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Welsh Government

Welsh Government
Consultation Document

Draft Legislation (Wales) Bill

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Overview

This document sets out the Welsh Government's proposals to improve the accessibility and statutory interpretation of Welsh law, and seeks views on the Draft Legislation (Wales) Bill.

How to respond

Please send your written response to the address below or by email to the address provided.

Further information and related documents

Large print, Braille and alternative language versions of this document are available on request.

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Foreword by the Counsel General

Law is a fundamental component of a civilised society, a society which is fair, prosperous and well-ordered. It sets out our rights and responsibilities. It is the means by which we achieve justice. It restricts the arbitrary exercise of power and ensures that governments are accountable to the people they serve.



In Wales both the UK Parliament and the National Assembly for Wales legislate. We take the process of law making very seriously. We invest considerable time and effort formulating ideas, taking the opinion of others, debating and drafting and passing laws that are as clear and precise as they can be.

But, as with the other three legislatures in the United Kingdom, once legislation is passed by the National Assembly, it enters a vast and confusing labyrinth of law which is difficult for lawyers and the public alike to comprehend. The United Kingdom statute book contains nearly 5,000 Acts and more than 80,000 Statutory Instruments. In fact the statute book is not a 'book' at all. It has no index and little structure, organised by reference to when each new law is made not by reference to what it contains. And it is constantly changing.

The complexity and inconsistency of the UK's constitution adds to the challenge of accessing and understanding the law. Domestic laws derive from four different legislatures and four different governments. They may apply to the UK as a whole, to Scotland only, to Northern Ireland only, to Wales only or to England only (or to various combinations of each). Further, the single legal jurisdiction of England and Wales means that there is strictly speaking no body either of "Welsh" law or indeed of "English" law.

We are fortunate to live in an information age. People in Wales rightly demand and have access to knowledge on the matters that concern our lives. Many of us can access information easily, online at our

convenience. Advances in digital technology and artificial intelligence should mean that accessing and understanding the law is easier than it has ever been before. But it is not.

All of the law is available online, but the 2 million or so people who visit the legislation.gov.uk website every month may not find what they need. This is because it requires expertise in navigating the patchwork of primary and secondary legislation likely to be relevant and making sure that it has been updated to reflect the frequent changes made to legislation. In practice, anyone who wishes to know the current state of the law in a way which is both reliable and authoritative must pay commercial publishers for this service; a service that is expensive and which is not currently available in Welsh.

These are not issues which impact just on the lives of lawyers. They impact upon the way we are governed, as people find it hard to understand who is responsible and accountable for what; they impact upon the economy, as those who do business need to know how they are regulated; and most fundamentally of all, they affect each of us as citizens who need to be able to better understand our rights and responsibilities under the law – and this at a time when cuts in legal aid already seriously hinder access to justice.

So – for reasons of social justice, democracy and efficacy – making our laws more accessible is essential. The process will take years and some problems will need to be tackled across the UK, working together with other governments and legislatures. But here in Wales we have made a start, and have made a long term commitment to do things differently and better. We in the Welsh Government propose to rationalise Welsh law and make it afresh bilingually by consolidating existing legislation within devolved areas. We then want to organise it by creating readily accessible codes of legislation on particular topics, and keeping the codes updated over time.

Because this will take many years to complete, we intend to take the unusual step of imposing a duty on future governments to maintain rolling programmes setting out what they intend to do to improve access

to Welsh law. While the main focus will be on consolidating and codifying the law, we must also make efforts to improve publication of the law, commentary on the law, and to facilitate use of Welsh in the law.

As part of our wider effort to improve access to legislation and to take responsibility for the growing body of Welsh law within the emerging Welsh legal jurisdiction, we also propose to legislate for how Welsh law is to be interpreted. Acts on how to interpret legislation are used by each of the other UK legislatures and by most Commonwealth jurisdictions to simplify and shorten the statute book. This is done by setting out technical rules and common definitions once, so that they don't have to be repeated each time a new law is drafted. It is now time for us to take that step in Wales.

We must take responsibility now for the laws we have inherited and the laws that we make, and ensure that they are clear, certain in their effect and accessible to our current and future generations. The proposals in this consultation document are an essential step on that journey.

JEREMY MILES AC/AM
Cwnsler Cyffredinol Cymru
Counsel General for Wales

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PART 1: ACCESSIBILITY OF WELSH LAW

1. The Welsh Government is consulting on a Draft Legislation (Wales) Bill. Part 1 of the Bill is concerned with accessibility of Welsh law, and Part 2 deals with the statutory interpretation of Welsh law (the background to statutory interpretation and an explanation of the provisions of Part 2 of the Bill is provided in Part 2 of this paper).
2. In this Part, Chapter 1 explains some of the reasons why the law is inaccessible, and begins to consider how accessibility can be improved. Chapter 2 sets out the proposals contained in the Legislation (Wales) Bill.

Chapter 1: Accessibility of Welsh law

Introduction

3. Concerns have been raised for many years about the complexity of the law in the United Kingdom and the disorganised state of our vast and sprawling statute book. Much of the complexity derives from the proliferation of laws that has developed over recent decades in the UK. The UK statute book is now vast and unmanageable.
4. This is a problem caused not only by the sheer volume of primary, secondary and quasi-legislation, but also because that legislation is amended, re-amended and re-made in inconsistent ways over time. The law, therefore, is difficult for lawyers to navigate let alone the affected citizen. In introducing this issue under a recent initiative to develop “Good law” the United Kingdom Office of the Parliamentary Office put it as follows:

People find legislation difficult. The volume of statutes and regulations, their piecemeal structure, and their level of detail and frequent amendments, make legislation hard to understand and difficult to comply with. That can hinder economic activity. It can create burdens for businesses and communities. It can obstruct good government, and it can undermine the rule of law.

5. The citizen struggles to find the law. Citizens must be able to find and understand the law with reasonable ease so they can enjoy the benefits, and respect the obligations, that the law confers or imposes on them. Given that access to justice more generally, notably through state funded legal advice, is under such threat, ensuring that people have a fighting chance of understanding the law is vital. It goes to the heart of a nation governed by the rule of law.

6. A clear, certain and accessible statute book is an economic asset. It gives citizens and those who wish to do business a more stable and settled legal framework. This in turn should help investment and growth, while still maintaining appropriate regulation.
7. These problems are particularly acute in Wales. Although the position is changing rapidly and there is a growing body of law made by the National Assembly for Wales and the Welsh Ministers, most of the laws that apply to Wales apply also to England or to Great Britain or the UK as a whole. Our laws have in most part been inherited from the UK Parliament and do not, therefore, generally reflect the nation's political and constitutional position as it is today.
8. Some of the complexity derives from there being no formal body of Welsh law; strictly speaking we should not speak of "Welsh law", but of the laws of England and Wales – known by most of course as "English law". The absence of a Welsh legal jurisdiction (and associated body of law), therefore, is part of the reason why the legal landscape is confusing.
9. The UK constitution, coupled with the process of devolution of powers, has therefore made things even more complicated. The incremental and piecemeal approach to devolution of power, has led to confusion over where responsibilities lie. As an obvious example many powers conferred upon the Secretary of State by Acts of Parliament have now been transferred to the Welsh Ministers, but this is generally not apparent from the wording of the Acts themselves, making it appear that power continues to lie with the Secretary of State. Determining where the line is drawn between a matter that is devolved and a matter that is not, is considerably more difficult in Wales even than is the case in Scotland and Northern Ireland due to our more narrow and complex arrangements.
10. Naturally, the UK's withdrawal from the European Union is likely to compound this problem. The exercise of incorporating law designed as international law, and based primarily on the creation of the single market, into domestic law will further exacerbate the problem of inaccessible law. Although the position remains unclear (not least because much depends on the nature of the UK's future relationship with the EU), the most likely scenario is that European law will have to be domesticated quickly and by the most expedient means possible. This would leave the statute book even more inaccessible unless further action is taken to rationalise the law.

Improving access to Welsh law

11. At the Welsh Government's request the Law Commission of England and Wales included a project in their Twelfth Programme of Law Reform considering the "*Form and Accessibility of the Law Applicable in Wales*". In its concluding report published in June 2016 the Law Commission made 32 recommendations, nearly all of which have been accepted or accepted in principle by the Welsh Government.
12. At the heart of the Commission's report, and central to the task of making Welsh law more accessible, is the need to consolidate and subsequently codify Welsh law.
13. The Law Commissions (of England and Wales and of Scotland) were created in the 1960s partly because of increasing concerns about the complex nature of the statute book. In explaining the rationale for creating the Commission (and for promoting what became the Law Commissions Act 1965), Sir Eric Fletcher, Minister without Portfolio, submitted to the UK Parliament¹ that:

One of the hallmarks of a civilised society is that its laws should not only be just, but should be up to date, accessible and intelligible. The state of our law today does not satisfy those requirements.

14. Despite these good intentions the statute book was not codified. Nor did the consolidation of legislation keep pace with the rapidly expanding statute book. In fact progress of law reform has now slowed and the statute book has continued to proliferate. Despite their only brief existence as a legislature and government, the National Assembly has passed 56 Measures or Acts since 2007 and the Welsh Ministers have made nearly 4,500 statutory instruments since 1999 – though this represents only a small fraction of the UK statute book.
15. The Law Commission and Welsh Government are very conscious of this. In making its recommendations the Commission was aware that existing systems were not working as they should to protect the system of statute law as a whole, and that these problems are particularly relevant in Wales due to our history and the nature of our system of devolution. The Welsh Government and Law Commission are clear 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. It was for these reasons, therefore, that the Law Commission recommended that:

¹ Hansard HC 8 February 1965 vol 706 cc47–158.

The Welsh Government should institute regular programmes of codification (Recommendation 14); and

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

The Welsh Government accepts both recommendations.

16. We propose that these recommendations of the Law Commission be implemented by Part 1 of the Draft Legislation (Wales) Bill, which requires all future governments to develop programmes to improve access to Welsh law. Chapter 2 of this consultation paper sets out the proposals in further detail.

Chapter 2: Proposals in Part 1 of the Legislation (Wales) Bill

Duty to keep accessibility of Welsh law under review

17. In order to inform the process of making Welsh law more accessible, section 1 of the Draft Bill requires the Law Officer for Wales, the Counsel General², to keep Welsh law under review. This is similar to, and intended to supplement (not replace), the obligation on the Law Commission under section 3(1) of the Law Commissions Act 1965.
18. For Welsh law to be accessible it needs to be clear and certain in its effect, as well as being easily available and navigable. This needs to be the case not only in respect of individual provisions of Acts or Statutory Instruments, but also as regards Acts and Statutory Instruments collectively – all of the law on a particular subject and the statute book as a whole.
19. In the UK considerable resource and expertise has traditionally been devoted to specific legislative projects, especially the development and drafting of primary legislation. There is an understanding of the importance of the rule of law, and the need to ensure that all new law is legally precise and understandable. There is, however, less focus on statute law collectively and the long-term impact each change in the law has on the statute book more generally. As stated by the UK Parliamentary Counsel's Office in a report instigated as part of its "good law" initiative³:

...pieces of legislation need to be regarded not just as documents in their own right, but as parts of a larger mosaic of legislation. It is the aggregate to which the user will have access to.
20. It is also envisaged that the Counsel General's obligation to keep the accessibility of Welsh law under review will be relevant when the Welsh Ministers are considering whether to propose new legislation. In such situations regard should be had to how the approach taken to legislating could impact upon the accessibility of the law. This does not, however, mean that the Welsh Ministers would have to legislate in a particular way in any individual case.

