, fairness and accountability’.⁵

Clarity

9. Making the law accessible is not just about finding it all in the same place, important though that will be. Using clear language is also important, and we commend the Housing (Wales) Act 2014 for its use of user-friendly language.

10. We hope that Codes will go beyond putting all legislation on a particular subject matter in one place, but also inconsistent and overlapping provisions will be removed when legislation is moved to Codes.

Availability of and changes to legal services

11. Our advice model aims to empower clients to resolve their problems by themselves, as much as possible. Similar models are followed by other advice agencies. Codification of laws by subject matter will assist them in this empowerment as they will find it easier to research the law themselves.
12. There is evidence that many families are being priced out of justice, so increasingly more people will have to research law themselves. A report produced by Professor Donald Hirsch of Loughborough University, commissioned by the Law Society of Wales and England, found that those that people on incomes already 10 per cent to 30 per cent below the

⁴ Sarah Nason, *Understanding Administrative Justice in Wales* (Bangor University: 2015 p.107)

⁵ Submission to the Commission on Justice In Wales from Dr Simon Hoffman (Swansea University) at para. 3 <https://beta.gov.wales/submission-justice-commission-dr-simon-hoffman-swansea-university> accessed on 16 January 2019

minimum income standard are being excluded from legal aid.⁶ The situation is getting progressively worse as the means test threshold for legal aid has been frozen since 2010. So, in addition to cuts in the scope of legal aid since 2013 those who are eligible for legal aid are still, in some cases, unlikely to be able afford it and maintain a minimum acceptable standard of living.

13. This means that individuals are being forced to navigate the legal system by themselves on such potentially life changing issues as eviction and severe housing disrepairs. There is evidence that the public read legislation with the National Archives recording 2 million visitors per month to their legislation.gov.uk website.⁷ This further increases the need to make the process of finding the law as simple as possible in order for people in such situations to better enforce their rights.

14. New business models for delivering legal services which are emerging such as limited retainers, also known as unbundling, mean that individuals and small businesses are doing more of their own legal work in order to make the cost of legal services affordable. As the Court of Appeal in *Minkin v Lesley Landsberg* (2015) has approved unbundling then it is reasonable to assume that they will form part of the landscape for legal services for the foreseeable future, and that members of the public and small businesses will be navigating legislation without legal advisers.

15. There is a good economic case for imposing the obligation under s1 of the Bill. There has been research that has found that small businesses are a hard to reach group for lawyers.⁸ There is further evidence that small businesses have a tendency to ignore legal problems or try to resolve them by themselves. The proposed obligation would assist small businesses in finding the law and assessing their legal rights and obligations which will assist in making their operations more efficient.

⁶ Donald Hirsch, *Priced out of Justice? Means testing legal aid and making ends meet* (Centre for Research in Social Policy Loughborough University, March 2018)

⁷ Office of the Parliamentary Counsel, *When laws become too complex* (March 2013).

⁸ Legal Services Board, *The legal needs of small businesses 2013 - 17* Available at: <https://research.legalservicesboard.org.uk/news/latest-research-18/> Accessed on 4 June 2018

16. The obligation addresses the unavailability of many laws which apply only in Wales passed by the UK Parliament in the Welsh language. It therefore has the potential to significantly enhance accessibility of laws for those who wish to access them in the Welsh language.

Publication of legislation

17. We want to see all Welsh law being available online. Section 9 of New Zealand's Legislation Act 2012 places a duty on the Chief Legislative Counsel to be accessible and, as far as is reasonably practicable, downloadable from the Internet. Up to date versions of current law which are available electronically free of charge ought to be available to members of the public. At the moment, UK legislation, including Welsh law, on the legislation.gov.uk website hosted by the National Archives is not always up to date. Although there are warning notices on the website there is no information which assists members of the public in making sure that they can find up to date information.

18. In order to aid understanding of the law as it applies to members of the public in their circumstances, we want to see a situation where they can easily identify currently in force legislation or even tailor searches of legislative databases to their own legal needs. We would like to see accessibility programmes under section 2 of the Bill explore whether computational law principles could be applied to achieve this.

Cross cutting legislation

19. There is legislation which potentially affects the public's legal position which cannot be incorporated into Codes because it is cross cutting and cannot be limited by subject matter such as the Human Rights Act 1998. In addition, there is specifically Wales-only legislation which creates duties which are cross cutting and could also potentially affect the legitimacy of legislation. Welsh Ministers must have 'due regard' to the UN Convention on the Rights of the Child (UNCRC) in 'all their functions' when 'exercising any of their functions' under section 1 of the Children and Young Persons (Wales) Measure 2011. In addition, public bodies must contribute to well-being goals in accordance with the sustainable development principle under section 3 of the Well-being of Future Generations Act (Wales) Act 2015.

20. We accept that the purpose of Codes is to find all applicable law in one place. It would not be the best place to engage in 'how to use' legislation discussions particularly as Law Wales already exists as a forum for such discussion. However, we would like to see brief reference to cross cutting legislation in explanatory memoranda to Codes themselves so that members of the public were at least alerted to the need, on occasion, to read Codes in conjunction with other legislation.

Explanatory material

21. Similarly, we support the idea of including primary and secondary legislation, as well as soft law, within Codes but are concerned that members of the public are not always aware of the hierarchy of legal norms. We would like to see some brief explanation of hierarchy of legal norms in explanatory memoranda to all Codes with cross reference to more detailed explanation on the Law Wales website.

22. We would like to see thought given not just to using text in explanatory material but also other ways of presenting information such as visualisations. At present, legislation and accompanying explanatory material only uses text and we feel it is time to be more innovative.

Accessibility programmes

23. 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.

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National Assembly for Wales
Constitutional and Legislative Affairs
Committee
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CLA(5) LW03
Ymateb gan Yr Athro Thomas Glyn
Watkin

Evidence from Professor Thomas Glyn
Watkin

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1. I am grateful to the Constitutional and Legislative Affairs Committee for the invitation to make a written submission and participate in an oral evidence session in relation to this inquiry. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.
 2. The Inquiry's terms of reference state it will address:
 - 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).

The General Principles

3. The bill seeks to promote the accessibility of Welsh law, as defined in section 1(2). This it seeks to achieve by placing a duty upon the Counsel General to keep the accessibility of Welsh law under review (section 1(1)), and requiring the Welsh Ministers and the Counsel General to prepare programmes setting out what they intend to do to improve such accessibility (section 2(1)). Each programme must include proposals which are intended to contribute to an ongoing process of consolidating and codifying Welsh law, maintaining Welsh law in that form and facilitating the use of the Welsh language (section 2(3)). These purposes build upon recommendations made by this Assembly Committee in its report *Making Laws in Wales* (October 2015) and by the Law Commission in its report on the *Form and Accessibility of the Law Applicable in Wales* (Law Comm. No. 336, June 2016).
4. What is envisaged may be achieved is a highly laudable objective. Citizens of the United Kingdom, including those in Wales, suffer from having their lives regulated by laws which are not easy to access. This is, in part, the

consequence of how relevant legislation has been drafted and accumulated. Bills are rightly drafted to allow those who legislate on behalf of the citizen to scrutinize legislative proposals prior to deciding whether the proposals should become law. The structure of bills reflects their use in that context. They set out the changes which it is proposed should be made to the law in order to achieve a particular policy objective. Likewise, if the bill is enacted, the resulting Act or Statute records the changes to the law which it has been decided should be made. 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.

5. Since at least the nineteenth century, serious attempts have been made to try to impose some order upon the accumulated mass of enactments, by for instance publishing editions, such as *The Statutes Revised*, which remove spent or repealed enactments and edit into the texts later amendments to them. The development of electronic sources of such texts is the latest most effective version of that endeavour. They do not however alter the basic problem which is that the collection remains chronological and is not designed to make the law – as opposed to individual pieces of law-making – accessible.
6. Over much the same period, attempts have also been made to restructure the accumulated mass of legislation based on its subject matter, in works such as *Halsbury's Statutes* and *Halsbury's Statutory Instruments*. In addition, *Halsbury's Laws of England* is a more ambitious, encyclopaedic work which sets out the relevant law on each subject and not simply legislation. Together, these works regroup the relevant legislation or law under appropriate subject headings arranged alphabetically. These works require continual updating as new laws are made, again a task which can be more effectively performed in a digital age.
7. Neither of these approaches delivers for the benefit of citizens a text which is an official, accessible statement of what the law is. In truth, the target audience for these works is mainly the legal professions, and access to them reflects that fact in terms of their cost. Their structure has led to the jibe that the English lawyer's idea of order is either chronological or alphabetical, in contrast to the rational order of the law codes of many other countries. However, even in those countries, the comprehensive nature of their codes of law is often compromised by the enactment of what is termed 'complementary legislation', that is free-standing enactments which are not inserted into the codes themselves. Such enactments, when frequent, undermine the accessibility which the codes are meant to achieve. Their existence highlights the importance of a sustained political will to maintain

a codified structure once adopted if accessibility is to be permanently achieved.

Consolidating and codifying Welsh law, and maintaining it in that form

8. The importance of maintenance is recognized in the Explanatory Memorandum to the Bill which states that:

only a sustained effort over the long term can solve the problems. What is required is a permanent change to our law making processes (¶ 14).

Crucial to the success of consolidating and codifying the law is that both continue over the long term and become an accepted part of the culture of law making in Wales. This means accepting that the law is constantly evolving and must, even after it has first been consolidated, be revisited periodically to ensure that it remains well ordered and accessible. It also means maintaining the overall structure – not the content, which will always change in accordance with policy and political wishes – of the statute book. Once the law is consolidated and codified we should only move away from the new structure in exceptional circumstances (¶ 31).

9. However, the Explanatory Notes which accompany the Bill are less clear in this regard. They state that:

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 (¶ 17),

but then appears to roll back on the broader vision of the EM :

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 (¶ 17).

10. The technical document on the Draft Taxonomy for Codes of Welsh Law repeats the latter two paragraphs (¶¶ 3 & 4), and the Annexes anticipate the collection of existing legislative sources under Proposed Codes and Topics. The approach is not dissimilar to that adopted in constructing the alphabetical, encyclopaedic works mentioned above (¶¶ 5–7), although it is

clearly intended that both primary and secondary legislation should be incorporated within each code, together with other relevant sources, such as guidance. It will also be the case that the sources will have been officially consolidated and will constitute an official statement of the legislation contained in each code. Nevertheless, 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).

11. 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 rôle 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.
12. If, on the other hand, the code becomes the principal legal instrument in its field, the changes required to the existing law-making processes are likely to be much more extensive. Bills and draft statutory instruments (other than in exceptional circumstances – see EM ¶31) could be drafted so as to amend the text of the code. The legislature could control the structure of the statute book by ensuring that – other than in exceptional circumstances – bills and instruments conformed to the new requirements. Standing Orders and requirements as to Proper Form might reflect this.
13. Questions also arise regarding the amendment of the code by secondary legislation. Would all such amendments attract the affirmative resolution procedure, or could some amendments to the codes still be made by the negative procedure? With the advent of codes, might the existing procedures themselves need to be reconsidered and possibly even replaced?
14. Greater clarity is needed with regard to these issues. However, seeking greater clarity regarding the long-term vision should not hinder the essential first steps which are proposed in this bill. Almost certainly, the ongoing process of consolidation and codification will encounter fresh challenges in its path. 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.

Potential barriers to Implementation and Unintended Consequences

Consolidation and the Equal Standing of Welsh and English Versions

15. As stated in the Explanatory Notes,

Section 2(3) also requires each programme to include activities intended to facilitate use of the Welsh language... 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 (¶ 20).

Both the Explanatory Notes and the Draft Taxonomy state that:

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 (EN ¶16; DT ¶12).

16. There is a clear intention, therefore, in producing the codes to 'repatriate' laws currently to be found in UK legislation and to express them bilingually in the resulting codifications. This raises a question concerning the status of the two language versions in such circumstances. 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. This is particularly important if, as the Law Commission stated in its report on the *Form and Accessibility of the Law Applicable in Wales*:

In order for the equal status of both versions of legislation under s. 156 of GoWA 2006 to have any meaning, it is necessary for the interpretation of bilingual legislation to take account of both language versions. We endorse the approach... [which] recognizes that the exact meaning to be given to legislation depends on the meaning of both language texts (¶¶ 12.17-12.18).

17. It would be convenient and preferable for the consolidated law to be treated as having been enacted or made when the consolidation was accomplished, but it could be argued that, if there was no intention to change the meaning of the provisions when consolidating, the Welsh version could not therefore be treated as of equal standing. In passing, one assumes that the English text would undergo such minor amendment as was appropriate to bring it into line with the Welsh interpretation provisions.
18. If the approach taken to the question of the relevance of the Welsh version to the interpretation of consolidated legislation was to deny its relevance, then there would be portions of a Code in which the two language versions were of equal standing and other portions in which they were not. This would be a potential pitfall when using the Welsh version and could discourage its use.

Section 8 and Grammatical Variations

19. Section 8 of the Bill introduces a provision of a kind which is not in the Interpretation Act 1978, but can be found, as noted in Annex A to the Explanatory Memorandum, in the interpretation provisions of other jurisdictions, citing Canada and Hong Kong as examples.

20. The Explanatory Notes state that the proposed section:

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”, such as “walking” and “walker”, are to be interpreted in the light of that definition (¶ 59).

21. They go on to say that:

It often goes without saying that a definition applies in these circumstances. In some cases though this needs to be put beyond doubt... Section 8 of the Bill makes general provision about the application of definitions, to avoid ambiguity and remove the need to make separate provision in individual Acts and instruments (¶ 60).

22. In his Gray Lectures, delivered at the University of Cambridge in 1966, the late Professor David Daube drew attention to the fact that agent nouns in particular, but also on occasion action nouns, have a narrower meaning than the verbs which correspond to them. Thus, while a *baker* undoubtedly bakes, not everyone who bakes is a *baker* (David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects*, Edinburgh, 1969, pp.1-63, example cited at p.2). Agent nouns and action nouns are often more than a modification or a grammatical form of a verb; they are frequently words with a different, more restricted even if connected, meaning.

23. Care needs to be taken regarding this provision, and it should not be assumed that any correspondence, for example, of verb and agent noun in one language will necessarily be replicated in another. As this provision is disapplied where 'the context requires otherwise', the problem may be resolved by interpretation, but it would be better avoided rather than resolved.

24. The usefulness of the provision with regard to dealing with mutational and other like changes in Welsh is not questioned.

Choice of Proposed Codes and Topics

25. Somewhat inevitably, the proposed codes and topics anticipated in the Draft Taxonomy reflect the subjects in relation to which the Assembly enjoyed legislative competence under the previous devolution settlements. While it is unavoidable that Welsh law to date will relate to those fields and headings, there is perhaps a danger that their conversion into Codes could, almost inadvertently, confine Welsh law-making within its former limits. To borrow and adapt F.W. Maitland's famous aphorism (*Equity*, p. 296), having buried the conferred powers model, we should not let it rule us from its grave.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW04

Ymateb gan Cymdeithas y Cyfreithwyr

Evidence from The Law Society

Introduction

The Law Society of England and Wales ("the Law Society") is the professional body for solicitors, representing over 160,000 registered legal practitioners. The Law Society represents the profession to parliament, governments and regulatory bodies and has a public interest in the reform of the law.

The Law Society Wales Office delivers the Law Society's aims in Wales, working with Welsh institutions; influencing and responding to the devolution of law-making; and promoting and supporting the legal community in Wales. This response has been informed by members of the Law Society's Wales Committee which includes solicitors, academics and lay members.

The Bill

The landscape of legislation in Wales is complex and the divergence of Welsh legislation from England only legislation is accelerating. Given this backdrop so far as it is possible to draw together the current law to improve accessibility the aim of the legislation is supported and to be encouraged.

Part 1 Accessibility of Welsh Legislation

The arguments for a duty to be included in legislation are clearly made in the Explanatory Memorandum. 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.

Codification and Codes of Law

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 Wales¹ 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

¹ <https://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/>

and codifying Welsh law' be referred to as 'Welsh Law Codes' to identify them as specific, novel and unique.

Having a new term to describe the way Welsh law is being 'ordered' will assist those learning about and using Welsh law in the future. The main aim of the Bill is to improve accessibility and the resulting activity will establish a new approach to statute law in Wales.

We would hope to see an open, inclusive approach to the preparation of the draft codes. Planning law is an early candidate which is benefitting from the involvement of the Law Commission another area which would benefit from being codified early in the process is local government law given its significant divergence from the law in England. We propose that the Welsh Government adopts a protocol to include factors such as early engagement with stakeholders, as these will differ with the varying topics, and whether the government can proceed to develop a new code without first seeking a Law Commission project on the relevant law.

Further, in response to the Law Commission project on the Form and Accessibility of the Law Applicable in Wales we said:

The Constitutional and Legislative Affairs Committee could include an additional scrutiny function regarding the form of new law applicable in Wales with a protocol to introduce draft Bills for pre-legislative scrutiny and engage expert advisers (voluntarily, by committee or otherwise).²

We would welcome more information on how the National Assembly will accommodate the making of new Welsh Law Codes.

Part 2 Interpretation and operation of Welsh legislation

In 2016 in response to the Law Commission's consultation to inform its project on the Accessibility of the Law Applicable in Wales, our members agreed an Interpretation Act was necessary for Welsh law but at the time did not feel the time had come. This provision for interpretation, however is supported and welcomed.

We note that there was significant input to some of the detailed proposals for interpretation in the Counsel General's consultation on the draft Bill. However, it is clear from the Bill as laid that some of the concerns raised then have not been reflected in the redraft as introduced to the Assembly.

On Section 13 we raised specific concerns on the issue of deemed service of documents by electronic means. This refers to documents deemed to have been served on the day on which an electronic communication is sent. However, practitioners will note that in some parts of rural Wales in particular, internet

² [ibid.](#)

connection is very poor, bandwidth of provision limited and transfer rates very slow. We question, therefore, whether a deemed service on the day of transmission is reasonable or achievable.

Whilst the Bill relates to Welsh legislation Sections 12 and 13 should be read in a wider context and in relation to the Civil Procedure Rules. Practice direction 6A at para 4.2 deals with the question of prior agreement to electronic service and file sizes etc.

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).³

Furthermore, in the Schedule of definitions we raised a query whether it may not be appropriate to include a definition of community councils as these are unique to Wales albeit similar to Parish Councils in England.

Finally, in the Counsel General's summary of responses to his consultation on the draft Bill, he notes that there was little support for what is now Section 25 regarding duplicate offences, but although slightly amended it remains in the Bill as introduced.

Having said the above, we are broadly supportive of the majority of the suggested interpretations. Indeed there are some very welcome additions such as Section 26 which determines that unless expressed otherwise, Welsh law shall bind the Crown.

In force dates

In our response to the Law Commission's project we noted:

There is a particular concern regarding 'in force' dates. Whereas amendments produce complicated legislation knowing when particular provisions came into force is a further, greater concern. Even where legislation is annotated reliable 'in force' information remains elusive. This issue becomes further complicated where there are amendments, and further and divergent amendments, to subordinate legislation.⁴

The inclusion of these provisions in Part 2 are also to be welcomed.

³ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06a

⁴ Ibid.

Post Legislative Scrutiny

Whilst the Bill is concerned with the ordering of legislation there is a further element of good law making which forms part of a robust system and that is post-legislative scrutiny. The regular analysis and evaluation of the implementation of Welsh legislation is not apparent on the face of the Bill and should be encouraged.

Time and Capacity

It will take many years for the aims of this legislation to be achieved. During that period of time it will be vitally important for the programme to be adequately resourced in terms of financial and human resources and for successive governments to respond positively to their new duty if the full benefits of this piece of legislation are to be realised. If they are then the profession and public in Wales will have much better, more reliable access to the legislative sources of the laws of Wales.

Bil Deddfwriaeth (Cymru) - Sylwadau

Cynnwys

Penawd 1 a 2 – newid *hygyrchedd* i **mynediad**

Penawd 15 – **Gweithredu** yn lle *arfer*

Penawd 20 – **rhannau** yn lle *rhaniadau*

Penawd 36 – **newid** yn lle *disodli*

Rhan 1 – newid *hygyrchedd* i **mynediad i**

Is adran 2 (3)

- (a) **Cyfrannu**
- (b) **Gynnal**
- (c) **Hwyluso y defnydd o'r Gymraeg**

(4) **Gall y** rhaglen.....

Rhan 2

3 (1) Mae'r Rhan hon yn gymwys **i'r**

- (a) **Ddeddf** Hon
- (b) **I Ddeddfau**.....

(2) (b) (i) a wneir o dan.....uniongyrchol UE a **gedwir**

4 (1) (a) y mae darpariaeth **penodol**

(2) Nid yw'r eithriad yn is adran (1) **yn weithredol**

(b) adran 26 **(gweithredu** deddfwriaeth....

9 Mae cyfeiriad.....oni wneir darpariaeth **benodol**

- 12 (1) Pan fo Deddf.....yn cyfeirio'n **gywir**
- (2) (a) os yw A yn cyfeirio'n **gywir**
- (3) Mae'r adran hon yn **weithredol**
- 13 (a) **Mewn** achos
- (b) **Mewn** achos
- 14 (1) **Gall** pwer.....Cymreig **ei arfer** ar fwy.....
- 15 **Gweithredu** pwer.....
- (2) Caniateir **gweithredu**.....
- (3) Ond yn ystod.....ni chaniateir **gweithredu**
- (4) Yn gysylltiedig.....ddyletswydd, **a weithredir** yn unol a'r adran hon, **ac**
- (5) Mae **gweithredu**
- 16 (1) Caniateir **gweithredu**
- (5) Caniateir **gweithredu**
- 17 (1) Caniateir **gweithredu**
- 19 (1) Caniateir **gweithredu** (**hefyd newid y gair gyfarwyddydau am gyfarwyddiadau dwy waith + hefyd yn is adran 2 is law**)
- 20 Newid rhaniadau am **rannau** (4 lle)

23 Mae'r adran hon yn **weithredol**

24 Mae'r adran hon yn **weithredol**

(2) Mae'r cyfeiriad.....y'i diwygiwyd, y'i **ymhestynnwyd**

25 (2) Nid yw is adran (1) yn **weithredol**

26 (1) a (2) **yn ymrwymo** yn hytrach na rhwymo (mewn pedwar lle)

(3) Newid y gair atebol am gyfrifol

(4) Mae'r adran hon.....i'r graddau **y bo'r** Ddeddf....darpariaeth **benodol**

30 (1) a (2) newid y gair amnewid am **gyfnewid**

(3) newid y gair ddargeddiwr am **gedwir**

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW
Ymateb gan Keith Bush CF¹

Evidence from Keith Bush QC

Cyflwyniad

1. Mae'r Bil wedi'i rannu'n ddwy brif ran (Rhannau 1 a 2) sy'n ymdrin ag agweddau penodol ar ddeddfwriaeth, sef:
 - Hygyrchedd cyfraith Cymru, gan gynnwys meithrin proses o gydgrynhoi a chodeiddio;
 - Dehongli cyfraith Cymru trwy ddeddfu, mewn gwirionedd, Deddf Ddehongli sy'n gymwys i ddeddfwriaeth Gymreig.
2. O ystyried cymeriadau gwahanol y ddwy Ran hyn bydd pob Rhan (gyda, yn achos Rhan 2, darpariaethau perthnasol Rhannau 3 a 4, sy'n ymdrin â materion sy'n atodol i'r Rhan honno) yn cael ei thrafod ar wahân.

Hygyrchedd cyfraith Cymru (Rhan 1)

3. Mae rhan 1 o'r Bil yn rhoi effaith i ymateb Llywodraeth Cymru i gynigion Comisiwn y gyfraith "Ffurf ac Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru "(2016)² trwy:
 - Osod dyletswydd statudol ar y Cwnsler Cyffredinol i adolygu hygyrchedd cyfraith Cymru;
 - Gosod dyletswydd statudol ar y Cwnsler Cyffredinol a Llywodraeth Cymru i baratoi, ar gyfer pob un o dymhorau'r Cynulliad Cenedlaethol, raglen sy'n nodi'r hyn y maent yn bwriadu ei wneud i wella hygyrchedd cyfraith Cymru, gan gynnwys eu gweithgareddau arfaethedig sydd wed'u bwriadu i gyfrannu at broses barhaus o gygrynhoi a chodeiddio cyfraith Cymru, i gynnal ei ffurf, ac i hwyluso'r defnydd o'r Gymraeg.

¹ Gweler yr Atodiad ar gyfer cv yr awdur.

² https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2016/10/lc366_form_accessibility_wales_Welsh.pdf

4. O ystyried natur y darpariaethau hyn, nid oes angen i'r awdur fanylu yn ei ymateb. Ymddengys iddo eu bod yn gam bach ond un arwyddocaol iawn wrth ymateb yn gadarnhaol i argymhellion Comisiwn y Gyfraith. Maent yn debygol o arwain at welliant hynod ddymunol o ran hygyrchedd ac effeithiolrwydd cyfraith Cymru. Yr unig *caveat* y dymunai'r awdur ei nodi yw na fydd y dyletswyddau a osodir gan Ran 1 yn ystyrlon ini bai fod y gwaith o godeiddio, cydgrynhoi a gwella'n gyffredinol hygyrchedd cyfraith Cymru yn derbyn adnoddau digonol. Os na wneir hynny, yna naill ai bydd y rhaglen sy'n ofynnol o dan adran 2 yn ddigon anuchelgeisiol ac aneffeithiol neu (rhywbeth a fyddai'n waeth byth) byddant yn troi allan i fod yn oruchelgeisiol ac yn amhosibl i'w chyflawni.

Dehongli a Gweithredu Deddfwriaeth Gymreig (Rhan 2)

Egwyddorion cyffredinol

5. Mae'r ffaith fod corff cynyddol o ddeddfwriaeth Gymreig wedi'i lunio gan y Cynulliad (a chan Weinidogion Cymru o dan bwerau dirprwyedig) yn golygu bod angen clir am ddeddfwriaeth sy'n ymdrin â'i dehongli. Mae allbwn deddfwriaethol y Cynulliad eisoes yn amlygu ffurf a chynnwys neilltuol yn ogystal, fel cwrs, a bod yn unigryw o fewn y Deyrnas Unedig am ei fod yn cymrud ffurf ddwyieithog. Er ei fod yn adeiladu ar sail traddodiad drafftio deddfwriaethol San Steffan, mae'n anochel, wrth iddo ddatblygu, y bydd Deddf Ddehongli 1978, a luniwyd fel cymorth i ddehongli deddfwriaeth a ddrafftiodd ar gyfer ac a gynhyrchwyd gan y ddeddfwrfa benodol honno, yn dod yn gynyddol annigonol fel modd i gyflawni'r swyddogaeth honno mewn perthynas â deddfwrfa wahanol.
6. Mae'r cysail o gael statudau dehongli ar wahân ar gyfer deddfwrfeydd datganoledig o fewn y DU wedi'i hen sefydlu. Mae'r Interpretation (Northern Ireland) Act 1954 yn dyddio'n ôl i ddyddiau'r Senedd Gogledd Iwerddon a sefydlwyd o dan Ddeddf Llywodraeth Iwerddon 1920 ond erbyn hyn mae'n gymwys i ddehongli Deddfau Cynulliad Gogledd Iwerddon ac is-ddeddfwriaeth a wneir oddi tanynt. Yr un sy'n cyfateb yn yr Alban yw'r Interpretation and Legislative Reform (Scotland) Act 2010. Ar hyn o bryd, mae Cymru'n eithriad ac nid oes rheswm resymegol nac ymarferol pam y dylai hyn barhau. I'r gwrthwyneb, am y rhesymau y cyfeiriwyd atynt yn y paragraff olaf, mae'r angen am gymhwyster cyfatebol Gymreig i'r statudau dehongli datganoledig eraill yn amlwg.

Rhwysterau posibl i weithredu

7. Pan ddaw'n fater o godeiddio'r modd y dehonglir statudau, mae'r tair deddfwrfa ddatganoledig yn wynebu her gyffredin y berthynas rhwng y statud dehongli datganoledig ac un y DU.
8. Mae deddfwriaeth y DU a deddfwriaeth ddatganoledig yn bodoli'n gyfochrog â'i gilydd, gyda deddfwrfa'r DU a'r rhai datganoledig yn cynhyrchu deddfwriaeth, pob o fewn eu cymwyseddau deddfwriaethol perthnasol, ar yr un pryd. Felly, mae'r gyfraith statud sy'n gymwys ym mhob tiriogaeth ddatganoledig yn cynnwys deddfwriaeth y DU a'r deddfwriaeth ddatganoledig.
9. Yn ogystal, hyd yn oed pan fydd pwnc deddfwriaeth wedi'i ddatganoli, mae llawer o deddfwriaeth y DU, sy'n dyddio o'r cyfnod cyn datganoli, yn parhau yn weithredol. Mae hyn yn ffactor lleiaf arwyddocaol yn achos Gogledd Iwerddon, gan fod datganoli wedi dechrau mor bell yn ôl â 1921 (er ei fod, wrth gwrs, wedi'i atal am gyfnodau sylweddol ers hynny). Yn achos yr Alban, roedd pob deddfwriaeth cyn 1999, p'un a oedd yn ymwneud â phynciau datganoledig ai peidio, yn deddfwriaeth Senedd y DU er ei bod yn aml ar ffurf Deddfau Seneddol ar gyfer yr Alban yn unig ac wedi'i drafftio gan gyfreithwyr drafftio o'r Alban.
10. Yn achos Cymru, mae effaith deddfwriaeth y DU ar Gymru hyd yn oed yn fwy, o ganlyniad i dri ffactor:
 - Cyn 2007 (dyddiad diweddarach nag yn achos y deddfwrfeydd datganoledig eraill) bu'r holl deddfwriaeth a oedd yn gymwys i Gymru yn deddfwriaeth Senedd y DU;
 - Oherwydd y cwmpas mwy cyfyngedig sydd i ddatganoli yng Nghymru – yn bennaf gan fod plismona, y gyfraith droseddol a sifil gyffredinol ac awdurdodaeth gyfreithiol sengl Cymru a Lloegr wedi'u cadw yn ôl gan y DU - mae cwmpas y deddfwriaeth barhaus y DU sy'n gymwys i Gymru yn fwy eang nag yn achos yr Alban neu Ogledd Iwerddon;
 - Mae'r ffaith fod y deddfwriaeth a oedd yn gymwys i Gymru, cyn datganoli deddfwriaethol, yn deddfwriaeth Cymru a Lloegr (yn hytrach na deddfwriaeth a oedd yn benodol i Gymru) wedi golygu bod deddfwriaeth y Cynulliad, yn y gorffennol, wedi gweithredu, yn aml iawn, trwy ddiwygio deddfwriaeth Cymru a Lloegr sydd eisoes yn bod yn hytrach na thrwy greu

statudau cynhwysfawr newydd hunan-gynhwysol sy'n gymwys i Gymru yn unig.

11. O ganlyniad, mae'r rhyng-gysylltiadau rhwng Deddf Ddehongli'r DU ac unrhyw Ddeddf Ddehongli newydd ddatganoledig (fel y Bil presennol) yn fwy agos a chymhleth nag yn achos y tiriogaethau datganoledig eraill. Er mwyn cyflawni'r nod o wella eglurder a hygyrchedd deddfwriaeth Cymru, mae angen, felly, rhoi sylw penodol i'r diffiniad o'r ffin rhwng maes y statud dehongli newydd yng Nghymru ac un Deddf Ddehongli 1978.
12. Mae'r Bil yn cynnig³ y dylai ei ddarpariaethau fod yn gymwys i:
 - (a) Deddfau'r Cynulliad sy'n derbyn y Cydsyniad Brenhinol ar neu ar ôl y diwrnod pan ddaw Rhan 2 o'r Bil i'w llawn rym, ac i
 - (b) Is-offerynnau Cymraeg a wnaed ar y diwrnod hwnnw neu wedi hynny, ac eithrio'r rhai a wneir o dan ddeddfau'r DU (neu ddeddfwriaeth uniongyrchol yr UE a gedwir) oni bai eu bod yn cael eu gwneud gan Weinidogion Cymru neu awdurdodau datganoledig Cymru yn unig ac yn gymwys i Gymru yn unig.

Bwriad Llywodraeth Cymru yw cychwyn Rhan 2 ar 1 Ionawr 2020, er mwyn ei gwneud mor hawdd â phosibl i ddweud a yw Deddf Cynulliad (neu ddarn o is-ddeddfwriaeth) yn dod o dan y Ddeddf newydd neu o dan Ddeddf Ddehongli 1978.

13. O ran Deddfau'r Cynulliad, ni dyma'r unig ffordd bosibl o fynd o gwmpas pethau. Mae'n unol â'r sefyllfa mewn perthynas â'r Alban⁴ ond cymhwyswyd ddeddfwriaeth gyfatebol ar gyfer Gogledd Iwerddon⁵ i holl ddeddfau Senedd Gogledd Iwerddon, p'un a gawsant eu pasio cyn i'r ddeddf ddehongli ddatganoledig ddod i rym neu ar ôl hynny. Canlyniad mabwysiadu'r dull cyntaf o'r rhain, yn y Bil, yn hytrach na'r ail un, byddai y bydd dosbarth o statudau'r Cynulliad (22 o Fesurau a thua 40 o Ddeddfau) a fydd, nes iddynt gael eu diddymu'n llawn⁶ yn cael ei ddehongli o dan Ddeddf Dehongli 1978

³ adran 3

⁴ Interpretation and Legislative Reform (Scotland) Act 2010 adran 1 (1)

⁵ Interpretation (Northern Ireland) Act 1954 adran 2 (1)

⁶ Bydd diwygiad testunol, yn y dyfodol, i Ddeddf o'r fath (adran 30 (1)) "yn cael effaith fel rhan o'r Ddeddf honno". Felly, bydd deddfwriaeth sylfaenol y Cynulliad sydd eisoes yn bod, a hyd yn oed

yn hytrach nag o dan Ddeddf deddfwriaeth (Cymru) 2019. Mae'r Memorandwm Esboniadol⁷ yn trafod manteision ac anfanteision cymhwyso'r Bil i holl Fesurau a Deddfau'r Cynulliad pa bryd bynnag y'i gwnaethpwyd. Y fantais fyddai creu rheol glir a chynhwysfawr y byddai pob deddfwriaeth Gymreig yn cael ei dehongli o dan un cod dehongli dwyieithog. Mae'r Memorandwm Esboniadol yn nodi'r anfanteision, sydd yn bennaf yn rhai ymarferolal ond sy'n cynnwys un anhawster cyfreithiol, sef bod deddfwriaeth y Cynulliad sydd eisoes yn bod wedi'i drafftio gyda'r bwriad y byddai rheolau a diffiniadau Deddf 1978 yn gymwys iddi. Gallai cymhwyso, yn ôl-weithredol, reolau dehongli gwahanol, a allai fod yn faterol wahanol, i ddeddfwriaeth sydd eisoes yn bod yn gallu arwain at ganlyniadau annisgwyl pe bai anghydfod yn codi ynglŷn â dehongli'r ddeddfwriaeth dan sylw.

14. Gan fod ystyriaeth ofalus wedi'i rhoi i'r cwestiwn, gan ddod i benderfyniad rhesymedig, gellid bod wedi disgwyl y byddai'r ateb a fabwysiadwyd mewn perthynas â dehongli deddfwriaeth sylfaenol, gan osgoi unrhyw elfen o ôl-weithredu wrth gymhwyso rheolau dehongli 'r Bil, hefyd yn cael ei gymhwyso, ar ôl ei addasu, i is-ddeddfwriaeth. Mae'r ymagwedd a gymerwyd mewn perthynas ag is-ddeddfwriaeth newydd a wneir o dan ddeddfwriaeth sylfaenol sydd eisoes yn bod, ym marn yr awdur, yn un sy'n newid y dull o ddehongli'r is-ddeddfwriaeth honno mewn ffordd sydd mewn perygl o greu gwahaniaeth dryslyd rhwng y rheolau ar gyfer dehongli corff mawr o ddeddfwriaeth sylfaenol sy'n gymwys i Gymru a'r rhai ar gyfer dehongli is-ddeddfwriaeth a wnaed oddi tano.