² The Counsel General is a member of the Welsh Government, appointed by Her Majesty upon the recommendation of the First Minister under section 49 of the Government of Wales Act 2006. The Welsh Government is made up of the First Minister, the Welsh Ministers, the Counsel General and Deputy Welsh Ministers (see section 45 of the Government of Wales Act 2006).

³ Office of the Parliamentary Counsel (2013) 'When laws become too complex – review by the Office of the Parliamentary Counsel into the causes of complex legislation'

21. Although resolving the issues will require collective effort within the National Assembly, the Welsh Government and beyond, we propose that the Counsel General be given the responsibility of overseeing the accessibility of Welsh law as a whole. This would enable a long term focus to be brought to what will need to be a long term effort to bring order to Welsh law and make it more accessible.

Programme to improve accessibility of Welsh law

22. Section 2 of the Draft Bill proposes that for each Assembly term⁴ the Welsh Ministers and the Counsel General must develop and implement a programme of activity designed to improve the accessibility of Welsh law.
23. Although the specific content of a programme will be a matter for the Welsh Ministers and the Counsel General, the Bill requires each programme to make provision to consolidate and codify Welsh law, maintain codified law and to facilitate use of the Welsh language.

Consolidating the law

24. A progressive, systemic exercise of consolidating the law over the long term is essential in order to modernise existing law bilingually in Assembly Acts. Consolidating the law generally involves bringing all of the law 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 there is an added dimension to consolidating the law. This is because consolidating the law will involve for the most part re-enacting laws previously made by the UK Parliament. This process has the added benefits, therefore, of clearly demarcating the law as Welsh law as it would be made by the National Assembly in both official languages. It would also assist in the complex process of understanding which topics of law are within the legislative competence of the National Assembly.

Codifying the law

25. The Welsh Government's vision of codifying the law involves bringing structure and order to the statute book, organising and publishing the law by reference to its content and not merely when it was made. A "Code" of Welsh law would generally be collated once all of the applicable law on a particular subject⁵ has

⁴ An Assembly term means the period from an Assembly being formed after a Welsh general election to dissolution prior to the following general election.

⁵ Subject to the limitations of the legislative competence of the National Assembly, and to the working practices we will develop for dealing with provisions that could fall within more than one subject.

been consolidated, or has been created afresh following wholesale reform. The existing hierarchy within, and delineation between, the legislative instruments (primary and secondary legislation, and guidance or other similar documents made under the Acts or subordinate legislation) will remain. All the legislation within a Code will be made in both English and in Welsh.

26. Therefore a code would not (generally) be one document but rather a collection of enactments under a unifying overarching title. The documents which make up the Code will be made available together. The Code is not intended to be a legal instrument in its own right but rather a means of collating the law more effectively.
27. A Code may consist of one or more “principal” Acts which set out the primary law on one or more coherent parts of the subject matter of the Code (or in the case of a Code made up of one principal Act, all of it). So a large Code of law on, say, education is likely to be made up of three or four principal Acts, (for example on Schools, Further Education and Higher Education), many sets of regulations as well as accompanying quasi legislation (or ‘soft’ law). The key point, however, is that unlike today there will be considerably fewer documents and they will be published together (with the relationship between each made clear).
28. In future, therefore, in consolidating or making new law the Welsh Government should have an overall plan for the eventual structure of a Welsh statute book organised by codes on particular topics.
29. References here to “codifying” the law mean, generally speaking, the codification of statute law. Although a bill that codifies statute law may incorporate the effect of case law on the meaning of the legislation being consolidated and codified, or rules of common law that are closely related to that legislation, we do not intend to undertake wholesale codification of the common law.
30. 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, therefore, even after it has first been consolidated be revisited periodically in order to ensure that it remains well ordered and accessible. It also means maintaining the structure – not the content, which will always change in accordance with policy and political wishes – of the law. Once consolidated and codified, therefore, we should only move away from the new structure in exceptional circumstances.

Facilitating the use of Welsh language

31. In 1999 the first laws were made in Welsh for several centuries. In the 18 years since then, more and more law has of course been made bilingually. It remains, however, novel and a large proportion of the laws that fall within devolved competence still exist in English only. Considerable effort is made to produce law bilingually and while evidence suggests that a significant proportion of those accessing the law⁶ do so in Welsh, more needs to be done to assist those who wish to use the language.
32. Another requirement for the programmes, therefore, is that in improving the accessibility of the law steps will be taken to facilitate use of the Welsh language in the law, in public administration and more generally. A key aspect of this will be consolidating the law bilingually so that much more of the law for which the National Assembly and Welsh Government are responsible for is made in Welsh. Similarly, improving publication arrangements and providing more commentary on the law in both languages will make it easier for Welsh to be used in the law and in public administration more generally in Wales. Other projects in a future programme could include making more glossaries for legislation available and further initiatives to develop agreed terminology where this is helpful.

Other matters which may form part of a programme

33. Section 2 of the Draft Bill also envisages that each programme will include proposals to promote Welsh law for example by raising awareness of significant changes in the law or the existence of Welsh law more generally.
34. The Welsh Government hosts a website, Cyfraith Cymru/Law Wales⁷, which provides information about Wales' constitutional arrangements and law made in Wales. This website also provides links to some of the primary and subordinate legislation published on the legislation.gov.uk website of The National Archives. The Welsh Government wishes to further develop this website, and over the long term intends to use the website as a method for displaying the Codes of Welsh law. Future programmes aimed at improving accessibility of Welsh law could include projects to increase the explanatory material available via both the Cyfraith Cymru/Law Wales website, and working with The National Archives

⁶ Statistics provided in 2015 by The National Archives to the Constitutional and Legislative Affairs Committee's inquiry, *Making Laws in Wales*, showed that 19% of visits to Acts and Measures of the Assembly on legislation.gov.uk between October and December 2014 were to the Welsh language texts.

⁷ Accessible at: <http://law.gov.wales/?lang=en>

to ensure the information they publish is available bilingually and in an up-to-date form⁸.

35. The Welsh Ministers and the Counsel General may also include other activities in a programme should they consider that they will make Welsh law more accessible. This may include entering into arrangements with the Law Commission, as is the case now, to pursue projects of reform that will improve accessibility.

Preparing a programme

36. As noted above, there must be a programme designed to improve the accessibility of Welsh law prepared for each term of the Assembly, and that programme must be laid before the Assembly within six months of the appointment of the First Minister following a general election. This ensures that each government is accountable for what its programme has achieved over an Assembly term.
37. Although a new government is not required to inherit the programme of the previous government at the beginning of an Assembly term, in practice, projects from one programme will almost certainly continue until the next programme is prepared and laid, and there is nothing to prevent projects from an earlier programme appearing in a subsequent programme where the timeframe for completing such a project requires that. This is important, as we anticipate that some of the individual projects will be long term in nature, and could take more than one Assembly term to complete.
38. 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 be prepared in draft and consulted upon, before being agreed by the Welsh Ministers and Counsel General and laid before the National Assembly.
39. Whilst the approach to any consultation will be a matter for the Government of the time, it is interesting to note a recent consultation undertaken by the New Zealand Parliamentary Counsel Office, on behalf of the Attorney General, on a proposed revision programme for the new Parliament⁹ ('revision' being the term used in New Zealand for consolidating the law). That consultation set out the

⁸ Primary responsibility for the day-to-day publication of legislation will remain with The National Archives.

⁹ Available at: <http://www.pco.govt.nz/revision-consultation-2018/>

projects which would be undertaken during the period of the programme together with the grounds for proposing the projects.

40. Section 2(7) of the Bill requires the Counsel General to make periodic reports to the National Assembly on progress against the programme. Such reporting could be made through a statement to the Assembly, which would enable Assembly Members to ask questions of the Counsel General on the report.
41. A programme set out at the beginning of the Assembly term may need to be varied during that term. New projects could be added, or perhaps existing projects removed if they were found not to be suitable for consolidation in light of related legislative reform. Section 2(6) of the Draft Bill provides that the Welsh Ministers and Counsel General may revise a programme during the Assembly term, but that revised programme must be laid before the National Assembly and again reported against.

The need to legislate

42. We are conscious that there is a certain paradox in legislating to impose a duty to make Welsh law more accessible. This is because one of the means of making law more accessible is that there should be less of it and we should not in principle produce new law where this is not necessary.
43. The concept of imposing a duty of this sort on government is inspired in part by the Law Commissions Act 1965. Also relevant were conclusions drawn more recently by the New Zealand Law Commission, which considered similar issues under the stewardship of Sir Geoffrey Palmer QC, a constitutional lawyer and former Prime Minister and Attorney General. In its 2009 report *Presentation of New Zealand Statute Law* the Law Commission of New Zealand, working in conjunction the Parliamentary Counsel Office, concluded:

...that to make a real difference to the accessibility of the New Zealand statute book it is essential that a systemic programme of revision of the statute book be undertaken.

44. Their Commission went on to recommend that the Attorney General should be placed under an obligation to put in place a long term programme of revision (or consolidation) of the law, something which was eventually implemented by section 30 of the Legislation Act 2012. New Zealand took this step because by comparison with other Commonwealth jurisdictions (or indeed with those jurisdictions with long traditions of codifying the law) their statute book had become large, complex and unwieldy. In Canada and Australia, for example, since inheriting legislation of the UK Parliament as dominion states, each

jurisdiction has to a greater or lesser extent rationalised its legislation and periodically undertaken wholesale, systematic consolidation.

45. For its part the Law Commission (of England and Wales) was conscious that existing systems within the UK for facilitating or encouraging rationalisation of the statute book had not been successful. It was also, no doubt, conscious that with the limited resources available to the Commission itself would not be available to undertake significant consolidation of the law on the Welsh Government's behalf. Something different was, therefore, required. It is for those reasons that the proposal to impose an obligation on all Welsh Governments to codify the law was made.
46. The process of incorporating European law into domestic law with the necessary changes will be resource intensive, and will for obvious reasons be a priority. Similarly it is clear also that the Welsh Government's programme of legislative reform will take precedence over efforts to improve access to Welsh law. The task of maintaining a long term focus on programmes to improve access will, therefore, be difficult. However, it is clear also that investment now in the Welsh statute book will lead to substantial social benefits and efficiency gains over time. Making the law accessible is not only the right thing to do, but also has clear economic and financial rationale. It is something that is necessary to do to prepare for the challenges we face.

Question 1: Do you agree that it is necessary to impose a statutory obligation on future governments in Wales in order to improve accessibility of Welsh law?

Question 2: If so, do you agree with the approach taken in Part 1 of the Draft Bill to impose such an obligation?