Y problem o ddod o hyd i reol syml a chyson ar gyfer dehongli is-ddeddfwriaeth Gymreig

15. Gwneir llawer o is-ddeddfwriaeth yng Nghymru o dan bwerau a roddir i Weinidogion Cymru gan Ddeddfau Seneddol y DU. Mae'r rhain fel arfer (ond nid bob amser, gan fod San Steffan yn parhau i ddeddfu o bryd i'w gilydd ar faterion datganoledig o dan Confensiwn Sewel) yn ddeddfau cyn-datganoli Cymru a Lloegr y trosglwyddwyd pwerau i wneud is-ddeddfwriaeth oddi tanynt i Weinidogion Cymru mewn perthynas â Chymru.

diwygiadau iddi yn y dyfodol, yn parhau i fod yn ddarostyngedig i Ddeddf Dehongli 1978. Gweler, pellach, paragraff 21(ii) isod

⁷ Paragraff 67- 69

16. Gellir cael syniad o raddfa'r arfer hwn drwy ddadansoddi'r 259 o Offerynnau Statudol Cymru a gyhoeddwyd gan *legislation.gov.uk* ar gyfer 2018. O'r rhain, roedd 134 yn orchmynion priffyrdd lleol arferol. Mae'r rhain yn defnyddio terminoleg safonol gyfyngedig ac maent yn annhebygol iawn o godi cwestiynau dehongli. O'r 125 offeryn sy'n weddill, dim ond 45 a wnaed o dan bwerau a roddwyd i Weinidogion Cymru gan ddeddfwriaeth sylfaenol Gymreig (Deddfau neu Fesurau), tra bod 22 wedi'u gwneud, yn bennaf, o dan adran 2 (2) o Ddeddf y Cymunedau Ewropeaidd 1972, gan roi effaith i gyfarwyddebau'r UE. Mae hynny'n gadael 58 a wnaed o dan Ddeddfau Seneddol.
17. Felly, o'r offerynnau statudol Gymreig cyffredinol (h.y. rhai sydd heb fod yn rhai lleol) a wnaed yn 2018 o dan naill ai Ddeddfau Seneddol neu Ddeddfau (neu Fesurau) y Cynulliad, gwnaed 56% o dan Ddeddfau Seneddol a 44% o dan Ddeddfau neu Fesurau'r Cynulliad. Dros amser, bydd y gyfran o offerynnau statudol Cymru a wneir o dan Ddeddfau Seneddol yn tueddu i ostwng, ond yn y dyfodol rhagweladwy byddant, yn anochel, yn ffurfio cyfran sylweddol o is-offerynnau Gymreig fel y'u diffinnir gan adran 3(2) o'r Bil.
18. Effaith arfaethedig adran 3(1) o'r Bil yw y bydd y rheolau dehongli a geir ynddo, o'r dyddiad y daw'r Ddeddf i rym, yn gymwys i holl is-ddeddfwriaeth Gymreig, boed a fyddai'r is-ddeddfwriaeth wedi'i gwneud o dan Ddeddf Seneddol neu o dan Ddeddf Cynulliad. Y rhesymeg dros y rheol hon yw y bydd pob deddfwriaeth a "wnaed yng Nghymru" o hynny ymlaen i gael ei dehongli o dan ddarpariaethau Deddf Ddeddfwriaeth (Cymru) yn hytrach na rhai Deddf Dehongli 1978 y DU.
19. Er bod y dyhead o greu un cod dehongli ar gyfer holl ddeddfwriaeth Cymru, rhai sylfaenol a rhai eilaidd, yn ganmoladwy, rhaid cofio na fydd y Bil, mewn gwirionedd, yn cyflawni hyn. Bydd deddfwriaeth sylfaenol Gymreig a ddeddfwyd cyn i'r Bil ddod i'w lawn rym yn parhau i fod yn ddarostyngedig i Ddeddf Dehongli 1978. A bydd is-ddeddfwriaeth Gymreig a wneir ar y cyd â Gweinidogion y DU (er enghraifft er mwyn gweithredu deddfwriaeth uniongyrchol yr UE ar raddfa Cymru a Lloegr, Prydain Fawr neu'r Deyrnas Unedig) hefyd yn parhau i gael ei dehongli o dan Ddeddf 1978. Felly ni fydd y fantais o greu un set neu reolau dehongli ar gyfer holl ddeddfwriaeth Cymru yn cael ei chyflawni, mewn gwirionedd, gan adran 3(1)(c). Bydd rhai is-ddeddfau Gymreig yn parhau i fod yn ddarostyngedig i reolau gwahanol.
20. Mae'r ffaith y bydd y Mesur, fel y mae, yn dal i olygu y bydd dwy set o reolau ar gyfer dehongli is-ddeddfwriaeth Gymreig yn parhau mewn bodolaeth yn

agor y posibilrwydd y gallai fod dull deuol amgen dull deuol (ond wedi'i fframio'n wahanol) sydd, er y byddai'n rhannu'r anfantais na fyddai'n cynnwys holl is-ddeddfwriaeth Cymru, yn rhydd o gymhlethdodau penodol eraill sy'n gynhenid i'r cynnig presennol. Y dull amgen byddai cymhwyso'r Bil dim ond i is-ddeddfwriaeth a wneir o dan ddeddfwriaeth sylfaenol y mae'r Bil yn gymwys iddi. Byddai is-ddeddfwriaeth Gymreig a wnaed o dan Ddeddfau Seneddol yn parhau i fod yn ddarostyngedig i Ddeddf Dehongli 1978 (fel y byddai'r ddeddfwriaeth a wnaed o dan deddfwriaeth sylfaenol Gymreig cyn i'r Bil ddod i rym yn llawn).

21. Mae tair dadl o blaid parhau i gymhwyso Deddf Ddehongli 1978 i is-ddeddfwriaeth Gymreig a wnaed o dan Ddeddfau Seneddol (pryd bynnag y'u deddfir):

i) Dylai is-ddeddfwriaeth gael ei dehongli'n gyson â'r ddeddfwriaeth sylfaenol y mae'n rhoi effaith iddi. Adlewyrchir hyn yn adran 11 o Ddeddf 1978 sy'n darparu "Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act." Yn ogystal â sicrhau cysondeb o ran dehongli rhwng deddfwriaeth sylfaenol ac is-ddeddfwriaeth mae i hyn hefyd, gyda llaw, y fantais ymarferol o osgoi gorfod naill ai atgynhyrchu'r diffiniadau yn y Ddeddf mewn unrhyw is-ddeddfwriaeth a wneir oddi tani neu'n gorfodi cynnwys, dro ar ôl tro, ym mhob is-offeryn, ddarpariaeth sy'n datgan bod i unrhyw fynegiant a ddefnyddir yn yr offeryn hwnnw yr un ystyr ag yn y rhiant Ddeddf.

Mae'r Bil yn hepgor y rheol hon. Ond bydd Deddfau Seneddol yn dal yn ddarostyngedig iddi a byddant wedi'u drafftio ar y ddealltwriaeth y bydd yn weithredol. Felly, os bydd darpariaeth bresennol adran 3 yn cael ei chadw, bydd yn ofynnol i is-ddeddfwriaeth Cymru gael ei dehongli'n aml yn ôl rheol wahanol i'r un y bydd y rhai a ddrafftiodd y ddeddfwriaeth sylfaenol wedi tybio y bydd yn gymwys. Mae'n ymddangos bod hwn yn rheol sylfaenol simsan. Dylid drafftio deddfwriaeth sylfaenol ac is-ddeddfwriaeth yn unol â chyfres gyffredin o reolau. Yn y dyfodol gall y rhain fod yn rheolau sy'n berthnasol i ddeddfwriaeth Gymreig neu'r rheolau sy'n berthnasol i ddeddfwriaeth y DU. Ond byddai cymysgu'r ddau fel y cynigir yn debygol o greu dryswch.

- ii) Mae is-ddeddfwriaeth yn aml yn diwygio offerynnau cynharach. Os bydd is-offeryn Cymreig a wneir ar ôl i'r Bil ddod i'w lawn rym yn diwygio offeryn cynharach, beth yw'r sefyllfa? Mae adran 30 (2) yn darparu, pan fo deddfiad presennol yn cael ei ddiwygio gan offeryn eilaidd Cymreig drwy fewnosod geiriau neu eu hamnewid, bod y geiriau hynny'n "cael effaith fel rhan o'r deddfiad hwnnw". Mae'r ymddangos bod hyn yn golygu y bydd pa reolau dehongli bynnag sy'n gymwys i'r offeryn fel mae'n sefyll hefyd yn gymwys i'r geiriau a fewnosodwyd. Felly, fel sy'n digwydd yn aml, mae is-offeryn yn cynnwys darpariaethau newydd annibynnol a hefyd rhai sy'n diwygio offeryn sy'n bodoli eisoes a wnaed o dan Ddeddf Seneddol (neu ddeddfwriaeth sylfaenol Gymreig) cyn i'r Bil ddod i'w lawn rym, bydd y rheol ar gyfer dehongli rhai o ddarpariaethau'r offeryn yn wahanol i'r rhai sy'n gymwys i rai eraill - ffynhonnell amlwg o ddryswch ac ansicrwydd.

Yn anffodus bydd y broblem hon yn codi'n anochel mewn perthynas ag offerynnau a wneir o dan ddeddfwriaeth sylfaenol Gymreig a ddeddfir cyn i'r Bil ddod i rym ond mae'r risg fod offeryn o'r fath yn cynnwys darpariaethau sy'n anghyson â'r Mesur yn gyfyngedig ac yn debyg o fedru cael ei gadw dan reolaeth. Yn achos y corff mawr iawn o is-ddeddfwriaeth sy'n gymwys i Gymru ond a wnaed o dan Ddeddfau Seneddol, mae'r risg o anghysonderau o bwys rhwng yr ystyr y mae'n ofynnol ei rhoi i wahanol ddarpariaethau o fewn yr un offeryn yn debygol o fod yn fwy o lawer.

- iii) Lle mae pwerau i wneud is-ddeddfwriaeth Gymreig yn codi o dan Ddeddfau Seneddol maen, fel arfer wedi'u rhoi i'r "Ysgrifennydd Gwladol" ac wedyn wedi'u trosglwyddo i Weinidogion Cymru o ran Cymru. Bydd pwerau o'r fath bron bob amser yn bodoli'n gyfochrog â phwerau i wneud is-ddeddfwriaeth ar y materion perthnasol a gyflwynir i Weinidog yn y DU mewn perthynas â Lloegr. Mae effaith adran 11 o Ddeddf Dehongli 1978 yn golygu, ar hyn o bryd, bod is-ddeddfwriaeth a wneir ar fater penodol mewn perthynas â phob tiriogaeth i'w dehongli, gan lysoedd sy'n gweithredu o fewn awdurdodaeth gyffredin Cymru a Lloegr, yn ôl yr un rheolau. Effaith adran 3 fyddai tanseilio'r arfer cyffredin hwn, nid o ganlyniad i unrhyw wahaniaeth polisi ond oherwydd gwahaniaethau posibl yn y rheolau dehongli sy'n berthnasol i eiriad a fydd yn aml yn union yr un fath. I'r rhai sy'n gorfod deall a chymhwyso is-ddeddfwriaeth, er enghraifft

mewn diwydiant neu'r proffesiwn cyfreithiol, mae'n bosibl iawn y bydd hyn yn arwain at ansicrwydd diangen wrth gymhwyso'r un geiriad ar y naill ochr a'r llall i'r ffin.

Casgliad

22. Er mwyn, felly, ddiogelu'r egwyddor o hybu sicrwydd a chysondeb wrth ddehonglia chymhwyso deddfwriaeth Gymreig, mae'r awdur yn cynnig na ddylai'r Bil fod yn gymwys i is-offerynnau a wnaed o dan Ddeddfau Senedd y DU, ac felly y bydd y rhain yn parhau i gael eu dehongli yn unol â Deddf Dehongli 1978.

Keith Bush CF

21 Ionawr 2019

ATODIAD

Mae Keith Bush CF LLM (Llundain) yn fargyfreithiwr ac yn Athro Anrhydeddus yn ysgol gyfraith Hillary Rodham Clinton ym Mhrifysgol Abertawe. Mae hefyd yn Llywydd Tribiwnlys y Gymraeg, yn aelod o Bwyllgor Ymgynghorol Comisiwn y Gyfraith ar gyfer Cymru ac yn Drysorydd Sefydliad Cymru'r Gyfraith.

Ar ôl gweithio fel Bargyfreithiwr yng Nghaerdydd am dros 20 mlynedd, ymunodd â gwasanaeth cyfreithiol Llywodraeth Cymru yn 1999, lle daeth yn Gwnsler Deddfwriaethol, gan arwain y tîm cyfreithiol a weithiodd ar nifer o Filiau'n ymwneud â Chymru, gan gynnwys yr un a ddaeth yn Ddeddf Llywodraeth Cymru 2006. O 2007 tan 2012, ef oedd prif gynghorydd cyfreithiol Cynulliad Cenedlaethol Cymru.

Mae ef wedi cyfrannu at y *Statute Law Review*, y *Cambrian Law Review*, *Wales Legal Journal*, *Journal of the Welsh Legal History Society* a'r *New Law Journal* ac mae'n darlithio'n aml ar faterion cyfraith gyhoeddus yn y Gymraeg a'r Saesneg. Mae'n Gyfarwyddwr Modiwl ar gyfer dau fodiwl israddedig arloesol ym Mhrifysgol Abertawe ar Ddeddfwriaeth a'r Gyfraith Llywodraethiant Aml-lefel yn ogystal â chyfrannu at addysgu cyfraith gyhoeddus yn Gymraeg ac yn Saesneg. Mae'n awdur gwaith iaith Gymraeg ar gyfraith gyhoeddus- '*Sylfeini'r Gyfraith Gyhoeddus*' a gomisiynwyd gan Brifysgol Bangor a'r *Coleg Gymraeg Cenedlaethol*. Mae ei ddiddordebau addysgu ac ymchwil yn cynnwys cyfraith datganoli, gwladwriaethau ffederal a lled-ffederal a strwythurau cyfansoddiadol annhiriogaethol a hawliau cyfreithiol grwpiau ieithyddol a diwylliannol

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW05
Ymateb gan Keith Bush QC¹

Evidence from Keith Bush QC

Introductory

1. The Bill is divided into two substantive parts (Parts 1 and 2) which deal with distinct aspects of legislation, namely:
 - The accessibility of Welsh law, including the fostering of a process of consolidation and codification;
 - The interpretation of Welsh law by the enactment, in effect, of an Interpretation Act applying to Welsh legislation.
2. Given the distinct character of these two Parts each Part (together, in the case of Part 2, with the relevant provisions of Parts 3 and 4, which deal with matters ancillary to that Part) will be discussed separately.

Accessibility of Welsh law (Part 1)

3. Part 1 of the Bill gives effect to the Welsh Government's response to the Law Commission's proposals "Form and Accessibility of the Law Applicable in Wales" (2016)² by:
 - Placing a statutory duty on the Counsel General to keep the accessibility of Welsh law under review;
 - Placing a statutory duty on the Counsel General and the Welsh Government to prepare, for each term of the National Assembly, a programme setting out what they intend to do to improve the accessibility of Welsh law, including their proposed activities intended to contribute to an ongoing process of consolidating and codifying Welsh law, maintaining its form and facilitating the use of the Welsh language.

¹ See Appendix for the author's cv.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560239/57148_Law_Comm_366_V1_Eng_Web.pdf

4. Given the nature of these provisions, the author need not go into detail in his response. They seem to him to be a small but highly significant step in responding positively to the Law Commission's recommendations. 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 section 2 will be unambitious and ineffective or (which would be even worse) will turn out to have been overambitious and incapable of achievement.

Interpretation and Operation of Welsh legislation (Part 2)

General Principles

5. The fact that there is a growing body of Welsh legislation produced by the Assembly (and by Welsh Ministers under delegated powers) means that there is a clear need for legislation which deals with its interpretation. The Assembly's legislative output is already manifesting distinctive form and content as well, as course, as being unique within the United Kingdom in that it takes bilingual form. Although it builds on the foundation of the Westminster tradition of legislative drafting, it is inevitable that, as it develops, the Interpretation Act 1978, which was conceived as an aid to the interpretation of legislation drafted for and produced by that specific legislature, will become increasingly inadequate as a means of discharging that function in relation to a different legislature.
6. The precedent of having separate interpretation statutes for devolved legislatures within the UK is well-established. The Interpretation Act (Northern Ireland) 1954 dates back to the days of the Northern Ireland Parliament established under the Government of Ireland Act 1920 but now applies to the interpretation of Acts of the Northern Ireland Assembly and subordinate legislation made under them. The Scottish equivalent is the Interpretation and Legislative Reform (Scotland) Act 2010. Wales is currently the odd one out and there is no logical or practical reason why this should continue to be the case. On the contrary, for the reasons referred to in the last paragraph, the need for a Welsh equivalent to the other devolved interpretation statutes is obvious.

Potential Barriers to Implementation

7. When it comes to codifying the interpretation of statutes, all three devolved legislatures face the common challenge of the relationship between the devolved interpretation statute and the UK equivalent.
8. UK and devolved legislation exist alongside one another, with both the UK and devolved legislatures producing legislation, each within their respective legislative competences, at the same time. The statute law that applies in each devolved territory therefore comprises both UK and devolved legislation.
9. In addition, even where the subject-matter of legislation is devolved, much UK legislation, dating from the time prior to devolution, continues to operate. This is least significant a factor in the case of Northern Ireland, since devolution began as long ago as 1921 (although it has of course been suspended for substantial periods since then). In the case of Scotland, all legislation prior to 1999, whether relating to devolved subjects or not, was UK Parliament legislation although often in the form of Scotland-only Acts of Parliament drafted by Scots drafting lawyers.
10. In the case of Wales the impact of UK legislation on Wales is even greater, as a result of three factors:
 - Prior to 2007 (a later date than in the case of the other devolved legislatures) all legislation applicable to Wales was UK Parliament legislation;
 - Because of the more limited scope of Welsh devolution – primarily the reservation to the UK of policing, the general criminal and civil law and the single England and Wales legal jurisdiction, the scope of continuing UK legislation applicable to Wales is greater than in the case of Scotland or Northern Ireland;
 - The fact that almost without exception legislation applying to Wales was, prior to legislative devolution, England and Wales legislation (rather than legislation specific to Wales) has meant that Assembly legislation, in the past, has very often proceeded by amending existing England and Wales legislation rather than by creating comprehensive self-contained new statutes applicable only to Wales.
11. As a result, the interrelation between the UK Interpretation Act and any new devolved interpretation act (such as the current Bill) is more close and

complex than in the case of the other devolved territories. In order to deliver the aim of improving the clarity and accessibility of Welsh legislation particular attention therefore needs to be given to the definition of the boundary between the province of the new Welsh interpretation statute and that of the Interpretation Act 1978.

12. The Bill proposes³ that its provisions should apply to:
- (a) Assembly Acts which receive the Royal Assent on or after the day when Part 2 of the Bill comes fully into force and
 - (b) Welsh subordinate instruments made on or after that day, except those made under UK Acts (or retained direct EU legislation) unless they are made only by Welsh Ministers or devolved Welsh authorities and apply only in relation to Wales.