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PART 2: STATUTORY INTERPRETATION OF WELSH LAW

47. In this Part of the paper we set out the proposals contained in Part 2 of the Legislation (Wales) Bill, which are concerned with statutory interpretation.
48. Statutory interpretation is the process of determining the meaning and effect of legislation, and how it operates – which can be a complex process. Acts prescribing rules on how laws are to be interpreted are a typical feature of legal jurisdictions across the common law world. Their purpose is to shorten and simplify legislation and promote consistency in its language, form and operation. All of the legislation applying in Wales is presently interpreted by reference to an Act of the UK Parliament, the Interpretation Act 1978 (the 1978 Act).
49. In this Part, Chapter 1 explains why the Welsh Government is considering legislating for Wales, and sets out the legislation to which a new interpretation Act for Wales would apply. Chapter 2 provides a section by section explanation of Part 2 of the Bill, and asks a number of detailed questions on specific sections.

Chapter 1: Application of Part 2 of the Legislation (Wales) Bill

Background

50. Since 1850 when the first Interpretation Act was passed by the UK Parliament¹⁰, most if not all legislatures have made statutory provision on how their legislation is to be interpreted. There is, therefore, an Act of this nature that applies to legislation in, for example, Scotland and Northern Ireland, and at federal and state or provincial levels in Australia and Canada. Wales, by contrast, does not have its own Act.
51. As observed in the Welsh Government's policy consultation held in 2017¹¹, the 1978 Act is nearly 40 years old and is not as clear and accessible as it could be. Some of the provisions are ambiguous or have caused problems in

¹⁰ "An Act for shortening the language used in Acts of Parliament", also known as Lord Brougham's Act.

¹¹ Welsh Government (2017) *Interpreting Welsh legislation: Considering an interpretation Act for Wales*.

practice, some are arguably redundant, and some are simply out of date. It would therefore benefit from modernisation.

52. This is especially true in a Welsh context as the Act predates the devolution settlement for Wales so some of the rules and definitions in the 1978 Act simply are not relevant in relation to law applying to Wales only (for example, a number of the words and terms defined in Schedule 1 to the Act such as, 'London borough'). Several provisions in the Act do not apply at all in relation to legislation made by the National Assembly.
53. Also of concern is the fact that the 1978 Act, as an Act of the UK Parliament, was enacted in English only. Although it was amended in 2007 so as to apply to Acts and Measures of the National Assembly and subordinate legislation made under such Acts and Measures, there is no Welsh language text of the 1978 Act. The lack of a bilingual interpretation Act is an obstacle to those seeking to use the Welsh language as a language of the law. This is because:
 - a. the core rules about the interpretation and operation of legislation applying in Wales are not available in the Welsh language; and
 - b. the absence of a Welsh language equivalent of the definitions of the words and phrases set out in Schedule 1 to the 1978 Act means that in order to understand the correct legal meaning of certain Welsh language words and phrases in legislation, it is necessary to cross-refer to the English language text of the same legislation, and then consult the relevant definition in the 1978 Act; in effect, there is no clear statutory authority for the legal meaning of those the Welsh language words and phrases.
54. This deficiency has been highlighted by the Law Commission¹²; the Constitutional and Legislative Affairs Committee of the National Assembly¹³; and stakeholders responding to the Welsh Government's policy consultation¹⁴.
55. Further, in accordance with section 156 of the Government of Wales Act 2006 the Welsh language and English language are to be treated as being of equal standing in relation to Assembly Acts and Measures and legislation enacted or made in both English and Welsh. Some stakeholders, in response to the Welsh Government's policy consultation, commented that the absence of bilingual provisions on interpreting legislation means that the Welsh language is being

¹² Law Commission (2016) *Form and Accessibility of the Law Applicable in Wales*.

¹³ Constitutional and Legislative Affairs Committee (of the Fourth Assembly) (2015) *Making Laws in Wales*.

¹⁴ Welsh Government (2017) *Interpreting Welsh legislation: Considering an interpretation Act for Wales*.

treated less favourably. The clear view of stakeholders was that action to address this should be taken.

56. The Welsh Government is therefore seeking views on detailed proposals for the statutory interpretation of Welsh law, and this is contained in Part 2 of the Legislation (Wales) Bill.

Application of this Part of the Bill

Application to Assembly Acts and subordinate legislation

57. A key question in the preparation of the Draft Bill was determining the legislation (applying in Wales) to which the Bill should apply. There are a range of approaches that can be taken, each with their own strengths and weakness. In considering what the application of Part 2 of the Bill should be, regard has been had to the results of the 2017 policy consultation and to the following matters –
- a. the need for the reader to be able to determine which interpretation Act applies to the legislation they are reading (because the 1978 Act will, inevitably, continue to operate in relation to some of the law applying in Wales; most notably, all law found in Acts of the UK Parliament);
 - b. the need to address the absence of bilingual interpretation rules applying to the wide range of bilingual legislation which is currently in force (and in particular, the absence of rules defining words and expressions in the Welsh language equivalent to the existing rules in the English language);
 - c. the desirability of the Bill itself being as simple as possible to navigate, understand and apply;
 - d. the need to minimise (and ideally avoid) creating any kind of operational tension between the Bill and the 1978 Act;
 - e. the desirability of creating a Bill that works best for the future statute book, noting that the body of legislation made by the National Assembly and Welsh Ministers will continue to grow;
 - f. the idea that interpretation Acts should ultimately exist in the background, as a part of the machinery of law that the average reader will not regularly need to have recourse to.
58. In light of the above matters, Part 2 of the Bill makes provision about the interpretation of the following kinds of legislation –

- a. Assembly Acts receiving Royal Assent on or after the day on which Part 2 of the Bill comes into force;
- b. subordinate legislation¹⁵ which is –
 - i. made on or after the day on which Part 2 of the Bill comes into force,
 - ii. made under Assembly Acts and Measures (whenever the Act or Measure received Royal Assent or approval), and
 - iii. made by the Welsh Ministers or any other person with a power to make subordinate legislation conferred by an Assembly Act or Measure;
- c. subordinate legislation which is –
 - i. made on or after the day on which Part 2 of the Bill comes into force,
 - ii. made under an Act of the UK Parliament (whenever that Act received Royal Assent), and
 - iii. made by the Welsh Ministers (not acting jointly with others).

In the Bill, both of these kinds of subordinate legislation are referred to as 'Welsh subordinate instruments'¹⁶.

59. This means that the Bill will not apply, and the 1978 Act will continue to apply, so far as it is relevant to the law in Wales, to –
- a. Assembly Acts which received Royal Assent before the day on which Part 2 of the Bill comes into force;
 - b. all Assembly Measures;
 - c. all subordinate legislation (regardless of who made it or what kind of Act or Measure it was made under) made before Part 2 of the Bill comes into force;
 - d. subordinate legislation made under an Act of the UK Parliament after Part 2 of the Bill comes into force, by someone other than the Welsh Ministers (for example, a local authority or a Minister of the Crown);
 - e. subordinate legislation made after Part 2 of the Bill comes into force by the Welsh Ministers in the exercise of powers held jointly with others e.g. a Minister of the Crown (often referred to as a joint statutory instrument)¹⁷.

¹⁵ 'Subordinate legislation' is defined in section 4 of the Bill.

¹⁶ See section 3.

¹⁷ This means subordinate legislation which is made under a power or duty which expressly provides that the power or duty may or must be exercised by the Welsh Ministers jointly with others. Where an

60. Although this list appears complex, the main advantage of the approach taken in the Bill is the relative simplicity it brings to the face of the Bill. It also follows the approach in fact taken in relation to Scotland in the Interpretation and Legislative Reform (Scotland) Act 2010, which applies only to legislation passed or made after it came into force. We understand that this has not led to any difficulties in practice in Scotland.
61. This approach will require the reader of any Assembly Act or subordinate legislation to be aware of the significance of *when* the legislation they are reading received Royal Assent or was made. However, it is intended that for any Act resulting from the Bill, Part 2 would be brought into force on 1 January of the year after it is passed. This will mean that the indication of the year included in the short titles of Acts and Measures and the titles of subordinate legislation will, without more, suffice to indicate whether the 1978 Act or the Bill applies to that legislation.
62. Although this approach means that there will be two interpretation Acts operating in relation to legislation in Wales, that was always inevitable to some extent (as is the case in Scotland, the 1978 Act will continue to have at least some effect in relation to the law in Wales).
63. The need to make it clear to readers which Act applies was considered as part of the first consultation and while there was a consensus that something should be done about this, there was no consensus as to the best means of assisting the reader in this regard. There are various ways in which this could be done, including in the explanatory material that accompanies legislation (for example, the Explanatory Notes which are published alongside an Act). Alternatively a “signpost” to the relevant interpretation Act could be included within legislation; for example, by amending existing legislation to deal with the issue, and making provision in new legislation. However, a signposting provision is not strictly necessary, and it is generally best to avoid including unnecessary provision in legislation. Signpost provisions of this nature have the potential to be relatively complex, and could in the longer term lead to problems (for example, where for any reason the signpost provision is not included in an Act or subordinate legislation).
64. We will continue to explore appropriate means of making it clear to readers which interpretation Act applies to which legislation, and views on this would be welcomed as part of this consultation.

instrument contains subordinate legislation made by the Welsh Ministers and subordinate legislation made by a Minister of the Crown, but not made in the exercise of a power held jointly (often referred to as composite legislation), the legislation itself may need to address the application of the Bill.

65. The Bill will not apply to subordinate legislation made under a UK Parliament Act other than where such legislation is made by the Welsh Ministers (though it will apply to all subordinate legislation made under an Assembly Act to which Part 2 of the Bill applies). In so far as the law applying in Wales is concerned, this means that subordinate legislation made by a variety of public bodies and persons exercising public functions will remain subject to the 1978 Act¹⁸.
66. This means, for example, the Bill would apply to an order made by a county council in Wales under the Local Government (Democracy) (Wales) Act 2013, but the 1978 Act would apply to an order made by a county council in Wales under the Local Government Act 1972. While this result is perhaps not ideal, the concern was that any attempt to resolve this issue could result in under-inclusion or over-inclusion, in other words missing legislation that should be subject to the Bill or capturing legislation that should not be subject to the Bill. In particular, we wanted to avoid capturing bodies and legislation where the relationship with Wales is not clear-cut; for example, bodies exercising cross-border functions. The approach taken in the Draft Bill will avoid any ambiguity in practice, and draws a clear line between the application of the Bill and the 1978 Act in this area. It should also be borne in mind that subordinate legislation made by the Welsh Ministers is by far the most common and numerous legislation of this sort.
67. Perhaps the most significant drawback of our proposed approach is the continued application of the monolingual 1978 Act to existing bilingual legislation. Most of the respondents to the 2017 policy consultation acknowledged that this is an issue that should be addressed, though there was no evidence of any practical issues arising from this state of affairs. The existence of the Bill, which contains a number of provisions which are equivalent to (though not always the same in substance as) the provisions in the 1978 Act, might help to reduce the impact of this issue in practice, though as a matter of law the Bill will not apply retrospectively to this legislation.
68. Responses to the 2017 policy consultation identified the absence of a Welsh language equivalent to Schedule 1 to the 1978 Act as a cause for concern. That Schedule¹⁹ sets out definitions of a range of words and expressions occurring in legislation in English. Many, if not all of those words and expressions have a Welsh language equivalent where they appear in bilingual legislation, but the Welsh language equivalent is not defined in the Schedule (or anywhere else). The 2017 policy consultation proposed a translation of

¹⁸ Such bodies include county and county borough councils, harbour authorities and Qualifications Wales.

¹⁹ Schedule 1 to the Bill makes equivalent provision, discussed below.

Schedule 1 to the 1978 Act as a possible solution. There are a variety of legislative means of putting in place legally operative equivalent provision in the Welsh language, and while the Bill would provide a means of dealing with this issue there are technical reasons (such as the fact that the 1978 Act extends across the United Kingdom, while any amendment made to that Act by the Bill would extend only to England and Wales) which indicate that other solutions may be preferable²⁰.

69. We intend to provide a solution to this issue as part of the package of reform driven by the Bill, and will explore further the best approach to be taken. In the meantime, we have prepared a Welsh language translation of the words and expressions in Schedule 1, a copy of which may be found on the consultation web-page, and comments on this are welcomed.

Application to deeds, documents and other instruments

70. Section 23(3) of the 1978 Act applies three provisions in that Act to deeds, documents and other instruments. Those provisions are section 9 (periods of time; see section 12 of the Draft Bill), section 17(2) (re-enactment; see section 33(1) of the Bill) and section 19(1) (editions of Acts; see sections 24 and 25 of the Draft Bill). The continuing application of sections 9 and 19(1) of the 1978 Act to deeds etc. means that it is not necessary to apply the equivalent sections in the Bill. However, it is necessary to apply section 33(1) of the Bill; this will mean that the rule in subsection (1) will operate on references in deeds, documents and other instruments to legislation to which Part 2 applies and which has been repealed and re-enacted.

Alternative approach to the application of the Draft Bill

71. Consideration was given to preparing a Draft Bill which applies to –
- a. all Assembly Acts and Assembly Measures (whenever made),
 - b. all subordinate legislation made under those Acts and Measures (whenever made, and regardless of who made the legislation), and
 - c. all subordinate legislation made by the Welsh Ministers (not acting jointly with others) under Acts of the UK Parliament (whenever made).
72. There were two key advantages to this model of application –

²⁰ Similar concerns arise in relation to any amendment of the 1978 Act by the Bill, including those provided for in Schedule 2 to the Bill. However amendments of the kind set out in Schedule 2 are an essential element of creating a new interpretation Act for Wales. Given this, consideration will be given to how best to put in place the necessary amendments of the 1978 Act.

- a. it resolved the bilingual issue, since almost²¹ all legislation which by its nature exists in English and Welsh would be subject to the Bill, and
- b. the nature and extent of the application of the Bill can be expressed simply and is readily understandable – broadly speaking, if it is or was made in Wales, then the Bill applies.

73. However, there were a number of problems with this approach–

- a. legislation made prior to the coming into force of the Bill will have been made with the intention that the rules and definitions in the 1978 Act apply to it - this means that where the Bill does more than reproduce the effects of the 1978 Act, it would not always be possible to apply any changes in the law to existing legislation;
- b. because it would be necessary to make provision in relation to those cases where the Bill could not make changes to existing legislation, the Bill would be longer and more complex²²;
- c. a number of specific technical problems would arise (none of which are insurmountable, but which would have had an impact on clarity and accessibility), for example-
 - i. the Bill would probably need specific provision dealing with the continuing operation of the 1978 Act in relation to things done in or under existing legislation during the period before the 1978 Act ceased to operate in relation to Assembly Acts and Measures etc.;
 - ii. the Bill would probably need to clarify the effect of the non-application of new rules to existing legislation, and whether that impacts on the interpretation of such legislation;
 - iii. most of the rules in the 1978 Act do not apply if, in any particular piece of legislation, “the contrary intent” appears; this rule would need to be adapted for the purposes of the Bill, and could be at odds with the new approach taken in the Bill²³.

²¹ There are forms of bilingual subordinate legislation which would not be subject to the Bill; an Order in Council which exists in English and Welsh made by the Sovereign under an Act of the UK Parliament, for example.

²² We anticipate that a Bill applying in this way would be as much as 50% larger than the Draft Bill.

²³ See section 3(3), discussed below.

74. For these reasons, we concluded that this approach to the application of the Bill should not be taken.

Words and expressions used in certain Welsh subordinate instruments

75. The Draft Bill contains no equivalent to section 11 of the 1978 Act. That section provides that words and expressions used in subordinate legislation have the same meaning as in the Act under which the subordinate legislation was made. The Bill does not contain equivalent provision for two reasons –
- a. it is intended help to improve the accessibility of Welsh subordinate instruments to which Part 2 of the Bill applies (and to which section 11 of the 1978 Act does not);
 - b. it helps to facilitate the application of the Bill to subordinate legislation made by the Welsh Ministers made under Acts of the UK Parliament.
76. On the first reason: the main effect of the connection provided for in section 11 of the 1978 Act is that in many cases subordinate legislation will contain terms which are not defined in the subordinate legislation, but which have a precise meaning given to them by the Act under which the subordinate legislation is made. We agree with the comment in *Craies on Legislation* that as a result of this, section 11 is a ‘significant trap for the unwary reader’²⁴.
77. On the second reason: Welsh subordinate instruments to which Part 2 of the Bill applies will be subject to Schedule 1 to the Bill (which, as noted above, does not reproduce a significant amount of Schedule 1 to the 1978 Act). In order to avoid any potential problems arising from the application of Schedule 1 to the Draft Bill to subordinate legislation made by the Welsh Ministers under Acts of the UK Parliament, alongside the continuing application of Schedule 1 to the 1978 Act to those Acts of the UK Parliament, the Draft Bill proposes breaking the connection between the subordinate legislation and the Acts it is made under.
78. We considered what the effect of removing the ‘trap’ created by section 11 will be and have found that although it requires drafters of legislation to make provision on a case-by-case basis, any interpretative provision made will result in subordinate legislation which is more readily understandable and accessible without recourse to the Act or Measure under which it was made.
79. Drafters of subordinate legislation to which Part 2 of the Bill will apply will need to actively consider how best to alert the reader to the meaning of key words in

²⁴ 11th Ed. 2017, paragraph 22.1.16.

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

Question 3: Do you agree with the approach to application of Part 2 of the Draft Bill?

Chapter 2 – Section by section explanation of Part 2 of the Legislation (Wales) Bill

80. This Chapter considers each rule contained in Part 2 of the Bill, and where relevant compares this to the existing provision made by the 1978 Act.

Application of the Bill and definitions of key terms

Section 3 “Application of Part” and section 4 “Definitions of key words and expressions used in Part”

81. Section 3(1) sets out the legislation to which this Part of the Bill applies. The effects of this subsection are set out above. Some of the terms used in this section are defined in section 4.
82. Section 3(3) makes provision for circumstances in which a rule in the Bill does not apply to a particular Assembly Act or Welsh subordinate instrument, or to a provision in such an Act or instrument. The 1978 Act takes a different approach. Most, but not all, of the rules in that Act are expressed as applying “*unless the contrary intention appears*”. Although this concept seems clear enough (and is relied on in other interpretation Acts such as the Interpretation Act 2005 applying in the Republic of Ireland), in practice it is not always obvious whether a contrary intent does arise in a particular piece of legislation.
83. The approach taken in section 3(3) mirrors that taken in the Interpretation and Legislative Reform (Scotland) Act 2010, the New Zealand Interpretation Act 1999 and the Legislation Bill currently before the New Zealand Parliament. It is narrower than the approach taken in the 1978 Act, in that it arguably makes it less likely that in any particular circumstance a rule in the Bill would be found not to apply. But this approach could be thought to bring greater certainty to the reader, with the additional effect that it will require drafters of legislation to consider more frequent use of express words in an Act or instrument to disapply a rule in the Bill.
84. On the other hand, this approach locates this limitation of the application of the Bill at the front of the Bill, rather than in each individual rule (as in the 1978 Act). It is also arguable that, while the test is narrower than the “contrary intent” approach, there may still be some doubt in certain cases as to whether the context of an Act or Welsh subordinate instrument requires that a particular rule does not apply.

85. Section 3(3)(a) is not strictly necessary in relation to Acts, as even in the absence of that provision it would be open to an Act to expressly disapply any provision of the 1978 Act; but it helps to make the situation clear.
86. Section 3(4) further narrows the rule in relation to sections 10 (time of day), 27 (Application of Assembly Acts and Welsh subordinate instruments to the Crown) and 31 (revival of repealed enactments). This addresses the fact that each of those sections provides that the rule in question can only be disapplied with express words.

Question 4: Do you agree with the approach in section 3(3) of the Draft Bill, which disapplies a particular rule if the context otherwise requires?

87. Section 4 sets out the definitions of key terms used in the Part, including the types of legislation to which it applies.

Meaning of words and expressions used in legislation

Section 5 “Definitions of words and expressions” and Schedule 1 “Definitions of words and expressions”

88. Section 5 is equivalent to section 5 of the 1978 Act, and Schedule 1 to the Bill is equivalent to Schedule 1 to the 1978 Act. Section 5 of the Bill, like section 5 of the 1978 Act, provides that the words and expressions set out in Schedule 1 (which it introduces) have the meaning given in that Schedule where they are used in Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill applies.
89. Schedule 1 to the Bill draws on Schedule 1 to the 1978 Act. Where Schedule 1 to the Bill defines a word or expression that is also defined in Schedule 1 to the 1978 Act, the definition given in the Bill is intended to have the same effect as that in the 1978 Act (with two exceptions which are set out below). Some of the definitions in Schedule 1 to the Bill appear different from the equivalent definition in the 1978 Act. This is not intended to change the effect of the definition, but rather to improve accessibility and make the definition more accurate in the light of legislative changes. For example, ‘Crown Court’ and ‘Senior courts’.
90. There are two definitions that appear in both Schedule 1 to the Bill and Schedule 1 to the 1978 Act which are different in the Bill. The first is “*financial year*”. In the 1978 Act, that definition is limited to certain references relating to public money. The definition in the Bill will apply for all purposes. It has been

used numerous times across Welsh law, and reflects a common understanding of when a typical financial year runs from and to.

91. The second is “*Wales*”: the definition of Wales in the Government of Wales Act 2006 (set out in section 158(1) of that Act) in effect expands the definition in the 1978 Act to include “*the sea adjacent to Wales out as far as the seaward boundary of the territorial sea*”. As the Government of Wales Act 2006 deals with the powers of the National Assembly to make legislation, the Draft Bill provides for the default definition of ‘Wales’ to be in line with the definition that is in it.
92. We have noted the potential effect of section 158(3) of the 2006 Act. That provision gives the Secretary of State the power to

by order determine, or make provision for determining, for the purposes of the definitions of “Wales”..., any boundary between waters which are to be treated as parts of the sea adjacent to Wales, or sea within British fishery limits adjacent to Wales, and those which are not.