The Welsh Government's intention is to commence Part 2 on 1 January 2020, so as to make it as easy as possible to tell whether an Act of the Assembly (or a piece of subordinate legislation) is governed by the new Act or by the Interpretation Act 1978.

13. As far as Assembly Acts are concerned, this is not the only possible approach. It accords with that which applies in relation to Scotland⁴ but the corresponding Northern Ireland⁵ legislation was applied to all Acts of the Northern Ireland Parliament whether passed before or after the devolved interpretation act came into force. The consequence of the adoption, in the Bill, of the former rather than the latter approach will be that there will be a class of Assembly statutes (22 Measures and approximately 40 Acts) which, until repealed in full⁶ will fall to be interpreted under the Interpretation Act 1978 rather than under the Legislation (Wales) Act 2019. The Explanatory Memorandum⁷ considers the advantages and disadvantages of applying the Bill to all Assembly Measures and Acts whenever made. The advantage would

³ Section 3

⁴ Interpretation and Legislative Reform (Scotland) Act 2010 section 1(1)

⁵ Interpretation Act (Northern Ireland) 1954 section 2(1)

⁶ A future textual amendment to such an Act will (section 30(1)) "have effect as part of that Act". So existing Assembly primary legislation, and even future amendments to it, will continue to be subject to the Interpretation Act 1978. See, further, paragraph 21(ii) below

⁷ Paragraph 67 - 69

be the achievement of a clear and comprehensive rule that all Welsh legislation would be interpreted under a single, bilingual, code of interpretation. The Explanatory Memorandum sets out the disadvantages, which are primarily practical but include one legal difficulty, namely that existing Assembly legislation will have been drafted with the intention that the rules and definitions in the 1978 Act apply to it. Applying distinct and possibly materially different rules of interpretation to existing legislation retrospectively could give rise to unexpected consequences if a dispute arose as to the interpretation of the legislation in question.

14. Careful thought having been given to the issue and a reasoned decision made, it might have been expected that the approach adopted in relation to the interpretation of primary legislation, avoiding any element of retrospectivity in the application of the rules of interpretation in the Bill would also be applied, in modified form, to subordinate legislation. 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 applicable to Wales and that for interpreting subordinate legislation made under it.

The problem of identifying a simple and consistent rule for interpreting Welsh subordinate legislation

15. Much Welsh subordinate legislation is made under powers conferred on Welsh Ministers by UK Acts of Parliament. These are usually (but not always, since Westminster continues to legislate occasionally on devolved matters under the Sewel Convention) pre-devolution England and Wales Acts whose powers to make subordinate legislation have been transferred to Welsh Ministers in relation to Wales.
16. An idea of the scale of this practice can be gained by analysing the 259 Wales Statutory Instruments published by legislation.gov.uk for 2018. Of these, 134 were routine local highways orders. These use limited standardised terminology and are very unlikely to give rise to issues of interpretation. Of the remaining 125 instruments, only 45 were made under powers conferred on Welsh Ministers by Welsh primary legislation (Acts of Measures), whilst 22 were made primarily under section 2(2) of the European Communities Act

1972, giving effect to EU directives. That leaves 58 made under Acts of Parliament.

17. So, of the general (ie non-local) Welsh statutory instruments made in 2018 under either Acts of Parliament or under Acts (or Measures) of the Assembly, 56% were made under Acts of Parliament and 44% under Assembly Acts or Measures. Over time, the proportion of Welsh statutory instruments made under Acts of Parliament will tend to decrease but for the foreseeable future they will inevitably form a substantial proportion of Welsh subordinate instruments as defined by section 3(2) of the Bill.
18. The proposed effect of section 3(1) of the Bill is that from the date when the Act comes into force the rules of interpretation contained in it will apply to all Welsh subordinate legislation, irrespective of whether that subordinate legislation was made under an Act of Parliament or an Act of the Assembly. The rationale for this rule is that henceforward all “made in Wales” legislation will be subject to interpretation under the provisions of the Legislation (Wales) Act rather than those of the UK Interpretation Act 1978.
19. Whilst the aspiration of creating a single code of interpretation for all Welsh legislation, primary and secondary, is laudable, it must be remembered that the Bill will not, in fact, achieve this. Welsh primary legislation enacted prior to the coming into full force of the Bill will continue to be subject to the Interpretation Act 1978. And Welsh subordinate legislation made jointly with UK Ministers (for example in order to give effect to retained direct EU legislation on an England and Wales, Great Britain or United Kingdom basis) will also continue to be interpreted under the 1978 Act. So the advantage of creating a single set of rules of interpretation for all Welsh legislation will not, in fact, be achieved by section 3(1)(c). Some Welsh subordinate legislation will, continue to be subject to different rules.
20. 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).

21. There are three arguments in favour of continuing to apply the Interpretation Act 1978 to Welsh subordinate legislation made under Acts of Parliament (whenever enacted):

i) Subordinate legislation should be interpreted consistently with the primary legislation to which it gives effect. This is reflected in section 11 of the 1978 Act which provides that “Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.” As well as ensuring consistency of interpretation between primary and subordinate legislation this also, incidentally, has the practical benefit of avoiding having to either reproduce the definitions in an Act in any subordinate legislation made under it or having to repeatedly include in each subordinate instrument a provision stating that any expression used in that instrument has the same meaning as in the parent Act.

1. The Bill dispenses with this rule. But Acts of Parliament will still be subject to it and will have been drafted on the understanding that it applies. So Welsh subordinate legislation will, if the current approach of section 3 is maintained, often be required to be interpreted according to a different rule from that which those who drafted the primary legislation will have assumed would apply. This seems to be a fundamentally unsound approach. Primary and secondary legislation should be drafted according to a common set of rules. These may in future either be the rules applicable to Welsh legislation or the rules applicable to UK legislation. But to mix the two as is proposed is likely to generate confusion.

ii) Subordinate legislation often amends earlier instruments. If a Welsh subordinate instrument which is made after the Bill comes fully into force amends an earlier instrument, what is the situation? Section 30(2) provides that where an existing enactment is amended by a Welsh subordinate instrument by inserting or substituting words, those words “have effect as part of that enactment”. This appears to mean that whatever rules of interpretation apply to the existing instrument also apply to the words inserted. So, as is often the case, a subordinate

instrument contains both new free-standing provisions and ones amending an existing instrument made under an Act of Parliament (or Welsh primary legislation) before the Bill comes fully into force, the rule for interpreting some provisions of the instrument will be different from those which apply to others – an obvious source of confusion and uncertainty.

2. This problem will unfortunately arise inevitably in relation to instruments made under Welsh primary legislation enacted before the Bill takes effect but the risk of such an instrument containing provisions inconsistent with the Bill is limited and is probably manageable. In the case of the very large body of existing subordinate legislation applicable to Wales which has been made under Acts of Parliament the risk of material inconsistencies between the meaning required to be given to different provisions within the same instrument is likely to be much larger.

- iii) Where powers to make Welsh subordinate legislation arise under Acts of Parliament these have usually been conferred on “the Secretary of State” and transferred to Welsh Ministers in relation to Wales. Such powers will almost always exist in parallel with identical powers to make subordinate legislation on the relevant matters conferred on a UK minister in relation to England. The effect of section 11 of the Interpretation Act 1978 means, at present, that subordinate legislation made on a particular matter in relation to each territory falls to be interpreted, by courts operating within the common England and Wales jurisdiction, according to the same rules. The effect of 3 would be to undermine this common approach not as a result of any policy divergence but because of possibly unforeseen distinctions in the rules of interpretation which apply to what will often be identical wording. For those having to understand and apply subordinate legislation, for example in industry or the legal profession, this may well give rise to an unnecessary uncertainty in applying identical wording on either side of the border.

Conclusion

- 22. 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.

APPENDIX

Keith Bush QC LLM (London) Barrister is an Honorary Professor at the Hillary Rodham Clinton School of Law at Swansea University. He is also President of the Welsh Language Tribunal, a member of the Law Commission's Advisory Committee for Wales and Treasurer of the Legal Wales Foundation.

Having practised at the Bar in Cardiff for over 20 years, he joined the Welsh Government's legal service in 1999, where he became Legislative Counsel, leading the legal team which worked on a number of bills relating to Wales, including the one that became the Government of Wales Act 2006. From 2007 until 2012 he was Chief Legal Adviser to the National Assembly for Wales.

He has contributed to the *Statute Law Review*, the *Cambrian Law Review*, the *Wales Legal Journal*, the *Journal of the Welsh Legal History Society* and the *New Law Journal* and he frequently lectures on public law issues in both English and Welsh. He is Module Director for two innovative undergraduate modules at Swansea University on Legislation and the Law of Multi-Level Governance as well as contributing to Public Law teaching in both English and Welsh. He is the author of a Welsh language work on Public Law - '*Sylfeini'r Gyfraith Gyhoeddus*' ('Foundations of Public Law') commissioned by Bangor University and the *Coleg Cymraeg Cenedlaethol* (the National Welsh Language College). His teaching and research interests include the law of devolution, federal and quasi-federal states and non-territorial constitutional structures and the legal rights of linguistic and cultural groups

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW06
Ymateb gan Capital Law

Evidence from Capital Law

1) The general principles of the Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives

The policy objectives of the Bill – i.e. to make Welsh Law more accessible, clear and straightforward in its use and application – are long overdue. We discussed the general principles of the Bill in far more detail in our response¹ to the Welsh Government's ("**Government**") initial Consultation on the Bill – we'll refrain from repeating our responses here, though note that our views remain the same.

In summary, however, we see a clear need to legislate in this area to fully achieve the desired effect of the Bill's objectives. In the Bill's current form, there is an entrenched (and in our view necessary) *duty* on successive Counsel Generals and Welsh Ministers to undertake reviews of the codification/ consolidation of Welsh Laws. Were it a *discretionary* programme in comparison, there'd clearly be less pressure, incentive and appetite to fully implement the policy objectives.

Equally, requiring Ministers, during each Assembly term, to set out how they intend to improve the accessibility and the interpretation of Welsh Law will inject momentum into the project – given the expected timescale of implementation (which, in theory, could be an infinite task), this ongoing duty is a neat way of keeping the project on track.

2) Any potential barriers to the implementation of the provisions and whether the Bill takes account of them

Naturally, implementation of the Bill will result in considerable time, cost and resource implications (see more in sections 3 and 4 below) – a 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.*"²

But, despite it being a long-term project, the Bill does make room for efficiency. To preserve political motivation, the Government's intention is that the Counsel General will present a codification programme and regularly report on its progress

¹ <https://beta.gov.wales/sites/default/files/consultations/2018-08/full-responses-legislation-bill.zip>.

² http://www.lawcom.gov.uk/app/uploads/2016/06/lc366_form_accessibility_wales_English.pdf (at para 3.6).

to the National Assembly.³ In our view, this will maintain focus, introduce flexibility where required, and minimise diversion from the objectives of the Bill.

Determining the correct procedures is also fundamental to ensuring a successful and within-limits implementation.⁴ For example, lawmakers should clearly avoid exposing existing laws to *substantive* reconsideration⁵ – but again, these potential barriers have been considered in our opinion, and the right balance has been struck between reform and consolidation.⁶

3) Whether there are any unintended consequences arising from the Bill

4) The financial implications of the Bill (as set out in Part 4 of the Explanatory Memorandum)

We see a cross-over between questions 3 and 4, and so will respond to both together.

At first glance, we don't foresee any notable unintended consequences – at least none which are detrimental.

From a regulatory perspective (and in line with the Government's impact assessment⁶ on the topic), we foresee no substantially negative impact of the Bill.

That being said, some potential consequences which initially came to mind include:

1. Cost, time and resource:

Codification and consolidation is naturally a mammoth task – the costs involved and financial implications are likely to be huge. As a rough and illustrative figure, the Government⁷ has estimated that the cost of preparing and delivering a programme of improving accessibility would be in excess of £500k per annum.

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? It's worth noting, however, that the Government does intend to use existing resources to cover some of the associated costs.⁸

³ See footnote 2 above (at para 1.58).

⁴ See footnote 2 above (at para 3.22).

⁵ See footnote 2 above (at para 3.23). ⁶ See footnote 4 above.

⁶ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Regulatory%20Impact%20Assessment.pdf>.

⁷ See footnote 7 above (at para 17).

⁸ See footnote 7 above (at paras 16-20).

Timing of implementing the Bill is another focal point. The Law Commission's June 2016 recommendation paper⁹ rightly stressed the need to maintain the impetus of a programme and to provide sufficient resources for the complex work involved, without hampering the rest of the Welsh legislative programme. The Government¹⁰ predicts, for example, that the goal of the ongoing programmes could take over 20 years to achieve – with Brexit's priority status in the play, this could be an even longer timeframe.

2. Welsh language implications

We see no undesirable impact on the Welsh language, and note similar findings in the

Government's impact assessment.¹¹

In fact, as well as the obvious/intended consequences of the Bill for the use and status of the Welsh language, we're likely to see an increased need for Welsh-medium drafters, jurilinguists and translators – a clear positive by-product of this mission, and one which supports the 2050

*Cymraeg*¹³ strategy as well as the general tenet of the Welsh Language Standards¹² and Government of Wales Act 2006.¹³

Equally, logic dictates that the more the law is made available and more clearly in Welsh, the more likely people will find it easier to take up and provide Welsh-medium services – particularly in the legal sector, which is worst hit by the current complexity.¹⁶ At Capital Law, we often advise

in Welsh, and anticipate that the lingual benefits of the Bill alone will have a clear positive impact on many of our clients.

3. Other impact assessments considered by the Government

No immediate issues surrounding equality come to mind¹⁴ – if anything, the Bill encourages the parity of Welsh and English being treated equally favourable.¹⁵

⁹ See footnote 2 above (at para 6.17).

¹⁰ See footnote 7 above (at para 13).

¹¹ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Welsh%20Language%20Impact%20Assessment.pdf> ¹³ <https://gov.wales/docs/dcells/publications/170711-welsh-language-strategy-eng.pdf>

¹² <http://www.legislation.gov.uk/wsi/2018/441/made>.

¹³

<https://www.legislation.gov.uk/ukpga/2006/32/section/7>

¹⁶ See footnote 12 above (at page 5).

¹⁴ And none are highlighted by the Government's Equality Impact Assessment -

<https://beta.gov.wales/sites/default/files/consultations/2018-03/Equality%20Impact%20Assessment.pdf>.

¹⁵ <http://www.legislation.gov.uk/mwa/2011/1/enacted>.

We also have no comments to make on the Government's assessments on children's rights,¹⁶ and on competition and the justice system.¹⁷

4. Inconsistency/ conflict with English law:

There's some inherent risk of conflict with English law – for example, both the Interpretation Act 1978 and the interpretation provisions in the Bill would operate side-by-side, which may give rise to confusion/ misapplication.

However, any confusion should be alleviated by the existence of:

- (i) guidance for drafters of legislation on how/ when both Acts apply
- (ii) Explanatory Notes to the relevant Act, which will assist the reader in understanding which Interpretation Act actually applies to the legislation they are reading, and
- (iii) general information on interpretation, made available on the Cyfraith Cymru/Law Wales and other relevant websites.¹⁸

5) 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)

Whilst subordinate legislation to amend the Bill (when enacted) will sometimes be more appropriate than seeking to bring forward primary legislation,¹⁹ we urge caution on the possible overuse/ misuse of the power.

We only have to look at the recent controversies²⁰ surrounding the so-called Henry VIII powers to see the potential dangers of side-stepping primary law-making procedures. The issue with this power is clearly that, in contrast to primary law, a draft subordinate instrument will not benefit from full scrutiny.

Though, the relevant powers within this Bill are, in our view, primarily administrative in nature – they concern non-policy matters such as removing, adding or amending definitions, replacing descriptions of dates and times, and bringing the Act into force. Dealing with these clerical actions by primary means (as part of an already packed legislative agenda) would likely be disproportionate.

Equally, the absence of full scrutiny does not equate to a *lack* of scrutiny – many of the significant powers are still limited by the affirmative or negative Assembly procedures. As such, they key powers will either be subject to objection by the Assembly or, before Ministers can exercise their power to make subordinate

¹⁶ <https://beta.gov.wales/sites/default/files/consultations/2018-03/Children%27s%20Rights%20Impact%20Assessment.pdf>.

¹⁷ <http://www.assembly.wales/laid%20documents/pri-ld11927-em/pri-ld11927-em-e.pdf> (at page 68).

¹⁸ See footnote 7 above (at paras 72-74).

¹⁹ See footnote 20 above (at para 108 onwards).

²⁰ <https://www.bbc.co.uk/news/uk-politics-39266723>.

legislation, the Assembly will need to pass a resolution approving a draft of that subordinate legislation.

So, provided they are used correctly, these flexible powers allow the Bill to be malleable to any necessary change, without the need to soak up the costs and time associated with enacting primary law. Any minor amendments following Brexit, for example, may be better dealt with by this secondary process.

On a final side-note, the proposed “statutory book” objective of the Bill should also ensure that any subordinate legislation wouldn’t add to the current patchwork law – in other words, any such legislation would be tidily categorised by subject matter along with its parent legislation.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW07
Ymateb gan Dr Catrin Fflûr Huws

Evidence from Dr Catrin Fflûr Huws

Cylch gorchwyl

Wrth graffu ar egwyddorion cyffredinol y Bil yng Nghyfnod 1, bydd y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol yn trafod y canlynol:

- egwyddorion cyffredinol y Bil Deddfwriaeth (Cymru) ac a oes angen [deddfwriaeth er mwyn cyflawni'r amcanion polisi a nodwyd ar gyfer y Bil; unrhyw rwystrau posibl i weithredu'r darpariaethau ac a yw'r Bil yn eu hystyried;](#)
- [a oes canlyniadau anfwriadol yn codi o'r Bil;](#)
- [goblygiadau ariannol y Bil \(fel y nodir yn Rhan 4 o'r Memorandwm Esboniadol\);](#)
- [priodoldeb](#) y pwerau yn y Bil i Weinidogion Cymru wneud is-ddeddfwriaeth (fel y nodir yn Rhan 3 o'r Memorandwm Esboniadol).

Rhan 1

Rhaid ystyried yn gyntaf oll a yw elfennau rhan 1 un fater deddfwriaethol, ac felly yn fater ar gyfer deddf gwlad, ynteu yn fater o amodau gwaith y Cwnsler Cyffredinol, ac felly yn fater o ddyletswyddau gwaith yr unigolyn..

Un o'r anawsterau gyda'r cysyniad o Gyfraith Cymru yw pan daw elfennau o gyfraith Cymru a Lloegr yn gyfraith Cymru yn unig oherwydd bod deddfu newydd ar gyfer Lloegr wedi diddymu deddf neu ran o ddeddf fel mae'n berthnasol i Loegr, gan adael y ddeddf honno ond yn gymwys ar gyfer Cymru. Gan hynny er mwyn cyflawnrwydd rhaid i'r Cwnsler Cyffredinol hefyd oruchwylio'r newidiadau hynny. Fodd bynnag, mae angen eglurder hefyd ynghylch a'r bil hwn, pe doi yn ddeddf gwlad, ynteu yr Interpretation Act 1978.

Rhaid ystyried hefyd pa gam a unionir gan wella hygyrchedd y gyfraith- gall hygyrchedd olygu dwyieithrwydd, eglurder termau a chysyniadau, y gyfraith ar bwnc penodol mewn un ddeddf, argaeledd a chyfrededd deddfwriaeth mewn ffynhonellau masnachol e.e. LexisNexis a Westlaw, argaeledd a chyfrededd deddfwriaeth mewn ffynhonellau am ddim e.e. www.legislation.gov.uk, argaeledd mewn ffynhonellau eilaidd e.e. gwefannau cynghori, gwrslyfrau i fyfyrwyr. Y mae'r gwahanol agweddau hyn yn amrywiol o ran gallu'r Cwnsler Cyffredinol i'w rheoli, ac felly rhaid ystyried beth yw ystyr llwyddiant neu fethiant i gydlynu a'r dyletswydd hwn.

Rhan 2

Bydd rhai o'r materion hyn yn dyblygu materion sydd yn ymddangos yn yr Interpretation Act 1978. Beth yw perthynas y bil hwn a'r ddeddf honno, a phryd y defnyddir y naill a phryd y defnyddir y llall, neu beth byddai yn digwydd petai anghysondeb rhyngddynt - p'un sydd drechaf. Hefyd oherwydd bod y mater o ddehongli deddfwriaeth yn mwny i gael ei gynnwys o fewn dwy ddeddf pe doi'r Bil hwn yn ddeddf, rhaid ystyried a yw'n peri i'r gyfraith fel sydd yn berthnasol i Gymru fod yn llai hygyrch o'r herwydd. A fyddai modd creu ychwanegiad i'r Interpretation Act 1978 er mwyn cros gyfeirio at y ddeddf hon, neu i gynnwys rhan newydd o'r Interpretation Act 1978 fyddai yn cynnwys y diwygiadau sydd yn berthnasol i Gymru?

Agwedd arall sydd yn berthnasol i'w ystyried yn y cyd-destun hwn yw sefyllfaoedd lle ceir anghysonder rhwng fersiwn Gymraeg a fersiwn Saesneg deddfwriaeth, a sut i unioni hynny. Nid yw hyn yn golygu pa fersiwn sydd drechaf, gan fod hynny yn tansellio'r amcan o ddeddfu'n ddwyieithog, ond yn hytrach yr egwyddorion a allai lywio'r penderfyniad, megis dewis dehongliad a fyddai yn ffafrio yr unigolyn yn hytrach na'r wladwriaeth. Rhaid hefyd ystyried a oes angen rheolau penodol ynghylch yr hyn ddylai ddigwydd pan fo anghydfod rhwng fersiynau Cymaeg a Saesneg deddf - a ddylid bod datganiad o anghysondeb fel a geir yn Neddf Hawliau Dynol 1998 adran 4.

Gan bod cymal 3 y Bil yn cyfeirio at y ffaith mai dim ond i ddeddfau a ddaw yn ddeddf glwad ar ôl i'r Bil Deddfwriaeth ddod yn gyfraith wlad, rhais ystyried yr anhwasterau a all godi pan bydd sefyllfa yn codi sydd yn cyfeirio at amryw o ddeddfau ac offerynau statudau, gyda rhai yn deillio o ddyddiad cyn pasio'r Bil hwn, ac eraill yn dyddio o ddyddiad wedi pasio'r Bil, gan y gall y rheolau dadansoddi fod yn wahanol.

O ran cymalau megis cymal 12, rhaid ystyried pa gyfraith sydd yn gymwys ar gyfer cyfathrebu oddi allan i Gymru - ai'r gyfraith gymwys yw'r gyfraith rhydd yn rhwymo'r anfonwr ynteu'r gyfraith sydd yn rhwymo'r derbyniwr.

Yn sgil y diffg ymwybyddiaeth a geir o bwerau deddfu Cynulliad Cenedlaethol Cymru, byddai hefyd yn fuddiol i nodi pa bryd nad yw'r Interpretation Act 1978 yn gymwys, pryd gellir defnyddio'r naill neu'r llall, a pryd dyid defnyddio'r Interpretation Act 1978.



Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Bil deddfwriaeth (Cymru)

CLA(5) LW08
Ymateb gan Comisiynydd y Gymraeg

Annwyl Bwyllgor,

Bil Deddfwriaeth (Cymru)

Diolch ichi am y cyfle i roi tystiolaeth ar egwyddorion cyffredinol Bil Deddfwriaeth (Cymru). Dylwn nodi fy mod wedi darparu tystiolaeth yn y maes hwn yn y gorffennol. Ymatebais i'r *Ddogfen Ymgynghori Dehongli deddfwriaeth Cymru: Ystyried Deddf ddehongli i Gymru yn 2017*.¹ Darparodd fy swyddogion hefyd sylwadau manwl i'r Prif Ieithydd Deddfwriaethol ar gyfieithiad drafft o Atodlen 1 i Ddeddf Dehongli 1978. Ymatebais yn ogystal i ddogfen ymgynghori Comisiwn y Gyfraith ar *Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru*² sy'n ymdrin â llawer o'r materion yr ymdrinnir â hwy yn y ddeddfwriaeth ddrafft. Yn olaf ymatebais i ymgynghoriad Cwnsler Cyffredinol Cymru ar y Bil Deddfwriaeth (Cymru) drafft yn 2018 sydd wedi'i atodi.³ Mae'r ymateb i'r ymgynghoriad hwn yn ysbryd y dystiolaeth i'r ymgynghoriadau uchod a buaswn yn eich annog i ystyried yr ymatebion hynny ac yn arbennig yr ymateb i Brif Gwnsler Deddfwriaethol Cymru wrth ichi ystyried y Bil. Rwy'n ymateb i ddau o'r pwyntiau a gynhwyswyd yn y cylch gorchwyl sef:

1

<http://www.comisiynyddygyfmaeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20170817%20LI%20C%20Ymateb%20i%27r%20ymgyngoria d%20Ystyried%20Deddf%20ddehongli%20i%20Gymru.pdf>

<http://www.comisiynyddygyfmaeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20151002%20C%20DG%20Ymateb%20Comisiynydd%20y%2 0Gymraeg%20i%20ddogfen%20ymgyngori%20Ffurf%20a%20Hygyrchedd%20y%20Gyfraith.pdf>

[http://www.comisiynyddygyfmaeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20180612%20CLI%20LIlythyr%20Bil%20Deddfwriaeth%20\(Cy mru\)%20Drafft.pdf](http://www.comisiynyddygyfmaeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20180612%20CLI%20LIlythyr%20Bil%20Deddfwriaeth%20(Cy mru)%20Drafft.pdf)

Comisiynydd y Gymraeg
Siambrau'r Farchnad
5-7 Heol Eglwys Fair
Caerdydd CF10 1AT

Welsh Language Commissioner
Market Chambers
5-7 St Mary Street
Cardiff CF10 1AT

0845 6033 221
post@comisiynyddygyfmaeg.org
Croesewir gohebiaeth yn y Gymraeg a'r Saesneg

0845 6033 221
post@welshlanguagecommissioner.org
Correspondence welcomed in Welsh and English



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

- Egwyddorion cyffredinol y Bil Deddfwriaeth (Cymru) ac a oes angen deddfwriaeth er mwyn cyflawni'r amcanion polisi a nodwyd ar gyfer y Bil
- Unrhyw rwystrau posibl i weithredu'r darpariaethau ac a yw'r Bil yn eu hystyried

Egwyddorion cyffredinol y Bil Deddfwriaeth (Cymru) ac a oes angen deddfwriaeth er mwyn cyflawni'r amcanion polisi a nodwyd ar gyfer y Bil

1. Mae Rhan 1 y ddeddf yn nodi'r ddyletswydd ar y Cwnsler Cyffredinol i gadw hygyrchedd cyfraith Cymru o dan adolygiad a bod rhaid i Weinidogion Cymru a'r Cwnsler Cyffredinol lunio rhaglen sy'n nodi'r hyn y maent yn bwriadu ei wneud i wella hygyrchedd cyfraith Cymru (2(1)). Mae'r Bil yn ei gwneud hi'n ofynnol i'r rhaglen gynnwys gweithgareddau yn ymwneud â chydgrynhoi a chodeiddio cyfraith Cymru; cynnal ffurf cyfraith Cymru wedi iddi gael ei chodeiddio a hwyluso'r defnydd o'r Gymraeg. Ar sail yr uchod, rwy'n croesawu gosod dyletswydd ar Weinidogion Cymru i adolygu cyfraith Cymru a bod unrhyw raglen adolygu yn gorfod cynnwys darpariaeth i hwyluso'r defnydd o'r Gymraeg. Mynegais yn fy ymateb i ddogfen ymgynghori Comisiwn y Gyfraith ar *Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru* fy mod yn gweld manteision i'r Gymraeg yn deillio o gydgrynhoi a chodeiddio deddfwriaeth. O'r herwydd rwyf hefyd yn croesawu bwriad y ddeddfwriaeth y byddai pob rhaglen i wella hygyrchedd cyfraith Cymru yn gwneud darpariaeth i gydgrynhoi a chodeiddio deddfwriaeth Cymru.
2. Rwyf, er hynny, yn nodi adrannau 15-18 o dystiolaeth yr Athro Thomas Glyn Watkin ichi⁴ sy'n nodi codi amheuaeth ynghylch statws y ddwy iaith pan godeiddir deddfwriaeth nas deddfwyd yn wreiddiol yn ddwyieithog. Buaswn yn eich annog i ystyried y mater hwn ymhellach er mwyn sicrhau y bydd fersiynau Cymraeg a Saesneg o ddeddfwriaeth a gydgrynhoir ac a godeiddir â'r un statws.

Adrannau 5-8

3. Rhoddais sylwadau yn fy ymateb i Brif Gwnsler Deddfwriaethol Cymru ar adrannau 5-8. Rwy'n croesawu'r adrannau hyn ar y cyfan ac nid oes gennyf sylwadau pellach i'm sylwadau gwreiddiol.
4. Er hynny, hoffwn dynnu sylw penodol at fy sylwadau ynghylch Adran 7. Mae adran 7 yn nodi 'nid yw geiriau sy'n dynodi rhywedd yn gyfyngedig i'r rhywedd hwnnw'. Rwy'n deall bwriad yr adran hon. Nid oes darpariaeth yn y Ddeddf er hynny, sy'n ei gwneud yn eglur bod i enwau Cymraeg hefyd genedl nad yw'n gyfystyr â rhywedd. Mae i

⁴ <http://www.senedd.cynulliad.cymru/documents/s82900/CLA5-02-19%20-%20Papur%20%20Saesneg%20yn%20Unig.pdf>



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

hynny oblygiadau gramadegol ac o ran ystyr a allasai fod yn berthnasol i'r adran hon. Cyfeiriwyd at fy sylwadau yn y crynodeb⁵ o'r ymatebion i ymgynghoriad Cwnsler Cyffredinol Cymru ond buaswn yn croesawu ystyriaeth pellach i hyn unai yn y ddeddfwriaeth neu mewn canllawiau neu ddarpariaethau sy'n deillio o'r Bil.

5. Rhoddais sylwadau yn fy ymateb i ymgynghoriad Cwnsler Cyffredinol Cymru ar y materion canlynol sy'n codi yn y memorandwm esboniadol (ME) cysylltiedig â'r Bil:
- cyfieithiadau Cymraeg o ddeddfiadau a chyrff nad oes ganddynt enwau Cymraeg (82-87 y ME)
 - dehongli is-ddeddfwriaeth ddwyieithog a'r berthynas rhwng testunau Cymraeg a Saesneg deddfwriaeth (76-77 y ME)
 - y trefniadau ar gyfer cyhoeddi cyfraith Cymru a'r broses o wneud a threfnu offerynnau statudol (e.e. 79-81 y ME)

Mae'r Llywodraeth yn nodi ei bod yn bwriadu rhoi ystyriaeth bellach i'r materion hyn. Rwy'n nodi'r eglurhad hwn yn y memorandwm esboniadol ac yn croesawu'r ymrwymiad i roi rhagor o ystyriaeth i'r materion hyn .

Unrhyw rwystrau posibl i weithredu'r darpariaethau ac a yw'r Bil yn eu hystyried

6. Yn yr asesiad o effaith y Bil ar y Gymraeg mae'r memorandwm esboniadol yn nodi 'effaith gadarnhaol ar y rhai sydd am ddefnyddio'r Gymraeg fel iaith cyfraith, er enghraifft gweithwyr cyfreithiol proffesiynol, y farnwriaeth, academyddion a defnyddwyr llysoedd sydd am gynnal achosion llys drwy gyfrwng y Gymraeg.' Rwy'n croesawu hynny. Dylwn nodi er hynny fy mod yn rhagweld y byddai'r broses o weithredu rhaglen i wella hygyrchedd cyfraith Cymru yn y Gymraeg a'r Saesneg yn gofyn am ieithyddion a chyfreithwyr sydd â sgiliau o lefel uchel yn eu priod feysydd yn y Gymraeg a'r Saesneg. Buaswn yn annog Llywodraeth Cymru i drafod â phrifysgolion Cymru, y Coleg Cymraeg Cenedlaethol a chyrff perthnasol o faes y gyfraith megis Cymdeithas y Gyfraith a'r farnwriaeth i gynllunio er mwyn sicrhau bod ffynhonnell o ieithyddion, terminolegwyr a chyfreithwyr dwyieithog â sgiliau addas ar gael i weithredu'r rhaglen hon ac amcanion y Bil.

Gobeithio y bydd y sylwadau hyn o gymorth ichi wrth ichi graffu ar Fil Deddfwriaeth (Cymru). Mae croeso ichi gysylltu â mi os dymunwch eglurhad am rai o'r bwyntiau a godwyd.

⁵ <https://beta.llyw.cymru/sites/default/files/consultations/2018-08/crynodeb-or-ymatebion-bil-deddfwriaeth.pdf>



Cwnsler Cyffredinol Cymru
Swyddfa'r Cwnsleriaid Deddfwriaethol
Llywodraeth Cymru
Parc Cathays
Caerdydd
CF10 3NQ

LegislativeCounsel@wales.gsi.gov.uk

12/06/2018

Annwyl Jeremy Miles AC,

Bil Deddfwriaeth (Cymru) Drafft

Diolch ichi am y cyfle i ymateb i'ch ymgynghoriad ar Fil Deddfwriaeth (Cymru) Drafft. Ymatebais i'r *Ddogfen Ymgynghori Dehongli deddfwriaeth Cymru: Ystyried Deddf ddehongli i Gymru yn 2017*.¹ Mae f'ymateb i'r ymgynghoriad hwn yn cyd-fynd ag ysbryd yr ymateb hwnnw. Darparodd fy swyddogion hefyd sylwadau manwl i'r Prif Ieithydd Deddfwriaethol ar gyfieithiad drafft o Atodlen 1 i Ddeddf Dehongli 1978. Ymatebais yn ogystal i ddogfen ymgynghori Comisiwn y Gyfraith ar *Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru*² sy'n ymdrin â llawer o'r materion yr ymdrinnir â hwy yn y ddeddfwriaeth drafft.

Gyda f'ymatebion i'r dogfennau hynny mewn golwg, croesawaf y cam hwn o gyflwyno Bil a fydd yn hwyluso'r defnydd o'r Gymraeg yn neddfwriaeth Cymru. Bydd yn gam pwysig tuag ategu cydraddoldeb y Gymraeg a'r Saesneg mewn deddfwriaeth fel y nodir yn adran 156 Deddf Llywodraeth Cymru 2006. Ni fyddaf yn ymateb i bob cwestiwn o'r ymgynghoriad hwn ond yn hytrach yn canolbwyntio yn bennaf ar yr adrannau sydd fwyaf perthnasol i'r Gymraeg.

1. Comisiynydd y Gymraeg

1

<http://www.comisiynyddygydraeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20170817%20LI%20C%20Ymateb%20i%27r%20ymgynghoria d%20Ystyried%20Deddf%20ddehongli%20i%20Gymru.pdf>

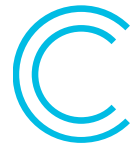
<http://www.comisiynyddygydraeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20151002%20C%20DG%20Ymateb%20Comisiynydd%20y%2 0Gymraeg%20i%20ddogfen%20ymgynghori%20Furf%20a%20Hygyrchedd%20y%20Gyfraith.pdf>

Comisiynydd y Gymraeg
Siambrau'r Farchnad
5-7 Heol Eglwys Fair
Caerdydd CF10 1AT

Welsh Language Commissioner
Market Chambers
5-7 St Mary Street
Cardiff CF10 1AT

0845 6033 221
post@comisiynyddygydraeg.org
Croesewir gohebiaeth yn y Gymraeg a'r Saesneg

0845 6033 221
post@welshlanguagecommissioner.org
Correspondence welcomed in Welsh and English



1.1 Prif nod y Comisiynydd wrth arfer ei swyddogaethau yw hybu a hwyluso defnyddio'r Gymraeg. Wrth wneud hynny bydd y Comisiynydd yn ceisio cynyddu'r defnydd o'r Gymraeg yng nghyswllt darparu gwasanaethau, a thrwy gyfleoedd eraill. Yn ogystal, bydd yn rhoi sylw i statws swyddogol y Gymraeg yng Nghymru, a thrwy osod safonau rhoddir dyletswyddau statudol ar sefydliadau i ddefnyddio'r Gymraeg. Un o amcanion strategol y Comisiynydd yn ogystal yw dylanwadu ar yr ystyriaeth a roddir i'r Gymraeg mewn deddfwriaeth a dyna a wneir yma. Ceir rhagor o wybodaeth am waith y Comisiynydd ar y wefan comisiynyddygyymraeg.cymru.