By relying on the definition in the Government of Wales Act 2006, references to ‘Wales’ in legislation to which Part 2 of the Bill applies will incorporate the effect of any such order. But if there is ever any reason why that outcome is not wanted, the power in section 5(2) of the Bill²⁵ can be used to amend the definition of Wales set out in Schedule 1 to the Bill.

93. There are, however, shortcomings with the definition of Wales in the Government of Wales Act 2006, that follow from its reliance on the definition in the 1978 Act. That definition provides that ‘Wales’ means

the combined areas of counties created by section 20 of the Local Government Act 1972, as originally enacted, but subject to any alteration made under section 73 of that Act (consequential alteration of boundary following alteration of watercourse)

94. Both the 1978 Act and the Government of Wales Act 2006 exist only in the English language, and the 1978 Act definition relies on a now repealed version of Schedule 4 to the Local Government Act 1972. We will explore further the best way of providing for a functional and accessible definition of Wales²⁶.

²⁵ Discussed below.

²⁶ The definition of ‘England’ in the 1978 Act (which is relied on in the definition of ‘England’ in Schedule 1 to the Bill) also refers to the areas of the counties established by the Local Government Act 1972; so any consideration of alternative approaches to the definition of Wales needs to have regard to the importance of ensuring that the definitions of England and Wales are in alignment, both geographically and across the Bill and the 1978 Act.

Question 5: Do you consider the definition of “Wales” should be by reference to the local authority areas of Wales, or by some other means?

95. Beyond the above differences, there are a number of words and expressions defined in Schedule 1 to the 1978 Act which have not been replicated in the Bill, and there are also some new words and expressions included which are not defined in Schedule 1 to the 1978 Act.
96. The decision to omit definitions of certain words and expressions that are included in Schedule 1 to the 1978 Act was based on a number of factors. Some of the definitions in that Schedule are of limited or no relevance in relation to law made in Wales (for example, definitions of terms such as “British overseas territory” or “London borough”) so these have not been reproduced in the Bill – see Annex A to this paper for a full list.
97. We have had regard to the fact that the more definitions that are included in Schedule 1, the more often the reader will potentially have to leave the legislation they are reading and turn to Schedule 1 to the Bill in order to determine the meaning of that legislation. On that basis, the Schedule has been pared down to only the most useful or essential terms.
98. Schedule 1 to the Bill contains a limited number of definitions of words or expressions which are only cross-references to other Acts – something which although not ideal can on occasion be the best way to define a word or expression. As a general rule, we considered it better for readers of legislation for definitions that consist of cross-references to be included in the Act or instrument in which the word or expression appears rather than in the Bill. This is because including the definition in the Bill would mean that readers would have recourse to the Bill only to find that they needed to consult a third Act or instrument. Where definitions of this nature have been included in the Schedule it is because they provide a legal or technical definition of a word or expression that would otherwise need to be defined to be given meaning or to be understood²⁷.
99. We have also added the following definitions, relating to institutions in Wales:
 - a. “First Minister”;
 - b. “Counsel General”;
 - c. “National Assembly for Wales”;
 - d. “National Assembly for Wales Commission”;

²⁷ For example: “England”, “Her Majesty’s Revenue and Customs”, “Lord Chancellor”.

- e. “Welsh Government”;
- f. “Welsh Ministers”;
- g. “Welsh Revenue Authority”;
- h. “Welsh tribunal”.

100. Section 5(2) provides for a power to amend the Schedule. This would allow definitions to be added to the Schedule where it would be helpful to do so. It would also allow the Schedule to be amended to reflect changes made by Acts of the UK Parliament or subordinate legislation made by the UK Government in relation to definitions contained in the Schedule, or to Schedule 1 to the 1978 Act itself. Under section 38 of the Bill, this power would be subject to the affirmative procedure and exercisable by statutory instrument.

Question 6: Do you have any comments on what has, or has not been, included in Schedule 1 to the Draft Bill?

Section 6 “Words in the singular include the plural and vice versa”

101. This section, which is self-explanatory, mirrors the equivalent provision in section 6(c) of the 1978 Act. This provision is relied on in most, if not all, legislation, and helps to facilitate shorter, more accessible drafting.

Section 7 “Words denoting a gender are not limited to that gender”

102. This section is equivalent to section 6(a) and (b) of the 1978 Act.

103. In the 2017 policy consultation it was noted²⁸ that the rule on gender in section 6(a) and (b) of the 1978 Act need not be included in the Draft Bill, on the ground that it was redundant given the ongoing practice of drafting legislation gender-neutrally.

104. We have subsequently considered clause 16 of the Legislation Bill before the New Zealand Parliament, which as we understand it is intended to apply in relation to legislation which is in any event drafted gender-neutrally. In particular, we note that, unlike the legislation it is intended to replace (section 31 of the New Zealand Interpretation Act 1999), it does not refer expressly to the male and female genders. Clause 16 therefore has a wider scope in terms of the concept of gender which underpins the rule.

105. The purpose of section 6 of the Draft Bill is, as with the equivalent New Zealand provision, to ensure that legislation is not too narrow in its application. It is

²⁸ Paragraph 79(a).

therefore drafted with a view to ensuring that even wording and phrasing which might traditionally have been considered gender-neutral (such as the phrase “he or she”) does not exclude anyone, regardless of their gender identity.

106. Drafters of legislation will need to continue to ensure that gender-neutral drafting, used alongside section 7 of the Draft Bill, does not lead to confusion in those instances where a provision is not intended to be gender neutral.

Question 7: Do you agree with the approach in section 7 of the Draft Bill?

Section 8 “Variations of a word or expression due to grammar etc.”

107. Section 8 has no equivalent in the 1978 Act. It draws on similar provision found in other interpretation Acts across the Commonwealth. In particular, we have considered the equivalent provisions in the Canadian Interpretation Act²⁹, and the Hong Kong Interpretation Act and General Clauses Ordinance³⁰, as in both of these jurisdictions legislation is made bilingually.
108. It often goes without saying that parts of speech relating to a word or expression which is defined or otherwise given meaning in legislation also carry the definition. For example, if the word “walk” were to be defined, then the parts of speech relating to “walk”, such as “walking” and “walker”, are to be interpreted in the light of that definition. In some cases though this needs to be put beyond doubt. See for example the definition of “education” in section 83(4) of the Children and Families Act 2014, which makes provision about the application of that definition in relation to “educate” and “educational”.
109. Section 8 of the Bill is intended to put beyond doubt the application of the definition or meaning of the word in these circumstances, so as to avoid ambiguity in practice, and to facilitate more naturalistic drafting in both English and Welsh. This rule will also put beyond doubt that a definition of a word or expression applies despite any variation of that word or expression arising due to the operation of rules and grammar.
110. In relation to the Welsh language text of legislation, this section will make it clear that a definition or meaning applies regardless of any mutations of a word, or variations of an expression arising due to rules about word order and sentence structure.

Question 8: Do you agree with the proposed approach taken in section 8 of the

²⁹ Interpretation Act, RSC 1985. See section 33(3).

³⁰ See section 5.

Draft Bill?

Section 9 “References to periods of time”

111. Section 9 has no equivalent in the 1978 Act. It draws on section 18(h) of the Republic of Ireland’s Interpretation Act 2005.

112. It is often necessary in legislation to use a relatively lengthy description of a period of time in order to avoid any ambiguity as to when it will start and finish. For example, a provision might state –

Notice may be given during the period beginning with the day on which the order is made, and ending with the day specified in the order.

113. Section 9 could be used to shorten legislation. For example, it would allow the provision set out in the paragraph above to be expressed like this –

Notice may be given from the day on which the order is made until the day specified in the order.

The drawback with this approach is that any ambiguities which might arise on the face of the legislation would only be resolved by consulting the Draft Bill, and the overall usefulness of this section partially depends on the extent to which such drafting would be understood without the need to consult the Draft Bill. To that extent, this provision is primarily intended to operate as a backstop where ambiguity has arisen, and is not intended to replace the use of clear drafting.

Question 9: Do you agree with the inclusion of section 9 in the Draft Bill?

Section 10 “References to time of day”

114. Section 10 is equivalent to section 9 of the 1978 Act, and is intended to have the same effect. Under this section a reference to a particular time of day (such as 2pm or 2am) is a reference to Greenwich mean time, except during the period when British summer time applies, when the reference is to British summer time (that is, the time fixed for general purposes during the period of summer time by section 1 of the Summer Time Act 1972).

115. Section 3(4)(a) does not apply to this section. In other words, section 9 will apply to a reference to the time of day unless the legislation it appears in expressly provides that the reference is not to Greenwich mean time or (in

summer) British summer time. This might arise in a provision which needs to refer to the time outside the United Kingdom.

Section 11 “References to the Sovereign”

116. Section 11 is equivalent to section 10 of the 1978 Act. The 2017 policy consultation noted³¹ that the rule relating to references in legislation to the Sovereign, set out in section 10 of the 1978 Act, need not be included in the Draft Bill on the ground that it is not necessary.
117. We have subsequently had regard to the fact that references to the Sovereign include references to “*His Majesty*” or “*Her Majesty*”, and that in the event of a change of Sovereign this section will operate in relation to such references. We have therefore concluded that this rule is useful and should be retained.

Section 12 “Measurement of distance”

118. Section 12 is equivalent to section 8 of the 1978 Act. The 2017 policy consultation noted³² that the rule on distance in section 8 of the 1978 Act need not be included in the Draft Bill on the ground that it is not necessary. We had taken the view that variations in relation to the application of this rule meant that it was best dealt with on a case-by-case basis.
119. We have subsequently had regard to the fact that measurements of distance arise in a wide range of contexts covering distances both large and small, and are often contained in legislation of a technical nature (such as Building Regulations). Dealing with the subject matter of section 12 of the Bill every time a reference to distance appears could lead to unwieldy legislation, with little gain.

Service of documents by post or electronically

Section 13 “Service of documents by post or electronically”

120. Section 13 and section 14 (considered below) are equivalent to section 7 of the 1978 Act but go further than that section by also providing for service of documents using electronic communication.
121. Section 13(1) will apply wherever an Assembly Act or Welsh subordinate instrument provides that a document may or must be served (or given or sent etc.) by post. We considered providing for a more restrictive approach to service by post and requiring that some form of recorded or expedited delivery

³¹ Paragraph 79(b).

³² Paragraph 79(b).

service must be used, but our concern was that this could be overly burdensome both for individuals and for organisations.

122. Subsection (2) takes a similar approach to subsection (1), but in relation to service of documents using methods of electronic communication. It will only apply where an Assembly Act or Welsh subordinate instrument provides that a document may or must be sent electronically.
123. Since email is the predominant method by which documents are sent electronically, the Bill makes specific provision about service by email. The concept of “*properly addressing*” in subsection (2)(a) is intended to require the sender to make sure that the email is sent to an address which is valid and which the recipient can be reasonably expected to access, and that the address has been accurately entered into the email.
124. Subsection (2)(a) also allows for the attachment of documents to an email, as well as for the email itself to be the document which is being served. It is not intended to allow service to be effected electronically by sending someone a link to a document hosted on the internet, which the recipient must then take further steps to access.
125. Subsection (2)(b) deals with other methods of electronic communication (which includes fax). It is intended to be broad enough to cover as many viable means of effecting service electronically as possible. Of course, in future this provision may need to be revisited to reflect changes in practice and technology.
126. We considered changing the nature of this provision, relative to section 7 of the 1978 Act, so that it would operate more as a standard form provision which would apply whenever an Assembly Act or Welsh subordinate instrument merely provided that a document may or must be served (and said no more about the means of service)³³. This approach was not taken in the Draft Bill, as it was thought best to continue to require that Acts and instruments deal with means of service, together with any additional requirements (for example, prior consent for service by electronic communications), on the face of the legislation itself. This maintains accessibility, and allows for greater flexibility without the need to disapply a rule in the Draft Bill.