2. Rhan 1 - Hygyrchedd Cyfraith Cymru - Cwestiynau 1 a 2

2.1 Mae Pennod 1 y ddogfen ymgynghori yn amlinellu bwriad y Llywodraeth i ddeddfu er mwyn gosod dyletswydd ar y Cwnsler Cyffredinol i adolygu cyfraith Cymru. Byddai'n gorfod gwneud hynny pan fydd Gweinidogion Cymru yn ystyried cynnig deddfwriaeth newydd. Yn ogystal, ar gyfer pob tymor Cynulliad byddai'n rhaid i Weinidogion Cymru a'r Cwnsler Cyffredinol ddatblygu a gweithredu rhaglen o weithgarwch wedi'i chynllunio i wella hygyrchedd cyfraith Cymru. Ymhellach, byddai'r Bil yn ei gwneud hi'n ofynnol i bob rhaglen wneud darpariaeth i gydgrynhoi a chodeiddio cyfraith Cymru; cadw cyfraith sydd wedi'i chodeiddio a hwyluso'r defnydd o'r Gymraeg. Byddai cydgrynhoi'r gyfraith, gwella trefniadau cyhoeddi a darparu mwy o sylwebaeth ar y gyfraith yn y ddwy iaith yn rhai elfennau a fyddai'n hwyluso defnyddio'r Gymraeg yn ôl y ddogfen ymgynghori. Elfennau eraill posibl fyddai llunio mwy o eirfaon cyfreithiol a datblygu terminoleg wedi'i safoni. Byddai'r cam hwn yn arbennig o gadarnhaol ac nid yn unig yn hwyluso'r gwaith o ddeddfu yn y Gymraeg ond hefyd o addysgu a gweinyddu'r gyfraith yn y Gymraeg. Gweler yn ogystal fy sylwadau manwl ar derminoleg yn fy ymateb i *Ffur a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru*.³

2.2 Ar sail yr uchod, rwy'n croesawu gosod dyletswydd ar Weinidogion Cymru i adolygu cyfraith Cymru a bod unrhyw raglen adolygu yn gorfod cynnwys darpariaeth i hwyluso'r defnydd o'r Gymraeg. Mynegais yn fy ymateb i ddogfen ymgynghori Comisiwn y Gyfraith ar *Ffur a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru* fy mod yn gweld manteision i'r Gymraeg yn deillio o gydgrynhoi a chodeiddio deddfwriaeth. Mae'r ddogfen ymgynghori yn mynegi yn ogystal y byddid yn cydgrynhoi ac yna yn codeiddio'r gyfraith yn ddwyieithog. O'r herwydd rwyf hefyd yn croesawu'r cynnig y byddai pob rhaglen i wella hygyrchedd cyfraith Cymru yn gwneud darpariaeth i gydgrynhoi a chodeiddio deddfwriaeth Cymru.

³ Gweler adran 3 yn benodol yn hyn o beth.



3. Rhan 2 – Dehongli Cyfraith Cymru yn Statudol

3.1 Cwestiwn 6

- 3.1.1 Gofynnwch yng nghwestiwn 6 a oes gennym sylwadau am yr hyn sydd wedi'i gynnwys, neu sydd heb ei gynnwys yn Atodlen 1 y Bil Drafft. Deallaf o'r ddogfen ymgynghori bod y Bil yn cynnwys nifer cyfyngedig o eiriau ac ymadroddion nad ydynt ond yn groesgyfeiriadau i Ddeddfau eraill. Dadleuwch mai dyma'r ffordd orau o ddiffinio gair neu ymadrodd ar adegau, er nad yw hynny'n ddelfrydol.
- 3.1.2 Deallaf bod adran 5 y ddeddfwriaeth ddrafft yn cyfateb yn gyffredinol i adran 5 Deddf Dehongli 1978 a bod Atodlen 1 y bil drafft yn cyfateb i Atodlen 1 Deddf 1978 ond yr hepgorwyd ac y cynhwyswyd rhai geiriau ac ymadroddion. Croesawaf y ffaith y bydd bellach fersiynau a diffiniadau Cymraeg o eiriau a gynhwyswyd yn Atodlen 1 Deddf 1978 wrth gwrs. Ar y cyfan, mae'r geiriau a'r ymadroddion yn rhai a bennir mewn deddfwriaeth nas deddfwyd gan y Cynulliad er eu bod wrth gwrs yn berthnasol i Gymru. Er fy mod yn deall yr awydd i gyfyngu'r termau a ddiffinnir i'r rhai mwyaf defnyddiol neu hanfodol yn unig, nid yw'n eglur imi er hynny, beth yw'r meini prawf ar gyfer cynnwys geiriau ac ymadroddion yn Atodlen 1 y Bil drafft. Tybed a oes lle er enghraifft i ystyried cynnwys diffiniadau mewn rhai deddfau sy'n benodol i Gymru? Yn hynny o beth, cyfeiriaf at y term 'llesiant' er enghraifft sy'n rhan annatod o Ddeddf Llesiant Cenedlaethau'r Dyfodol ac sydd wedi magu ystyr penodol iawn i Gymru o'r herwydd, ond ei fod hefyd yn cael ei ddefnyddio mewn mannau eraill yn ogystal.⁴ Roedd y term hwn yn un o'r rhai y cyfeiriais atynt yn fy ymateb i'r *Ddogfen Ymgynghori Dehongli deddfwriaeth Cymru: Ystyried Deddf ddehongli i Gymru* fel rhai yr oedd eu dehongli wedi profi i fod yn allweddol er mwyn sicrhau eglurder, sicrwydd a chysondeb wrth weithredu Mesur y Gymraeg a'i reoliadau cysylltiedig.

3.2 Cwestiwn 7

- 3.2.1 Gofynnwch a ydym yn cytuno â'r dull gweithredu yn adran 7 sef 'nid yw geiriau sy'n dynodi rhywedd yn gyfyngedig i'r rhywedd hwnnw'. Nid wyf yn siŵr a yw'r geiriad fel y mae yn egluro'n ddiamwys bod i enwau Cymraeg hefyd genedl nad yw'n gyfystyr â rhywedd. Sylwaf y nodir yn yr asesiad effaith ar y Gymraeg ei bod hi'n fwriad gennydh i wneud yn glir nad yw'r rheol yn gymwys i genedl enwau. Buasai'n ddefnyddiol derbyn rhagor o wybodaeth ac enghreifftiau am y penderfyniad hwn. Ystyrier y geiriau 'nyrs' sy'n fenywaidd ei genedl a 'doctor' sy'n wrywaidd ei genedl yn Gymraeg. Nid yw'r geiriau nyrs na doctor yn dynodi rhywedd fel y cyfryw eithr cenedl y geiriau. Er hynny, byddai angen ei gwneud yn glir nad yw cenedl y geiriau hyn yn gyfystyr â rhywedd y sawl fyddai'n ymgymryd â'r swyddi hyn. Yn yr un modd, yn achos yr enw

⁴ Gweler rheoliadau safonau'r Gymraeg, e.e. http://www.legislation.gov.uk/wsi/2015/996/pdfs/wsi_20150996_mi.pdf



'Comisiynydd', mae cenedl y gair yn wrywaidd ond ar hyn o bryd mae menywod yn ymgymryd â'r swyddogaeth o fod yn gomisiynwyr mewn nifer o sefydliadau cyhoeddus yng Nghymru. Mae materion eraill yn deillio o hynny hefyd y dylid eu ystyried megis bod rhagenwau ôl yn amrywio yn dibynnu ar genedl gair yn hytrach na rhywedd unigolyn, a bod geiriau yn cael eu treiglo yn dilyn rhagenw dibynnol blaen gan ddibynnu ar genedl y gair. Mae adran 8 y ddeddfwriaeth ddrafft yn mynd i'r afael â'r pwynt olaf hwn wrth gwrs.

3.3 Cwestiwn 8

3.3.1 Gofynnwch a ydym yn cytuno â'r dull gweithredu arfaethedig a ddefnyddir yn adran 8 o'r Bil Drafft. Ei fwriad fel yr eglurwch, yw dileu 'pob amheuaeth ynghylch cymhwyso'r diffiniad o air neu ystyr gair er mwyn osgoi amwysedd yn ymarferol, ac i hwyluso drafftio mwy naturiol yn y Gymraeg a'r Saesneg'. Nodwch fod hyn yn berthnasol i oledffiadau ar air neu amrywiadau ar ymadrodd sy'n deillio o reolau ynghylch trefn geiriau a strwythur brawddegau'. Rwy'n croesawu'r dull gweithredu arfaethedig hwn gan ei fod yn cydnabod yr amrywiadau ar eiriau Cymraeg (megis treigladau) a bydd felly'n hwyluso drafftio a dehongli yn y Gymraeg.

4. Rhan 3: Materion eraill y gellid mynd i'r afael â nhw – Cwestiwn 23

- 4.1 Gofynnwch yng nghwestiwn 23 a oes gennym farn am rai materion eraill yr ydych wedi'u hystyried wrth ddatblygu'r Bil Drafft hwn y gellid ymdrin â hwy drwy ddeddfwriaeth. Cyfeiriaf isod at y materion sy'n berthnasol i'r Gymraeg yn hyn o beth.
- 4.1 Nodwch ichi ystyried dymunoldeb ailddatgan adran 156 Deddf Llywodraeth Cymru 2006 sy'n ymwneud â chydaddoldeb testunau Cymraeg a Saesneg o ddeddfwriaeth ddwyieithog. Buaswn yn cefnogi camau i ailddatgan y ddarpariaeth hon yn y ddeddfwriaeth gan ei fod yn cyd-fynd yn naturiol â natur y Bil a byddai'n tanlinellu pwysigrwydd cydraddoldeb y testunau. Deallaf yr anawsterau y cyfeiriwch atynt yn y ddogfen ymgynghori ac fe'ch anogaf i barhau i ymchwilio i fecanweithiau priodol i alluogi ailddatgan adran 156 Deddf Llywodraeth Cymru 2006 o fewn y ddeddfwriaeth ddrafft hon.
- 4.2 Nodwch eich bod yn rhoi ystyriaeth i'r trefniadau ar gyfer cyhoeddi'r gyfraith a bod legislation.gov.uk yn hyn o beth yn cael ei ddiweddarau, ond nad oes dull ar gyfer diweddarau testunau Cymraeg. Er mwyn sicrhau'r cydraddoldeb i ddeddfwriaeth Gymraeg a Saesneg y mae adran 156 Deddf Llywodraeth Cymru 2006 yn ei osod rwy'n credu bod angen mynd i'r afael â'r mater hwn ar fyrder. Rwy'n falch y nodir bwriad Gweinidogion Cymru i asesu sut y gellid diweddarau'r trefniadau presennol i adlewyrchu anghenion Cymru a'r oes ddigidol. Dylid sicrhau fod y Gymraeg yn greiddiol i unrhyw ddatblygiadau digidol newydd. Mae bod â chorpws sylweddol o



destunau dwyieithog cyfochrog megis codau yn rhan bwysig o ddatblygu technolegau iaith pellach. Dylid ystyried o'r herwydd y trwyddedau a ddefnyddir i ddatblygu technolegau newydd er mwyn hwyluso datblygu technolegau pellach. Er gwybodaeth ichi, rwyf wedi cyhoeddi dogfen gyngor *Technoleg, Gwefannau a Meddalwedd: Ystyried y Gymraeg* sy'n cynnig canllawiau ar gyfer llunio meddalwedd a datblygu gwasanaethau TG dwyieithog o ansawdd a buaswn yn eich annog i'w ystyried wrth ddatblygu technolegau newydd ar gyfer hwyluso mynediad at gyfraith Cymru yn y Gymraeg a'r Saesneg.⁵

- 4.3 Neilltuwch adran i'r berthynas rhwng testunau Cymraeg a Saesneg deddfwriaeth. Fel y nodwch y mae adroddiad Comisiwn y Gyfraith ar *Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru* yn ymdrin yn fanwl â'r mater hwn ac fe roddais innau fy safbwynt gerbron yn fy ymateb i'r ddogfen ymgynghori. Buasai gennyf ddiddordeb mewn deall rhagor am eich bwriadau o ran ystyried a ddylid gweithredu i egluro'r berthynas rhwng fersiynau'r ddwy iaith ymhellach wrth ddehongli deddfwriaeth.
- 4.4. Mae'r ddogfen ymgynghori yn trafod mewn manylder defnyddio cyfieithiadau Cymraeg o ddeddfiadau a chyrrff sydd heb enwau Cymraeg ac yn trafod yr arfer presennol a'r newid diweddar i'r arfer presennol. Trafodir yn ogystal y defnydd o enwau cwrteisi ar gyfer cyrrff a swyddfeydd nad ydynt wedi'u sefydlu drwy statud ac sydd heb enwau Cymraeg, a'r enwau sydd wedi'u cofrestru yn Nhŷ'r Cwmnïau a'r Comisiwn Elusennol ar gyfer cwmnïau preifat ac elusennau. Nid oes gennyf deimladau cryfion ynghylch y materion hyn ond gellid dadlau bod y newid diweddar i'r arfer presennol a ddisgrifir ym mharagraff 229 yn llai amwys yng nghyd-destun enwau deddfau. Pa bynnag drefn a ffefrir yn y pen draw mae sicrhau cysondeb yn yr arferion a fabwysiedir yn fanteisiol a byddai canllaw cyhoeddus yn ogystal yn ddefnyddiol – yn enwedig pe bai gofyn i chi amlygu ac egluro'r system gyfeirio. Croesawaf hefyd y cyfeiriad yn y ddogfen at y potensial i ddefnyddio technoleg er mwyn datrys yr anhawster hwn i'r rhai sy'n darllen ar-lein a charwn eich annog i ymchwilio ymhellach i'r posibilrwydd hwn.
- 4.5 Rwy'n cydnabod, fodd bynnag, ei bod hi'n fwy anodd sefydlu patrwm cyson yng nghyd-destun enwau cyrrff. Mae'r arfer bresennol a ddisgrifir ym mharagraff 236 o safbwynt defnyddio enwau cwrteisi Cymraeg ar gyrff megis Senedd y Deyrnas y DU wedi ennill ei blwyf bellach a go brin bod arddel y ffurf Gymraeg yn mynd i beri dryswch. I'r gwrthwyneb, byddai mynnu defnyddio enw Saesneg technegol gywir yn lle'r enw Cymraeg ar ganol testun Cymraeg yn fwy tebygol o dynnu sylw'r darllenydd.

⁵ Ar gael ar-lein yn <http://www.comisiynyddygyymraeg.cymru/Cymraeg/Adroddiadau/Pages/Technoleg,-Gwefannau-a-Meddalwedd-Ystyried-y-Gymraeg.aspx> neu fel PDF yn <http://www.comisiynyddygyymraeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/Technoleg,%20Gwefannau%20a%20Meddalwedd%20-%20Technology,%20Websites%20and%20Software.pdf>



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

Dylwn bwysleisio yn hynny o beth yn ogystal fod yr arfer a osodir mewn deddfwriaeth yn rhwym o gael ei ddilyn gan gyfieithwyr ac awduron Cymraeg mewn cyd-destunau eraill.

Hyderaf y bydd y sylwadau hyn o gymorth ichi wrth ichi ddatblygu Bil Deddfwriaeth (Cymru) Drafft.

Yr eiddoch yn gywir,

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW08
Ymateb gan Comisiynydd y Gymraeg

Evidence from the Welsh Language
Commissioner

i

Thank you for the opportunity give evidence on the general principles of the Legislation (Wales) Bill. I should note that I have previously provided evidence in this field. I responded to the *Interpreting Welsh legislation Consultation Document: Considering an interpretation Act for Wales* in 2017¹. My officers also provided detailed comments to the Chief Jurilinguist on the draft translation of Schedule 1 of the Interpretation Act 1978. I also responded to the Law Commission's consultation document on the *Form and Accessibility of the Law*

*Applicable in Wales*² which addresses many of the matters covered in the legislation. Finally,

I responded to the Counsel General for Wales' consultation on the Draft Legislation (Wales) Bill which is attached.³ The response to this consultation is in the spirit of the consultations above and I would encourage you to consider those responses, in particular the response to the Counsel General for Wales when considering the Bill. I will respond to two of the points included in the terms of reference, namely:

- 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.

General principles of the Legislation (Wales) Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives

1. Part 1 of the Bill places the duty on the Counsel General to keep the accessibility of Welsh law under review and that Welsh Ministers and the

¹
<http://www.comisiynyddygydraeg.cymru/English/Publications%20List/20170817%20LI%20S%20Ymateb%20i'r%20ymgyngoriad%20Ystyried%20Deddf%20dehongli%20i%20Gymru.pdf>

²
<http://www.comisiynyddygydraeg.cymru/English/Publications%20List/20151002%20S%20DG%20Ymateb%20Comisiynydd%20y%20Gymraeg%20i%20Ffur%20a%20Hygyrchedd%20y%20Gyfraith.pdf>

³
[http://www.comisiynyddygydraeg.cymru/English/Publications%20List/20180612%20S%20LI%20Llythyr%20Bil%20Deddfwriaeth%20\(Cymru\)%20Drafft.pdf](http://www.comisiynyddygydraeg.cymru/English/Publications%20List/20180612%20S%20LI%20Llythyr%20Bil%20Deddfwriaeth%20(Cymru)%20Drafft.pdf)

Counsel General must prepare a programme setting out what they intend to do to improve the accessibility of Welsh law (2 (1)). The Bill requires for the programme to include activities relating to consolidating and codifying Welsh law; maintaining the form of Welsh law once codified and facilitating the use of the Welsh language. On the basis of the above I welcome the duty placed on Welsh Ministers to review Welsh legislation and that any programme includes provision to facilitate the use of the Welsh language. In my response to the Law Commission's consultation document on the *Form and Accessibility of the Law Applicable in Wales*, I expressed my view that consolidating and codifying legislation would benefit the Welsh language. Therefore, I also welcome the proposal that each programme to improve the accessibility of Welsh law would make provision to consolidate and codify Welsh legislation.

2. However, I also note sections 15-18 of Professor Thomas Glyn Watkin's⁴ evidence which raises some doubt about the status of the two languages when legislation that was not legislated bilingually. I would encourage you to consider this matter further in order to ensure that Welsh and English versions of consolidated and codified legislation have the same status.

Sections 5-8

3. I provided comments in my response to the Counsel General on sections 5-8. I generally welcome these sections and I have no comments further to my original comments.
4. However, I would like to draw particular attention to my comments on Section 7.

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 comments⁵ in the summary of responses to the Counsel General's consultation but I would welcome that further

⁴<http://www.senedd.cynulliad.cymru/documents/s82900/CLA5-02-19%20%20Papur%20%20Saesneg%20yn%20Unig.pdf>

⁵<https://beta.gov.wales/sites/default/files/consultations/2018-08/summary-of-responses-legislation-bill.pdf>

consideration is given to this either in the legislation or in guidelines or provisions resulting from the Bill.

5. I provided evidence to the Counsel General's Consultation on the following matters that are raised in the Bill's Explanatory Memorandum (EM):
- use of Welsh translation of enactments and bodies which do not have Welsh language titles or names (82-87 of the EM)
 - interpretation of bilingual legislation and the relationship between Welsh and English versions of legislation (76-77 of the EM)
 - arrangements for publishing Welsh law and the process of making and organising statutory instruments (e.g. 79-81 of the EM)

The Government states its intention to give further consideration to these matters. I note this explanation in the explanatory memorandum and welcome the intention to give further consideration to these matters.

Potential barriers to the implementation of the provisions and whether the Bill takes account of them

6. In the assessment of the effect of the Bill on the Welsh language the explanatory memorandum states that the Bill will have 'a positive impact on those wishing to use the Welsh language as a language of law, for example legal professionals, the judiciary, academics and court users wishing to conduct court proceedings in the medium of Welsh.' I welcome this. I should state however that I foresee that the process of implementing the programme to improve the accessibility of Welsh legislation in Welsh and English will require linguists and lawyers who have high level skills in their fields of work in both Welsh and English. I would encourage the Welsh Government to discuss with Welsh universities, the Coleg Cymraeg Cenedlaethol and relevant organisations from the field of law, such as the Law Society and the judiciary 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.

I hope that these comments will be of help as you scrutinize the Legislation (Wales) Bill. You are welcome to contact me if you require further explanation of the points raised.

12/06/2018

Dear Jeremy Miles AM,

Thank you for the opportunity to respond to your consultation on the Draft Legislation (Wales) Bill. I responded to the *Interpreting Welsh legislation Consultation Document: Considering an interpretation Act for Wales in 2017*⁶. My response to this consultation echoes the spirit of that response. My officers also provided detailed comments to the Chief Jurilinguist on the draft translation of Schedule 1 of the Interpretation Act 1978. I also responded to the Law Commission's consultation document on the *Form and Accessibility of the Law Applicable in Wales*⁷ which addresses many of the matters covered in the draft legislation. In light of these responses, I welcome the introduction of this Bill that facilitates the use of the Welsh language in Welsh legislation. It represents an important step towards recognising the equal status of Welsh and English in legislation, as laid out in section 156 of the

Government of Wales Act 2006. I will not respond to every consultation question but will focus mainly on the sections that are most relevant to the Welsh language.

1. Welsh Language Commissioner

- 1.1 The principal aim of the Commissioner in exercising her functions is to promote and facilitate the use of the Welsh language. In doing so the Commissioner will seek to increase the use of the Welsh language with regard to the provision of services, and via other opportunities. In addition, she will also address the official status of the Welsh language in Wales and, by imposing standards, place statutory duties on organisations to use the Welsh language. One of the Commissioner's strategic aims is to influence the consideration given to the Welsh language in legislation, as is the case here. Further information on the Commissioner's work can be found on the website: comisiynyddygybraeg.cymru.

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<http://www.comisiynyddygybraeg.cymru/English/Publications%20List/20170817%20LI%20S%20Ymateb%20i'r%20ymgyngoriad%20ystyried%20Deddf%20dehongli%20i%20Gymru.pdf>

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<http://www.comisiynyddygybraeg.cymru/English/Publications%20List/20151002%20S%20DG%20Ymateb%20Comisiynydd%20y%20Gybraeg%20i%20Ffur%20a%20Hygyrchedd%20y%20Gyfraith.pdf>

Part 1 – Accessibility of Welsh law – Questions 1 and 2

- 2.1 Chapter 1 of the consultation document outlines the Government's aim to legislate to impose a duty on the Counsel General to keep Welsh law under review. The Counsel General would be required to do this when the Welsh Ministers are considering whether to propose new legislation. Additionally, for each Assembly term, the Welsh Ministers and the Counsel General would be required to develop and implement a programme of activity designed to improve the accessibility of Welsh law. Furthermore, the Bill would require each programme to make provision to consolidate and codify Welsh law; maintain codified law and to facilitate the use of the Welsh language. Consolidating the law, improving publication arrangements and providing more commentary on the law in both languages are some of the elements which would facilitate use of the Welsh language according to the consultation document. Other possible elements include producing more legal glossaries and developing agreed terminology. This, in particular, would be a very positive development, not only in terms of facilitating the process of legislating in Welsh but also in terms of teaching and administering the law through the medium of Welsh. More detailed commentary on terminology can be found in my response to the Law's Commission's consultation on the *Form and Accessibility of the Law Applicable in Wales*.⁸
- 2.2 Based on the above, I welcome the proposal to impose a duty on the Welsh Ministers to keep Welsh law under review and that any review programme must make provision to facilitate use of the Welsh language. In my response to the Law Commission's consultation document on the *Form and Accessibility of the Law Applicable in Wales*, I expressed my view that consolidating and codifying legislation would benefit the Welsh language. The consultation document also notes that the law will be consolidated and then codified in both languages. Therefore, I also welcome the proposal that

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<http://www.comisiynyddygybraeg.cymru/English/Publications%20List/20151002%20S%20DG%20Ymateb%20Comisiynydd%20y%20Gybraeg%20i%20Furf%20a%20Hygyrchedd%20y%20Gyfraith.pdf>

each programme to improve the accessibility of Welsh law would make provision to consolidate and codify Welsh legislation.

2. Part 2 – Statutory interpretation of Welsh law

2.1 Question 6

3.1.1 Question 6 asks for comments on what has, or has not been, included in Schedule 1 to the Draft Bill. I understand from the consultation document that the Bill includes a limited number of words and expressions which are only cross-references to other Acts. You argue that this although not ideal can on occasion be the best way to define a word or expression .

3.1.2 I understand that section 5 of the draft legislation is generally equivalent to section 5 of the Interpretation Act 1978 and that Schedule 1 of the draft bill is equivalent to Schedule 1 to the 1978 Act but that some words and expressions have been omitted and included. I welcome the fact that there will now be Welsh language versions and definitions of words included in Schedule 1 to the 1978 Act, of course. On the whole, these words and expressions appear in legislation not enacted by the Assembly although they apply, of course, to Wales. Although I understand the desire to define only those terms which are essential or most useful, the criteria for including words and expressions in Schedule 1 to the draft Bill are unclear to me. For example, is there scope to consider including definitions in some acts that are specific to Wales? With respect to this, I refer to the term

'well-being', for example, which forms a crucial part of the Well-being of Future

Generations Act and has, as a result, developed a very specific meaning to Wales, but is also used elsewhere⁹. This was one of the terms I referred to in my response to the *Interpreting Welsh legislation Consultation Document: Considering an interpretation Act for Wales* as terms whose interpretation has proved to be crucial in order to ensure clarification, certainty and

⁹ See the Welsh Language Standards Regulations, e.g. http://www.legislation.gov.uk/wsi/2015/996/pdfs/wsi_20150996_mi.pdf

consistency in implementing the Welsh Language Measure and associated regulations.

2.2 Question 7

3.2.1 You ask whether we agree with the approach in section 7 that 'words denoting a gender are not limited to that gender'. I am unclear whether the current wording explains clearly enough that Welsh nouns also have a grammatical gender that is not equivalent to gender. I notice that in the Welsh language impact assessment you intend to make it clear that this rule does not apply to the gender of nouns. It would be useful to receive further information and examples with regards to this decision. For example, the Welsh word 'nyrs' (nurse) is feminine whilst the Welsh word 'meddyg' (doctor) is masculine. These Welsh words do not denote gender but rather the words themselves have a grammatical gender. However, there would be need to clarify that the grammatical gender of these words is not equivalent to the gender of those undertaking those roles. In much the same way, the gender of the noun 'Comisiynydd' is masculine, but currently many females fulfil the role of commissioner in a number of public bodies in Wales. Further considerations follow as well, the gender of the Welsh noun could influence the use of the suffixed pronoun, for example, and cause mutations following the prefixed pronoun depending on the gender of the noun. Section 8 of the draft legislation does consider this last point, however.

2.3 Question 8

3.3.1 You ask whether we agree with the proposed approach taken in section 8 of the Draft Bill. You explain that its intention is to 'put beyond doubt the application of the definition or meaning of the word... so as to avoid ambiguity in practice, and to facilitate more naturalistic drafting in both English and Welsh'. You explain that this applies to any mutations of a word or variations of an expression arising due to rules about word order and sentence structure. I welcome this proposed approach as it acknowledges variations of Welsh words (such as mutations) and would therefore facilitate Welsh language drafting and interpretation.

3. Part 3: Other matters which could be addressed – Question 23

4.1 You ask in question 23 whether we have any views on some of the other matters that you have considered during the development of this Draft Bill which could be addressed by way of future legislation. I refer below to matters which apply to the Welsh language.

4.1 You state that you considered the desirability of restating section 156 of the Government of Wales Act 2006 which concerns the equality of the Welsh

language and English language texts of bilingual legislation. I would endorse steps to restate this provision in the legislation as it naturally complements the nature of the Bill and would highlight the importance of equality between texts. I understand the difficulties outlined in the consultation document and I encourage you to continue to investigate appropriate mechanisms to enable the restatement of section 156 of the Government of Wales Act 2006 within this draft legislation.

- 4.2 You state that you are considering arrangements for publishing the law and that legislation.gov.uk is being updated in this respect, but that there is no mechanism in place to update Welsh language texts. In order to ensure equality for Welsh language and English language legislation as provided by section 156 of the Government of Wales Act 2006, I believe that this matter must be addressed promptly. I am pleased to note that the Welsh Ministers intend to assess how existing arrangements could be modernised to reflect the needs of Wales and the digital age. It is important to ensure that the Welsh language is given due consideration in any future technological developments. In order to facilitate such future development, it is important that there exists a substantial corpus of bilingual texts (for example codes). For your information, I have published an advice note *Technology, Websites and Software: Welsh Language Considerations* which provides guidelines for designing bilingual software and information technology of high quality. I would recommend that you consider these guidelines as you develop new technologies that will facilitate access to Welsh law through the medium of Welsh and English.¹⁰
- 4.3 You devote a section to the relationship between the Welsh language and English language text of legislation. As you note, the Law Commission's report on the *Form and Accessibility of the Law Applicable in Wales* covers this matter in detail and I expressed my views in my response to the consultation document. I would be interested in learning more about your intentions with regard to considering whether action should be taken to further clarify the relationship between Welsh language and English language versions when interpreting legislation.
- 4.4. The consultation document discusses in detail the use of Welsh translations of enactments and bodies which do not have Welsh language titles or names as well as current practice and the recent change to the current practice. It also discusses the use of courtesy names for bodies and offices which are not established by statute and which do not have Welsh language names, and the names registered at Companies House or the Charity Commission for private companies and charities. I do not have strong feelings on these matters but it could be argued that the recent change to current practice (described in paragraph 229) is clearer in terms of the name of acts. The key

¹⁰ Available online at <http://www.comisiynyddygybraeg.cymru/English/ReportsGuides/Pages/Technology,-Websitesand-Software-Welsh-Language-Considerations-.aspx>

issue here is ensuring consistency, and providing further public guidance would be useful – especially if you were required to explain the citation system. I also welcome the reference to the potential of using technology to aid those who read online and I would encourage you to further consider this possibility.

- 4.5 I acknowledge, however, that it is more difficult to establish a consistent protocol in the context of naming bodies. As explained in paragraph 236, the current practice of using Welsh courtesy names for bodies such as the UK Parliament (known as “Senedd y DU” in Welsh) is well established, and it is unlikely that using the Welsh form would cause confusion. As a corollary, using technologically correct English names instead of the Welsh name in the middle of Welsh language text is more likely to disrupt the flow of the text. I should emphasise also that the practice established in legislation is bound to be adopted by solicitors and Welsh language authors in other contexts.

I trust these comments will be useful to you in developing the Draft Legislation (Wales) Bill.

CLA(5) LW09

Ymateb gan Comisiynydd Pobl Hŷn

Evidence from the Older People's Commissioner

Bill Deddfwriaeth (Cymru) - Tacsonomeg Ddrafft ar gyfer Codau Cyfraith Cymru

Yn y Dacsonomeg Ddrafft ar gyfer Codau Cyfraith Cymru a gyhoeddwyd yn ddiweddar gan Lywodraeth Cymru, mae'r ddeddfwriaeth a sefydlodd Gomisiynydd Plant Cymru a Chomisiynydd Pobl Hŷn Cymru wedi cael ei chategoreiddio dan y Cod 'Iechyd a Gofal Cymdeithasol'.

Fel y byddwch yn ymwybodol, mae pobl iau a phobl hŷn yn defnyddio ystod o wasanaethau cyhoeddus eraill y tu hwnt i iechyd a gofal cymdeithasol, gan gynnwys addysg, cyfiawnder, cyflogaeth a thai. Yn yr un modd, mae ein swyddfeydd yn gwneud swm sylweddol o waith y tu hwnt i iechyd a gofal cymdeithasol.

Rydym o'r farn y byddai'n fwy priodol ail-ddosbarthu'r ddeddfwriaeth a sefydlodd ein swyddi dan y Cod "Gweinyddiaeth Gyhoeddus" ochr yn ochr ag Ombwdsmon Gwasanaethau Cyhoeddus Cymru.

Er nad yw'r cod hwn yn effeithio ar ein gallu i gyflawni ein swyddogaethau statudol, mae'n bwysig dangos i'r rhai sy'n defnyddio'r Dacsonomeg, gan gynnwys y cyhoedd, bod ein gwaith yn ymestyn y tu hwnt i iechyd a gofal cymdeithasol.

Rydym yn gobeithio y byddwch yn ystyried ein barn wrth i chi ddatblygu'r Bil ymhellach ac edrychwn ymlaen at ei weld yn mynd drwy Gynulliad Cenedlaethol Cymru.

Gan i'r mater gael ei godi gan Suzy Davies AC ym Mhwyllgor Materion Cyfansoddiadol a Deddfwriaethol y Cynulliad, byddwn yn anfon copi o'r llythyr hwn at Gadeirydd y Pwyllgor er mwyn taflu goleuni wrth iddynt graffu ar y Bil.

Yn gywir,



Yr Athro Sally Holland
Comisiynydd Plant Cymru



Heléna Herklots CBE
Comisiynydd Pobl Hŷn Cymru

CC:

Mick Antoniw AC, Cadeirydd, Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol, Cynulliad Cenedlaethol Cymru

Sophie Howe, Comisiynydd Cenedlaethau'r Dyfodol Cymru

Meri Huws, Comisiynydd y Gymraeg

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi. Rydym yn croesawu galwadau yn Gymraeg.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding. We welcome calls in Welsh.

CLA(5) LW09

Tystiolaeth gan Gomisiynydd Pobl Hŷn Cymru a Chomisiynydd Plant Cymru
Evidence from the Older People's Commissioner for Wales and the Children's Commissioner
for Wales

Legislation (Wales) Bill - Draft Taxonomy for Codes of Welsh Law

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.

We hope that you will take our views into consideration when further developing the Bill and look forward to its progression through the National Assembly for Wales.

As the issue has been raised by Suzy Davies AM at the Assembly's Constitutional and Legislative Affairs Committee, we will be sending a copy of this letter to the Committee's Chair to inform their scrutiny of the Bill.

Yours sincerely,



Prof. Sally Holland

Children's Commissioner for
Wales



Heléna Herklots CBE

Older People's Commissioner for
Wales

CC:

Mick Antoniw AM, Chair, Constitutional and Legislative Affairs
Committee, National Assembly for Wales

Sophie Howe, Future Generations Commissioner for Wales

Meri Huws, Welsh Language Commissioner

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn
Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi. Rydym yn croesawu galwadau yn Gymraeg.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and
corresponding in Welsh will not lead to a delay in responding. We welcome calls in Welsh.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol
a Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW10
Ymateb gan Huw Williams-Geldards

Evidence from Huw Williams-Geldards

This is a submission in response to the Constitutional and Legislative Affairs Committee's call for evidence on the Legislation (Wales) Bill. This response has been prepared by Huw Williams¹ of this firm and represents his personal views on the provisions of the Bill.

The Committee has asked respondents 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)

This submission responds to these questions but focuses on four aspects of the Bill, namely (1) the activities to be included in programme to improve accessibility of Welsh law, (2) the form and status of the proposed codes, (3) the definition of "Wales" and (4) the powers proposed in Part 3 and particularly clauses 37 and 38 of the Bill relating to timing and the making of subordinate legislation and some aspects of the Regulatory Impact Assessment.

¹ Huw Williams is the Vice-chair of Geldards LLP and the Lead Partner, Public Law at Geldards. Prior to joining Edwards Geldard as it then was in 1987, he worked as an in-house lawyer in local government. His main areas of practice are planning, compulsory purchase and local government law and related subjects such as environmental law and highways. He has served on the Planning and Environment Committee of the Law Society from 2003 to 2016 and on the Wales Committee from 2003 to 2011 and from 2016 to date. He has served on the Board of the Legal Wales Foundation and the Legal Wales Conference Committee since 2002 becoming Chair in 2018. He was a member of the Welsh Minister's Independent Advisory Group on Planning in Wales 2011-12. He has served as a Trustee of the both the National Museum of Wales and the National Library of Wales and has been Company Secretary of the Wales Millennium Centre since 1998.

1. Programme to improve the accessibility of Welsh law

The provisions of Part 1 of the Bill and their legislative intent are to be welcomed and the commitment of the Government to pursue an active programme of consolidation and codification is to be applauded.

My only reservation that the nature of and ambition for, what might be encompassed within a codification or consolidation programme.

The Law Commission's Report on the Form and Accessibility of the Law Applicable in Wales² 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.

2. The Form and status of the proposed codes

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 QC³ 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.

² See paragraphs 3.5 – 3.15 discussing Legislative Procedures

³ See paragraph 9 of his written evidence

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,⁴ which stated that the Welsh Ministers envisaged secondary legislation and quasi legal material, such as statutory guidance should also stand 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 and orderly and thus accessible series of Codes.

The notion that a Code once assembled should enjoy a protected status that ensures that amendments to 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, although I note that in its response to Law Commission the Government noted that the Business Committee of the Assembly's decision to develop standing orders for consolidation bills.