Question 10: Do you agree with the approach taken on service of documents in section 13 of the Draft Bill?

³³ See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which takes a more expansive approach than sections 14 and 15 of the Bill.

Section 14 “Day on which service is deemed to be effected”

127. This section, like section 7 of the 1978 Act, relies on the concept of “*the ordinary course of post*” for the purposes of deeming when service by post is effected. This concept provides flexibility: it is intended to operate with service using first class or second class post, or some other means of expedited postal delivery. In each case, when post is used, the sender can determine the day (reflective of normal delivery times) by which service will have been deemed to be effected, and can proceed accordingly.
128. We considered using a more precise time of deemed service (such as 48 hours or two working days), but if section 13 is to allow a sender flexibility as to what method of post to use, it is difficult if not impossible to impose a specific time of deemed service that will be appropriate in all circumstances (for example, two working days may be too long where first class post is used, and too short where second class post is used). In any event, the deemed date of service is, as in the 1978 Act, merely a presumption which can be rebutted.
129. This section also deals with the deemed date of service of all documents served using electronic communication. In order to reflect the near instantaneous nature of most electronic communication, the document is deemed to be served on the day it is sent. There are a variety of approaches that could be taken in this context. In particular, we considered providing that service by electronic communication (unless the contrary is proved) –
- a. is instantaneous, or
 - b. takes effect 1 hour (or some other shorter timeframe) after the communication is sent, or
 - c. takes effect at the start of the next working after the communication is sent.

Question 11: Do you agree with the approach for deemed service (in section 14 of the Draft Bill) or do you consider there is a more precise workable alternative?

Powers and duties

Section 15 “Continuity of powers and duties”

130. Section 15 is equivalent to section 12 of the 1978 Act. The provision made by this section applies to all powers and duties, and is of particular importance in relation to the making of subordinate legislation. It puts beyond doubt that powers conferred and duties imposed on a person are continuous, and may be exercised from time to time and as necessary.

Section 16 “Anticipatory exercise of a power or discharge of a duty that is not in force”

131. This section is equivalent to section 13 of the 1978 Act, but it contains a number of differences intended to remove the doubts about the limits of the power contained in section 13, and about the circumstances in which that section can be properly relied on, which have arisen during the period that the 1978 has been in effect.
132. These changes of substance, which are intended to make it easier to rely on the section where it is appropriate to do so, are as follows:
- a. the power in section 16 can be used in relation to a duty to do something, as well as a power;
 - b. section 16, unlike section 13, is not limited to the exercise of certain specified kinds of power;
 - c. in order to avoid uncertainty about whether the context of an Assembly Act or Welsh subordinate instrument requires that section 16 should not apply, section 16(2) sets out exactly when the power can be relied on;
 - d. section 16(4) allows for reliance on other provisions in the Act or Welsh subordinate instrument which are not in force but which are incidental or supplementary to the provision granting the power or imposing the duty;
 - e. section 16(5) makes it clear that any limitations or conditions which would apply to the exercise of the power or discharge of the duty if the Act or instrument were fully in force also apply when the power is exercised or the duty discharged in reliance on section 16.
 - f. Section 16 does not reproduce section 13(a) of the 1978 Act; that provision was intended to operate where the provision in an Act dealing with the coming into force of the Act (often referred to as the commencement provision) is not itself in force. The long-standing drafting practice of providing that the commencement provision itself comes into force when an Act receives Royal Assent means that section 13(a) is seldom, if ever relied on. There are other technical arguments relating to the coming into force of legislation which also suggest that section 13(a) is not needed.

Question 12: Do you agree with the approach taken in section 16 of the Draft Bill?

Section 17 “Inclusion of sunset provisions and review provisions in subordinate legislation”

133. Section 17 is equivalent to section 14A of the 1978 Act³⁴. It will apply in relation to powers in an Assembly Act to make subordinate legislation, and section 14A will continue to apply to equivalent powers in an Act of the UK Parliament.
134. Like section 14A of the 1978 Act, section 17 puts beyond doubt that the Welsh Ministers, or any other person making subordinate legislation under an Assembly Act, may provide in the subordinate legislation –
- a. for the legislation to cease to have effect at a specified time or at the end of specified period;
 - b. for the person who made the legislation to be required to review the effectiveness of the legislation.

Section 18 “Revoking, amending and re-enacting subordinate legislation”

135. Section 18 of the Bill is equivalent to section 14 of the 1978 Act, but there are a number of differences.
136. Section 14 of the 1978 Act provides that where an Act confers a power to make certain kinds of subordinate legislation, a power to amend, revoke or re-enact any legislation made under the power is also implied. Section 14, however, is limited in its application: it applies to all rules, regulations and byelaws, and to Orders in Council, orders and other subordinate legislation (as defined in section 21 of the 1978 Act) made by statutory instrument.
137. This limitation was imposed because it was considered that the power to amend, revoke or re-enact was not necessary for all kinds of subordinate legislation³⁵. However, this sets a potential trap for drafters of legislation in that it may be necessary to provide expressly that certain kinds of subordinate legislation can be amended and revoked, if that is what is intended. We consider that there is no particular reason derived from modern practice to maintain this limitation. We note that section 6 of the Interpretation and Legislative Reform (Scotland) Act 2010 does not contain this limitation.
138. Section 18 of the Bill, unlike section 14 of the 1978 Act, makes it clear that the rule applies where subordinate legislation is made in the discharge of a duty. Subsection (2) puts this beyond doubt, while also limiting the power to revoke

³⁴ Section 14A was inserted into the 1978 Act by the Enterprise and Regulatory Reform Act 2013.

³⁵ Joint report of 1978 of the Law Commission and the Scottish Law Commission on the Interpretation Act 1889 etc. (Cmnd. 7235) (Law Com No. 90).

and amend to the extent necessary to ensure that the duty to make the subordinate legislation cannot be undermined.

139. Finally, the approach taken in section 18 differs from section 14 of the 1978 Act in that it provides that the power to make the subordinate legislation in question includes a power to amend, re-enact or revoke, rather than creating an additional implied power. This means that it is unnecessary to provide that the power to amend, re-enact or revoke is exercisable in the same manner, and subject to the same conditions or limitations, as the power itself.

140. As with section 17, section 18 will not apply in relation to subordinate legislation made by the Welsh Ministers under an Act of the UK Parliament. In that case, section 14 of the 1978 Act will continue to apply in relation to the subordinate legislation.

Question 13: Do you agree with the inclusion of duties in section 18 of the Draft Bill?

Section 19 “Amendment of subordinate legislation by an Assembly Act”

141. This section has no equivalent in the 1978 Act. Section 19 was influenced by clause 41 of the Legislation Bill before the New Zealand Parliament, and is intended to address an issue that arises when an Assembly Act amends or revokes subordinate legislation.

142. Although it is not common for an Assembly Act to amend or revoke subordinate legislation, it is not unheard of³⁶. Where this happens, it can give rise to questions about whether the amendment or revocation is in some way intended to limit the future exercise of the power under which the subordinate legislation is made. Sometimes express provision is made in the Act to remove any doubt about this, but the rule in section 19 of the Draft Bill would make this unnecessary.

Question 14: Do you agree with the inclusion of section 19 in the Draft Bill?

Varying and withdrawing directions

Section 20 “Varying and withdrawing directions”

143. This section has no equivalent in the 1978 Act. Most legislation which confers a power or imposes a duty to given directions contains provision about varying

³⁶ At least five Assembly Acts and Measures have made provision amending or revoking subordinate legislation.

and withdrawing those directions. Even in instances where no express provision about variation or withdrawal of directions has been made, it may be possible to interpret the legislation as permitting the variation or withdrawal of directions given under it.

144. Section 20 serves two purposes: it would put beyond doubt that directions can be varied or withdrawn, and it would remove the need to state this expressly every time a directing-giving power or duty is created. This would help to bring consistency across all legislation to which Part 2 of the Bill would apply.
145. There are two other provisions which regularly appear where a directing-giving power or duty is created: whether the direction needs to be in writing, and the enforceability of the direction³⁷. Those provisions do not occur with the same regularity as provision about variation and withdrawal, and in the case of enforcement a range of different approaches exists. For these reasons the Bill contains no other provisions on direction-giving powers and duties.

Question 15: Do you agree with the inclusion of section 20 in the Draft Bill?

References in legislation to other legislation

Section 21 “References to portions of legislation”

146. Section 21 is equivalent to section 20(1) of the 1978 Act. It is intended to remove any doubt about the precise portion of text in one piece of legislation being referred to in another. This is particularly useful in relation to provisions in legislation which make amendments. For example, in the case of a provision which states “*In section 1, for the words from “the local authority” to “officer” substitute “the county council may appoint two or more officers”*”; section 20 puts beyond doubt that the substituted text starts with, and includes, “*the local authority*”, and ends with, and includes, “*officer*”.
147. Subsection (2) of section 21 extends the meaning of “enactment” in this section (which, under section 3, includes Assembly Acts and Measures, Acts of the UK Parliament, and subordinate legislation made under those Acts and Measures) to include Acts of the Scottish Parliament, Northern Ireland legislation, and subordinate legislation made under Acts of the Scottish Parliament or Northern Ireland legislation³⁸. This means that the rule in subsection (1) will apply where a provision in an Assembly Act or Welsh subordinate instrument to which Part 2

³⁷ For example, see section 45 of the Higher Education (Wales) Act 2015 or section 155 of the Local Government (Wales) Measure 2011.

³⁸ Section 35 provides that ‘Northern Ireland legislation’ has the same meaning as in the 1978 Act. That term essentially covers a wide range of legislation applying in the law of Northern Ireland.

of the Bill applies refers to a portion of another such Act or instrument, or to a portion of –

- a. any other Assembly Act or Measure,
- b. any subordinate legislation made under an Assembly Act or Measure,
- c. any Act of the UK Parliament,
- d. any subordinate legislation made under an Act of the UK Parliament,
- e. any Act of the Scottish Parliament and any subordinate legislation made under such an Act, and
- f. Northern Ireland legislation and any subordinate legislation made under such legislation.

Section 22 “References to legislation are to the legislation as amended”

148. Section 22 is equivalent to 20(2) of the 1978 Act, which addresses the situation where an Act or other legislation refers to another Act or other legislation, and the Act or other legislation being referred to has been amended. Section 20(2) of the 1978 Act has been subject to close scrutiny over the years, and in particular there is a lack of certainty among practitioners as to the extent to which it is ‘ambulatory’ (i.e. the extent to which it applies to a reference to legislation which is later amended).

149. In other words, it is clear that section 20(2) achieves the following result –

- if Act A is passed, and is subsequently amended by Act B;
- and if Act C is passed after Act B, and contains a references to Act A;
- then the reference in Act C is to Act A *as amended by Act B*.

But there is doubt about what the effect of section 20(2) is in the following case–

- Act A is passed, and is subsequently amended by Act B;
- Act C is passed after Act B, and contains a references to Act A;
- Act A is amended again, by Act D.

Under section 20(2) of the 1978 Act it is not clear whether, in the above situation, the reference in Act C to Act A is a reference to Act A as amended by Act D.

150. We have noted that section 14 of the Interpretation and Legislative Reform (Scotland) Act 2010 is drafted to put the above issue beyond doubt, and provide that in the second scenario in the preceding paragraph, the reference in Act C to Act A would operate as a reference to Act A as amended by Act D.

Section 22 of the Draft Bill is intended to achieve the same result. Although section 22 of the Draft Bill and section 20(2) of the 1978 Act look quite different, no other differences in effect are intended.

151. As with section 21, this section will apply to references in Assembly Acts and Welsh subordinate instruments to a range of other kinds of legislation existing across the United Kingdom.

Question 16: Do you agree with the approach taken in section 22 of the Draft Bill?

Section 23 “References to EU instruments”

152. Section 23 is equivalent to section 20A of the 1978 Act³⁹. Section 23 of the Draft Bill makes provision along similar, but not identical, lines to that in section 22, save that this section concerns references to European Union instruments in Acts and Welsh subordinate instruments to which Part 2 of the Bill applies.
153. ‘EU instrument’ is defined in Schedule 1 to the Bill (and is also defined in Schedule 1 to the 1978 Act), by reference to the European Communities Act 1972. That Act provides (in Schedule 1) that EU instrument means any instrument issued by any institution of the European Union.
154. Section 23 of the Bill provides that where an Act or Welsh subordinate instrument to which Part 2 of the Bill applies refers to an EU instrument, and that instrument was amended by another EU instrument before the Act was passed or the Welsh subordinate instrument was made, the reference to the EU instrument is to that instrument as amended.
155. There is no doubt that section 20A of the 1978 is not ‘ambulatory’. It is drafted in a way that makes it clear that where it applies, a reference in an Act of the UK Parliament to an EU instrument which is amended after Act is passed is not a reference to the EU instrument as amended. Section 23 of the Draft Bill takes the same approach. This is because of paragraph 1A of Schedule 2 to the European Communities Act 1972. That paragraph confers a power on the Welsh Ministers, when making subordinate legislation under section 2(2) of that Act⁴⁰, to provide for references to EU instruments to be ‘ambulatory’. This means that a decision as to whether a reference to an EU instrument should be ambulatory needs to be taken on a case by case basis.

³⁹ Section 20A was inserted by the Legislative and Regulatory Reform Act 2005, and subsequently amended by the European Union (Amendment) Act 2008.

⁴⁰ That is, subordinate legislation made for the purpose of implementing obligations, and providing for rights, under European law.

156. The UK Parliament is currently considering the European Union (Withdrawal) Bill; that Bill contains amendments to the 1978 Act, but those amendments are not reflected in the Draft Bill. In the event that Part 2 of the Draft Bill is taken forward after the consultation, any changes to the 1978 Act made by the European Union (Withdrawal) Bill will be taken into account.

Section 24 “Edition of Assembly Act or Assembly Measure referred to” and section 25 “Edition of Act of Parliament of the United Kingdom referred to”

157. Sections 24 and 25, taken together, are equivalent to section 19(1) of the 1978 Act. Section 19(1) of the 1978 Act enables readers of legislation to determine, where that legislation refers to an Act, what ‘edition’ of that Act is being referred to.

158. Section 19(1) was of particular value in a historical Act of the UK Parliament context; there were sometimes different editions of Acts and statutes⁴¹, and in those Acts and statutes the numbering and order of provisions sometimes differed between the editions. The historical reach of section 19(1) means that it is necessary to refer to citation of Acts “*by year, statute, session or chapter*”.

159. Section 19(1)(c) refers to Acts printed by the Queen’s Printer or under the superintendence or authority of Her Majesty’s Stationery Office. This applies to all Assembly Acts and Measures.

160. The references to ‘statute’ and ‘chapter’ in section 19(1), and section 19(1)(a) and (b) in their entirety, are not relevant in relation to references to Assembly Acts and Measures. They are, however, relevant where an Assembly Act or Measure, or subordinate legislation made under such an Act or Measure, contains a reference to an Act of the UK Parliament. Sections 24 and 25 of the Draft Bill reflect this.

161. Section 24 will apply to any reference to any Assembly Act or Measure in an Assembly Act or Welsh subordinate instrument to which Part 2 of the Bill applies. Section 24(2) refers to the Act or Measure “*published*”, rather than (as in section 19(1) of the 1978 Act) “*printed*”. This is intended to reflect changes in practice. In the past, the Queen’s Printer (or a person acting under the superintendence or authority of Her Majesty’s Stationery Office) would have printed a version of an Act as it stood on receiving Royal Assent. This would have been, for all intents and purposes, the definitive version of the Act, and could be obtained from The Stationery Office. While that is still the case today, Acts are also made available on the legislation.gov.uk website, in a form which

⁴¹ As noted in the annotation of section 19 of the 1978 Act on the Lexis Library, ‘Statute’ here is used in its medieval sense; see, for example, the Statute of Marlborough of 1267.

reflects exactly the version of the Act which is printed. This is now how the vast majority of people access and read an Act.

162. In order to improve accessibility of legislation, and to avoid suggesting that only the printed version of an Act or Measure can be regarded as the version referred to under section 24, the Bill refers to the version of the Act or Measure which is “*published*”. This allows for a version published by the Queen’s Printer etc. other than by printing to be the version referred to under section 24.
163. In practice, however, the legislation.gov.uk website updates Acts in order to incorporate amendments made to those Acts (while generally keeping the original, “*as enacted*” version of the Act available). These updates mean that the printed version of the Act and the online version of the Act will diverge. In order to avoid confusion, and to avoid having a different effect from section 19(1) of the 1978 Act (which still refers to the printed versions of Acts), section 24(2) refers to –
- a. the certified copy of an Assembly Act (see section 115(5D) and (5E) of the Government of Wales Act 2006), and
 - b. an Assembly Measure as it stood when it was approved by Her Majesty in Council (see section 102 in Part 3 of the Government of Wales Act 2006, which is now repealed, but section 106 of that Act makes saving provision in relation to the repeal of Part 3 of that Act).

In other words, section 24(2) provides that references to an Assembly Act or Measure are to the version of the Act or Measure published by the Queen’s Printer etc. which reflects the Act or Measure as it stood at the moment it ceased to be a Bill or proposed Measure and was enacted as an Act or Measure.

164. Section 25 of the Draft Bill applies to any reference to an Act of the UK Parliament in an Assembly Act or Welsh subordinate instrument to which Part 2 of the Bill applies. As a result, it is necessary in effect to reproduce section 19(1) of the 1978 Act. As in section 24, the concept of publishing rather than printing is relied on. Additionally, the structure of section 25 is different from section 19(1) of the 1978 Act to reflect the fact that for some time now Acts of the UK Parliament fall within subsection (1)(c) rather than subsection (1)(a) or (b).
165. Schedule 2 to the Bill replaces section 23B of the 1978 Act (which governs how that Act applies in relation to Assembly Acts and Measures) with new sections 23B and 23C. The effect of section 23C(5), amongst other things, is that section 19(1) will continue to apply where an Act of the UK Parliament, or an

Assembly Act or Measure to which Part 2 of the Bill will not apply, or subordinate legislation under such Acts and Measures, refers to an Assembly Act to which Part 2 of the Bill applies. However, section 23C(5) only applies section 19(1)(c) to Assembly Acts and Measures, as subsection (1)(a) and (b) are not relevant.

Duplication of criminal offences

Section 26 “Duplicated offences”

166. Section 26 is equivalent to section 18 of the 1978 Act. That section currently applies where a person’s act or failure to act amounts to a criminal offence under any combination of two or more of the following –

- a. Acts of Parliament,
- b. Assembly Acts and Measures,
- c. Acts of the Scottish Parliament,
- d. subordinate legislation made under any of the above Acts or Measures,

or under any one or more of the above, and at common law.

167. The effect of section 18 is that a person whose conduct is a criminal offence can be prosecuted and punished under any of the legislation in question (in other words, the various criminal offences which cover the conduct in question are without prejudice to each other). However, section 18 makes it clear that the person in question can only be punished once for the offence.

168. As noted above, section 18 of the 1978 Act operates in relation to Acts of the Scottish Parliament⁴²; consequently the Interpretation and Legislative Reform (Scotland) Act 2010 does not contain provision equivalent to section 18. We considered taking a similar approach in relation to the law applying in Wales, and continuing to rely exclusively on section 18. However, given the importance of the rule and the desirability of creating a bilingual version of the rule (regardless of its application), we concluded that it was preferable to create an equivalent rule.

169. Section 26 of the Draft Bill will govern the interaction between Acts and instruments to which Part 2 of the Bill will apply, and between such Acts and instruments and the common law. It will apply where conduct is an offence under two or more different Acts or instruments to which Part 2 applies, or is an offence under one or more Acts or instruments to which Part 2 applies as well as the common law. Section 18 of the 1978 Act will continue to apply where an

⁴² See section 23A of the 1978 Act.

act or omission is an offence under an Act or Measure of the Assembly to which Part 2 of the Bill does not apply or under any subordinate legislation made under those Acts or Measures, and also is an offence under any of the other kinds of legislation to which section 18 applies or at common law.

170. Section 18 will also apply where an act or omission is an offence under an Act or instrument to which Part 2 of the Bill will apply, and under any other legislation to which section 18 applies (including Acts and Measures of the Assembly and Welsh subordinate instruments to which Part 2 of the Bill will not apply). Schedule 2 to the Bill replaces 23B of the 1978 Act (which governs how that Act applies in relation to Assembly Acts and Measures) with new sections 23B and 23C. In section 23C, subsection (4) is intended to achieve this result.

Question 17: Do you think the Draft Bill should make provision on duplication of criminal offences (section 26), or should we follow the approach taken in Scotland and leave this as a matter dealt with in the 1978 Act?

Application to the Crown

Section 27 “Application of Assembly Acts and Welsh subordinate instruments to the Crown”

171. Section 27 does not have an equivalent section in the 1978 Act, though there is similar provision in section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010.

172. The question of whether an Act or subordinate legislation binds the Crown⁴³ (that is, whether or not the Crown is subject to any duty or burden imposed by the Act) can be problematic in practice, as it is governed by a common law rule⁴⁴ that Acts and subordinate legislation do not bind the Crown unless –

- a. the Act expressly provides that it binds the Crown,
- b. the Crown is bound by necessary implication (though what amounts to a “necessary implication” for the purposes of the rule is not wholly certain), or

⁴³ For these purposes, the Crown generally means either: the Sovereign personally; her servants and agents; and persons who are now Crown servants or agents but who for certain purpose are considered to be in an analogous position. It can also include Crown property, such as Crown land and vehicles. But the question of what amounts to the Crown for the purposes of the application of the law is not always clear.