For example, in my consultation response to the Law Commission's Report on the Form and Accessibility of the Law Applicable in Wales I commented:

I would support a solution that was based on the Standing Orders of the National Assembly. I envisage the Assembly by resolution declaring an enactment to be a "Code". The consequence of this could be that if a future Bill was presented and it was declared by the Presiding Officer to fall within the ambit of the "Code" then the Bill could only proceed by way of amendment to the Code unless the Assembly resolves to the contrary – possibly by way of a super majority, say 60%. The principle should surely be that once a subject is codified changes to the law should only be by means of amendments to the Code and that this principle is protected through the Standing Orders of the Assembly.⁵

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. For example, the legislation relating to compensation for the compulsory acquisition of land has, historically, been

⁴ See the Counsel General's final letter to the Law Commission <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2016/06/2017-07-19-Law-Commission-Final-Response.pdf>

⁵ Quoted at paragraph 4.16 of the Law Commission Report.

referred to as the “Land Compensation Code”, but there is scarcely another more striking example of an unsatisfactory, not to say chaotic, group of statutes that make up this Code starting as it does with the Lands Clauses Act 1845 (parts of which remain in force) with the most recent legislative interventions and amendments to be found in the Neighbourhood Planning Act 2017.

Turning to the Draft Taxonomy, I would comment that it represents a useful starting point, but I sense the ghost of executive devolution within the structure. Rather than see the accessibility programme wedded to an overall taxonomy from the outset, I would prefer to see further experience accumulated following the planning law pilot codification followed through with another major codification – Education law is the obvious example to my mind and a reform leading codification project, of which local government law is the clearest potential example. With three substantial codes in place then an overall taxonomy might then be suggested, with certain overarching and cross cutting topics such as administrative justice and lands powers sitting alongside but outside the major functional Codes.

Consequently, 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 area 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.

3. The definition of “Wales”

While I note that, perhaps understandably, the Bill has elected to maintain a definition of “Wales” by reference to the aggregate of the principal councils in the same way that “England” is defined, the Government’s consultation on the proposals for the Bill invited ideas as to how “Wales” might otherwise be defined. The response prepared by me and my colleague, Clare Hardy made the following suggestion, which I draw to the attention of the Committee:

We do not consider it satisfactory any longer that the country of Wales should only exist in law by means of a definition that makes it an agglomeration of its local government units. We suggest that Wales should be defined by an official map which should be:

- (a) *Prepared by and with the advice of the Ordnance Survey to a specified scale.*
- (b) *Made in, say, three duplicates, each sealed with the Welsh Seal and deposited with the National Library of Wales, the National Assembly and the National Archives respectively.*
- (c) *Made available digitally on the same basis as legislation.*

In conjunction with this seek an amendment of the Interpretation Act 1978 to define “Wales” for the purposes of UK and England and Wales legislation by reference to the official map.

4. Part 3 Miscellaneous

I am extremely pleased to see the provisions of Part 3 of the Bill.

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.

We are also pleased that clauses 37 and 38 will mean that secondary legislation can be prepared in a co-ordinated fashion that reflect the subject rather than the method by which the provisions must be made. In our consultation response to the Government we commented:

“... we recall the Welsh Government’s response to the Law Commission’s recommendations on codification which set out an aspiration for future Welsh Codes to contain, in addition to the primary legislation, the secondary legislation and quasi-legislation in the form of policy statements and statutory guidance. This approach, which we welcome in principle, does raise the question in our minds of whether specific powers may be required to bring secondary legislation into a codified format. Our reason for saying this is our concern about the way the format of secondary legislation is dictated by the procedure for its making with the resultant proliferation of instruments, orders, directions and so forth.

A striking example of this is the ten pieces of secondary legislation that were needed to introduce the system of nationally significant infrastructure permissions under the Planning (Wales) Act 2015 Part 5. The primary legislative provisions were framework powers and should, in our view, have given rise to a coherent secondary legislative code applying to these applications.”

5. Regulatory Impact Assessment

I note that a programme of consolidation and accessibility is estimated to cost approaching £3m pounds of an Assembly term. This is a not insubstantial sum and I recognise that the employment of additional lawyers to draft new versions of laws may not be viewed as a necessity especially when there so may other pressing calls on taxation income.

Nevertheless, the contribution that such accessibility programmes can make, over time, to the rule of law and the education of the citizen on the importance of clear well-drafted laws cannot be over-estimated and is literally beyond price.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol
a Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW11
Ymateb gan Y Comisiwn
Penodiadau Barnwrol

Evidence from Judicial
Appointments Commission

**The National Assembly for Wales' Constitutional and Legislative Affairs
Committee consultation on the general principles of the Legislation (Wales) Bill
- Judicial Appointments Commission (JAC) response**

I write on behalf of the Judicial Appointments Commission Board (JAC). The JAC is an independent body established in April 2006 to select candidates for judicial office in courts and tribunals in England and Wales and for some tribunals whose jurisdiction extends across the UK. We welcome the opportunity to respond to your consultation on the Legislation (Wales) Bill.

We do not feel that it is appropriate for us to respond to the consultation in detail, but we do wish to comment in general terms.

In JAC selection exercises for positions in Wales, we seek assurance that successful candidates can demonstrate an awareness of the distinctiveness of administration of justice in Wales, and either have an understanding of the particular requirements of Wales or have the ability to acquire it.

As a result, we are particularly aware of issues in relation to the divergence of the law pertaining in Wales from that applying in England (as noted in the Law Commission Report *Form and Accessibility of the Law Applicable in Wales*). An accessible source describing the law applicable in Wales is important for potential users of the courts and tribunals, those representing them and, indeed, for the judiciary. Currently the law in some areas is found in a wide range of National Assembly legislation, Westminster legislation and statutory instruments.

We therefore support any attempt to improve the accessibility of Welsh law and to organise it effectively. It seems reasonable to require this to be a statutory responsibility on the Welsh Government.

We also believe that the proposed measures would facilitate a more constructive assessment of the knowledge of Welsh law of candidates for judicial positions in Wales and be helpful to them in their preparation for selection exercises. It would also support those in judicial roles in Wales and ultimately benefit the quality of justice in Wales.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW12
Ymateb gan Cyfraith Gyhoeddus
Cymru

Evidence from Public Law Wales

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1. Public Law Wales (previously the Wales Public Law and Human Rights Association) is an organisation promoting, in Wales, discussion, education and research relating to public law and human rights and promoting expertise amongst lawyers practising in Wales in the fields of public law and human rights. This submission focuses on the general principles of the Legislation (Wales) Bill from the perspective of public administrative law and the administrative justice system in Wales.
 2. As the significant body of evidence to the Law Commission's initial consultation on the *Form and Accessibility of Welsh Law*, published responses to the current *Commission on Justice in Wales* and the *Counsel General's Consultation on the Draft Legislation (Wales) Bill* demonstrate, there is no question that people in Wales can find it difficult to access the law applicable to Wales, and to understand their rights (and also in some cases, their obligations) under it.
 3. The body of evidence in essence speaks for itself as to the need to make Welsh law 'more accessible, clear and straightforward to use' and we therefore support this general purpose of the Bill. In particular we highlight some examples from public administrative law research showing that at present people in Wales appear less likely to utilise statutory and common law rights to seek appeal and/or review of public body decision-making, when compared to their English counterparts, and that over time people from both Wales and England have been increasingly less likely to be legally represented when they do issue challenges:
 - a. The *Public Law Project* and *Dr Sarah Nason's submission to the Commission on Justice in Wales* provides evidence that rates of judicial review challenge originating in Wales per-head of population are consistently lower than in England (including across various English regions). The research also found that only 15% of litigants in judicial review cases in the Administrative Court in Wales who instruct Counsel are represented by Counsel based at chambers located in Wales. This research also found that 'regionalising' the Administrative Court has had no significant long-term impact on the involvement of solicitors

based in Wales in Administrative Court litigation.¹ The proportion of people representing themselves in civil (non asylum and immigration) judicial review claims in the Administrative Court (across England and Wales) has increased from 20% in 2007/08 to 37% in 2017/18. It should be noted here in particular that many (likely the majority) of judicial review claims are issued on the basis that a public body has failed to properly apply relevant law (these cases generally do not involve reconsideration of facts).

- b. Recent research by Shelter Cymru,² and by Salford University³ discloses that there are only two to four appeals to the County Court per-annum on a point of law relating to homelessness duties under the Housing (Wales) Act 2014. Judicial interpretation of the law here is limited to *obiter dicta* statements in English cases in the England and Wales Court of Appeal.
 - c. In various workshops involving a range of 'stakeholders' in the administrative justice system, the view has been expressed that people in Wales (especially the most vulnerable, and most likely to come into regular contact with administrative justice) are not aware of their rights, and most specifically not aware of their rights under Welsh law. There are particular difficulties in the field of education law. The research (which is still in its comparatively early stages) has found examples of statutory rights to redress (e.g., under housing law applicable to Wales) that are barely ever used.⁴
4. This is from the perspective of individuals, but there are also problems of accessibility, clarity and simplicity from the perspective of public bodies in Wales. The 2014 *Williams Commission Report on Public Service Governance and Delivery in Wales*, recommended that the Assembly: 'Review existing legislation to ensure that it simplifies and streamlines public-sector decision-making rather than imposing undue constraints on it or creating complexity;

¹ <https://beta.gov.wales/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf>

² As yet unpublished presented to Wales Housing Research Conference 10 January 2019:

³ A. Ahmed, M. Wilding, A. Gibbons, K. Jones, M. Rogers, I. Madoc-Jones (2018). Cardiff: Welsh Government, GSR report number

46/2018.

Available at: <https://gov.wales/statistics-and-research/evaluation-homelessness-legislation/?lang=en>

⁴ From research workshops under Nuffield Foundation funded research: Paths to Administrative Justice in Wales (Sept 2018 to Feb 2020): <http://www.nuffieldfoundation.org/paths-administrative-justice-wales> and see Sarah Nason, *Administrative Justice: Wales' First Devolved Justice System* (December 2018) <http://adminjustice.bangor.ac.uk/research-report.php.en>

and either repeal such provisions or clarify their meaning and interaction'.⁵ Welsh public administrative law can be difficult to navigate, both for individuals and for public bodies.

5. Public administrative law is often seen as a Cinderella area of law (and often barely seen as a system of justice at all) despite affecting more people, more regularly, than criminal justice.⁶ Administrative justice is also significantly devolved to Wales, in light of this the proposed taxonomy of Codes of Welsh Law, is significantly a taxonomy of Welsh public administrative law.
6. 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).⁷

Codification - the first step towards accessibility

7. 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, 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.
8. The Bill does not impose a duty to seek simplification of the law in terms of drafting styles, and indeed such a duty would likely be unrealistic given that legislation which has the most impact on ordinary people's lives (entailing a balance say between individual rights/interests and the broader public

⁵ Para [2.37] online at: <https://www.lgcplus.com/Journals/2014/01/21/d/r/x/Commission-on-Public-Service-Governance-and-Delivery-Wales.pdf>

⁶ See e.g., Nason (n 4) and Committee for Administrative Justice and Tribunals in Wales (CAJTW) in its 2016 *Legacy Report: Administrative Justice, A Cornerstone of Social Justice in Wales: Reform priorities for the Fifth Assembly* <https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>

⁷ Michael Adler, 'The rise and fall of administrative justice: A cautionary tale' 8(2) *Socio-Legal Review* (2012) and Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Palmer, Cornford, Marique and Guinchard (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016).

interest) may be necessarily complex. Likewise, as has been recognised by other evidence submissions, the Codes are not primarily directed at ordinary people, but at legal and other professionals.

9. Our concern here is that, again from research workshops/user feedback, attempts to simplify Welsh law (especially in the areas of housing and homelessness, and additional learning needs) have been used, or are proposed to be used, as justification for cutting advice and advocacy services. In the area of public administrative law, where there can already be a significant power imbalance between individuals and public bodies (to some extent actual, to some extent perceived), reduction in the availability of publicly funded suitably independent advice/advocacy services is especially detrimental. In many cases the system for seeking redress against public body decision-making only functions effectively because of access to independent intermediaries. Various evidence draws a correlation between access to affordable legal advice, the incidence of public law challenges and resultant improvements to public administration.⁸ 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.

Codes, cases and commentary

10. There is a notable dearth of academic and practitioner commentary on Welsh law. As Bargenda and Wilson-Stark have put it: ‘Welsh lawyers have a dearth of textbooks to look to for guidance when the law is unclear. Having “so many excellent textbooks” has been cited as a reason why codification is not needed in Scotland. The best textbooks provide accessible digests of the law which cut down the time needed to wade through all the primary sources.’⁹ Whilst a Code itself may not be particularly accessible to ordinary people, a modern clearly worded textbook (with the addition of online resources as is nowadays common) can prove crucial. However, the lack of incentive (and indeed the significant disincentive) for academics to develop

⁸ See e.g., L. Platt, M. Sunkin and K. Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (supp 2) *Journal of Public Administration Research and Theory* 243 and C. Hunter, D.S. Cowan, A. Dymond and S. Halliday, ‘Reconsidering Mandatory Reconsideration’ [2017] *Public Law* 215.

⁹ A. Bargenda and S. Wilson Stark, ‘The Legal Holy Grail? German lessons on codification for a fragmented Britain’ (2018) 22(2) *Edinburgh Law Review* 183.

textbooks on Welsh law, and to write commentaries for platforms such as the 'Law Wales' website has already been well-discussed.

11. On balance it may be that codification could catalyse an increase in academic commentary (less wading through primary sources is needed prior to developing an accessible commentary/critique). On the other hand, the presence of Welsh Codes 'might' be postulated as yet another disincentive for academics to devote time to analysing Welsh law (a possible reverse of Bargenda and Wilson-Stark's view of the Scottish position).
12. The lack of academic, and to an extent also practitioner, commentary is compounded by a dearth of case law where public administrative law duties under Welsh legislation are given clear, authoritative, independent and impartial judicial interpretation. Again, research is beginning to uncover an informal approach to public law dispute resolution in Wales, whilst this can reduce costs and lead to early and satisfactory resolution of issues for individuals and public bodies, a side-effect can be lack of transparency and binding future precedents.¹⁰
13. In the area of public administrative law, the main body of generally applicable legal principles are still to be found in the common law of England and Wales. *The Public Law Project and Dr Sarah Nason's submission to the Commission on Justice in Wales* (looking specifically at judicial review claims) notes:

'...any attempt to categorise [judicial review] claims precisely as turning on matters of Welsh law and/or devolved Welsh policy, was fraught with difficulties. This is significantly due to the nature of public administrative law, where the general principles - that public body decisions must be lawful, procedurally fair, and reasonable - stem from the common law of England and Wales. Whilst these common law principles have often been described as generalised principles of statutory interpretation, the precise significance of the relevant statutory provisions to the case at hand varies greatly. Judicial review claims rarely ever include just one ground, more often than not multiple common law grounds are argued (including illegality, procedural impropriety and irrationality), regularly accompanied by particular forms of statutory illegality - breach of the UK wide Human Rights Act 1998 or Equality Act 2010, or of a particular piece of EU law.'

¹¹

¹⁰ See references at (n 4).

¹¹ See (n 1).

14. The issue here, again as others have noted, is that 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.

Accommodating innovation and cross-cutting issues

15. As is understandable the proposed taxonomy of Codes is effectively based around the powers originally devolved to Wales as part of a culture of executive devolution. As envisaged consolidation ‘involves no or only minor amendments to the substance of the law consolidated’. On the other hand, it is stated that: ‘A “Code” of Welsh law would generally be published once some or all of the primary legislation on a particular subject...has been consolidated, or has been created afresh following wholesale reform’. It is not then clear how substantive amendments short of ‘wholesale reform’ could be accommodated. For example, researchers have proposed a possible Administrative Procedure Code for Wales, the contents of which would largely be a consolidation of existing duties applying to various public bodies in Wales, but still the creation of such a Code, either as a freestanding Welsh Code, or as a specific aspect of the proposed Public Administration (or Public Administration and Human Rights) Code, would be more than a minor amendment to existing law.¹² We have further comments to make about the proposed taxonomy at a more appropriate juncture, our point here is that there appears to be a grey area between minor amendments and wholesale reform, and it will be important to consider further how to accommodate issues, and make people aware of issues, that cut across various Codes.

Cultural change and collaboration

16. As the Explanatory Memorandum states, the success of consolidation and codification depends upon a cultural shift. Most importantly this evolving culture must be embraced by a range of ‘stakeholders’ including law-makers, legal professionals and other advice/advocacy providers, academics, and judges (to name a few). Rationalisation of the statute book only goes part of the way to improve the accessibility of law and facilitate people’s exercise of their legal rights. In this regard s.2(4)(a) of the Bill noting that the programme ‘may also include proposed activities – (a) that are intended to promote awareness and understanding of Welsh law’ is especially important. The success of Welsh Codes in improving the accessibility of law for ordinary people (and in facilitating exercise of their rights) will depend largely on initiatives to promote awareness and understanding, significantly through

¹² See e.g., S. Nason and D. Gardner, ‘The Administrative Court and Administrative Law in Wales and Comparative Perspectives’ (in *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press 2017)) and David Gardner, ‘An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome’ (2018) *Statute Law Review*.

the production of user-friendly materials (by academics, legal professionals, 3rd sector and others) that; bridge the gap between statutory language and everyday understanding of the law/rights, raise awareness of issues cutting across Codes, and provide additional reference to and interpretation of common law precedents. 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.

Proposals to strengthen the Bill

17. In light of the points we raise we suggest some possible proposals to strengthen the Bill. In its 2011 Legacy Report, at the end of the Third Assembly, the Children and Young Persons Committee remarked that, 'Wales is policy rich but implementation poor'.¹³ 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.
18. We also suggest that in preparing a programme to improve accessibility of law, Ministers be required to state key priority areas, for example research has highlighted that the accessibility of education law applying to Wales is a major concern and can negatively impact achievement of other policy priorities in particular relating to children's rights.
19. As we have noted, success in improving accessibility will likely depend heavily in practice on the programme of activities that are intended to promote awareness and understanding of Welsh law. In order to strengthen this aspect of the Bill, and to redress concerns around disincentives for academics to produce materials on Welsh law, 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.
20. As the Explanatory Memorandum notes: 'In preparing a programme it will be important to take the views of the public. The main purpose of such an exercise would be to ensure focus on those areas of law most in need of consolidation and which have most impact on users of legislation (be they public bodies, business or the citizen). It is anticipated that a programme will

¹³ Para [179].

be prepared in draft and consulted upon, before being agreed by the Welsh Ministers and Counsel General and laid before the National Assembly'. This provides an opportunity to identify the key priority areas (as we have referred to in our para 18). However, we note also that 'the approach to consultation will be a matter for the Government of the time'. Consideration could be given to making specific reference to consultation within the Bill itself. In particular that when preparing a programme Ministers be required to consult with a specified body (or bodies) representing the legal professions in Wales, universities, public authorities and third sector organisations.