⁴⁴ See in particular *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, *Lord Advocate v Dumbarton District Council* [1990] 2 AC 50; [1989] 3 WLR 1346, and most recently *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81 (which, in paragraph 36 and 37, contains a “clarification” of the test behind the rule).

- c. other exceptions to the rule apply (for example where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that the Crown will be bound by all relevant statutes relating to civil proceedings).
173. This means that in the absence of an express provision binding the Crown, the question of whether an Act binds the Crown needs to be considered by looking at the rule and its limits, and then determining whether the nature, context and content of the Act in question mean that the National Assembly must have meant for the Crown to be bound.
174. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 puts this matter beyond doubt (and abolishes the common law rule in relation to Acts of the Scottish Parliament to which that Act applies, and subordinate legislation made under such Acts). This is done by providing that the Crown is always bound by an Act or subordinate legislation unless the Act or subordinate legislation expressly provides that this is not the case.
175. Section 27 has the same effect in relation to Assembly Acts and Welsh subordinate instruments to which Part 2 of the Draft Bill applies. This would bring increased clarity by dealing with the question of Crown application in a statutory rule, and would mean that in relation to any individual Act or Welsh subordinate instrument there will be no doubt about whether the Act or instrument binds the Crown.
176. There are, however, some drawbacks to this approach. First, the approach relies (as does current practice) on silence on Crown application to deliver a particular result; so (in this case) a reader has to understand that where there is no express provision on Crown application, the Crown is bound by the Act or subordinate legislation.
177. Second, the legal effect of silence in an Assembly Act or Measure or Welsh subordinate instrument will differ depending on when the legislation in question received Royal Assent or was made. For example –
- a. silence in an Assembly Act to which Part 2 of the Bill does not apply means that the Crown is not bound by the Act, subject to the operation of the common law rule, but
 - b. silence in an Assembly Act passed *after* the Bill receives Royal Assent will mean that the Crown is bound.
178. The situation is more complex in relation to subordinate legislation, and a particular issue will arise where a Welsh subordinate instrument is subject to

the rule in section 27, but the Act under which it is made is not. In that case silence on the matter in the Act will lead to a different result from silence in the subordinate legislation.

179. In any event, the current situation is not satisfactory⁴⁵, though it would be possible to improve the situation incrementally by dealing with Crown application on the face of all legislation, and making it clear whether or not the legislation binds the Crown.
180. Given the relatively technical nature of this rule, and the desirability of creating an express rule in bilingual legislation which both puts this matter beyond doubt and means that the question of Crown application can be readily determined, this provision has been included in the Bill.
181. It is noted that in the draft Bill consulted on by the Scottish Government which preceded the Interpretation and Legislative Reform (Scotland) Act 2010, a different approach was taken from that taken in section 20 of that Act. In that draft Bill, the provision in question provided that the Crown is to be bound by an Act of the Scottish Parliament, or by subordinate legislation made under such an Act, only if the Act or instrument expressly provides. In other words, silence in an Act or instrument means that the Crown is not bound; this is perhaps closer in spirit to the common law rule than section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, though it would still have represented a significant change in the law. The consultation paper relating to that draft Bill noted

there are, however, arguments that this provision does not go far enough and that the Crown should be placed in the same position as any other subject and be bound by every [Act of the Scottish Parliament] [and all subordinate legislation made under such Acts] unless it is expressly provided otherwise.

Question 18: Should the Draft Bill make provision about Acts binding the Crown (section 27), or should this be addressed in another way?

Coming into force of legislation

Section 28 “Time of coming into force”

182. Section 28 is equivalent to section 4(a) of the 1978 Act. Section 28 provides that where the day on which an Assembly Act or Welsh subordinate instrument,

⁴⁵ We have noted the comments of Lady Hale in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81 (paragraph 35), calling for Parliament, possibly with the Law Commission, to consider the merits of abolishing the rule or reversing the current presumption.

or a provision in such an Act or instrument comes into force is provided for in legislation, the Act or instrument comes into force at the beginning of that day.

183. In practice, the day on which an Assembly Act or a provision in an Act comes into force is usually provided for in the Act itself⁴⁶, or the Welsh Ministers are given a power to bring it into force on a specific day by making an order (usually known as a commencement order). All of these scenarios are covered by section 28.

Section 29 “Day on which an Assembly Act comes into force”

184. Section 29 is equivalent to section 4(b) of the 1978 Act. However under section 4(b) an Act comes into force on the day on which it receives Royal Assent, whereas under section 29 of the Draft Bill an Assembly Act or provision in an Assembly Act comes into force at the beginning of the day after the day on which the Act receives Royal Assent.
185. Section 29 will operate where an Assembly Act does not address the coming into force of the Act or a provision in the Act (in other words, is silent on how or when the Act or provision comes or is brought unto force). The expectation is that, like section 4(b) of the 1978 Act, this provision would not generally be relied on in practice; but it would operate as a useful backstop.
186. This change means that section 29 operates in the same way as section 2 of the Interpretation and Legislative Reform (Scotland) Act 2010. As was noted in the consultation paper on the Bill that preceded that Act⁴⁷, and as is noted in *Craies on Legislation*⁴⁸, section 4(b) contains an element of retrospectivity and this can cause problems in practice. The consultation paper that preceded Scotland’s Act explains it as follows:

The difficulty is that the date of Royal Assent is not known in advance. At the moment it is therefore possible that problems could arise where, for example, a Bill receives Royal Assent in the afternoon and those applying the law in the morning (for example, in the courts) have to apply the existing law which is then amended retrospectively.

For this reason, we think that the approach taken in the 2010 Act is preferable to that in the 1978 Act.

⁴⁶ Usually by providing that the Act comes into force at the end of a certain period beginning with the grant of Royal Assent, or that it comes into force on a specific date. Occasionally, an Act will provide for the Act to come into force when a certain event or other contingency occurs.

⁴⁷ See the commentary on section 2 in that consultation.

⁴⁸ 11th Ed. 2017, paragraph 10.1.4.

Section 30 “Orders and regulations bringing legislation into force”

187. Section 30 has no equivalent in the 1978 Act. It sets out a proposition which appears in almost all Assembly Acts and Measures, meaning that this provision will not need to be included on an Act-by-Act basis. This will help to shorten future Assembly Acts.

Question 19: Do you agree with the approach taken in section 30 of the Draft Bill?

Repeal, revocation and re-enactment of legislation

188. Sections 31 to 34 of the Draft Bill, discussed below, make provision about the effects of, and the limits of the effects of, a repeal of an Act or a provision in an Act, or even of a word or phrase in an Act. Section 35(2)(a) of the Bill (interpretation of Part 2) sets out what repeal and revocation mean when used in the Part, and in so doing makes express provision intended to reflect the operation of the common law on the 1978 Act⁴⁹. At common law, ‘repeal’ and ‘revoke’ include not just express repeals and revocations⁵⁰, but any limitation of the enactment. This includes an Act which provides that another enactment “*ceases to have effect*” in relation to a place, person or thing; or where an amendment to an enactment (or the substitution of the enactment) in any way limits the operation or effect of the enactment⁵¹.

Question 20: Do you consider that section 35(2)(a) of the Draft Bill provides an accurate reflection of the common law provision?

189. Section 35(2)(b), which is equivalent to section 16(2) of the 1978 Act, means that the expiry of a temporary enactment (which generally means an enactment that contains what is known as a ‘sunset provision’ as to which see the note on section 17, above) is to be treated as a repeal or revocation for the purposes of the Bill.

⁴⁹ See, in particular, *Moakes v Blackwell Colliery Co* [1926] 2 KB 64. In that case, the substitution in an Act of a reference to an amount of money with a reference to a higher amount of money was held to be a repeal.

⁵⁰ For example, a provision stating ‘Section 1 is repealed’ or ‘In section 1, omit ‘and Wales.’

⁵¹ In *Moakes v Blackwell Colliery Co* [1926] 2 KB 64, 70, the substitution in an Act of a reference to an amount of money with a reference to a higher amount of money was held to be a repeal.

Section 31 “Repeals and revocations do not revive things previously repealed or revoked”

190. Section 31 of the Draft Bill is equivalent to section 15 of the 1978 Act. Section 15 overrides the common law rule that when an Act is repealed, it is treated as if it had never been enacted except in relation to things already done and finished under the Act. Without section 15, where an Act (Act A) repeals a provision in another Act which in turn had repealed a third Act (Act C), the effect of Act A would be to revive Act C. As this is rarely the desired outcome in practice, section 15 provides that in the above circumstances Act A does not revive Act C.
191. Section 31 makes it clear that it also operates in relation to repeals and revocations made by Welsh subordinate instruments, and (given the definition of ‘enactment’ in section 4) it operates where an Assembly Act or Welsh subordinate instrument repeals or revokes any –
- a. Assembly Act or Measure,
 - b. subordinate legislation made under such an Act or Measure,
 - c. Act of the UK Parliament,
 - d. subordinate legislation made under such an Act, or
 - e. any provision in any of the above kinds of legislation.
192. Although this appears to be narrower than section 15 of the 1978 Act, which operates also where an Assembly Act or Measure (or subordinate legislation made under such an Act or Measure) repeals other enactments (such as an Act of the Scottish Parliament), we think that in practice the limits of the National Assembly’s competence mean that an Assembly Act etc. will not repeal any enactment beyond those listed above.
193. Section 31 is not subject to section 3(3)(b) of the Draft Bill; so if the intention is that this rule should not apply in relation to a particular repeal or revocation, express words will be needed in the Act or instrument making the repeal.
194. In paragraph 79(f) of the 2017 policy consultation we noted that section 15 could perhaps be extended to expressly prevent the revival of previously abolished common law rules. In the Draft Bill, this matter is dealt with in section 32 (discussed below).

Section 32 “General savings”

195. This section is equivalent to section 16 of the 1978 Act. That section operates in relation to the same common law rule as section 15 of the 1978 Act

(discussed above, in relation to section 31 of the Draft Bill). Where an Act repeals another enactment, section 16 of the 1978 Act –

- a. in paragraph (a), provides for a rule which is a kind of expansion of the rule provided for in section 15, so that a repeal or revocation does not revive things (and in contrast to section 15, which can only be disapplied by express words, section 16 can be disapplied if the contrary intention appears);
- b. in paragraphs (b) to (e), provides more generally for what is described in *Craies on Legislation*⁵² as the preservation of ‘transactions past and closed’ from the effect of a repeal or revocation.

196. In *Craies on Legislation*, it is noted that this section gives effect to the assumption that ‘the abolition of a particular law for the future is not intended to prevent the due operation of the rule of law as it stood prior to the abolition’s taking effect’⁵³. In other words, the repeal of a law does not mean that things which happened or matters which arose prior to the repeal are to be treated as if they were never subject to that law. For example, if a person committed an offence under a law which was repealed after the offence was committed but prior to the matter being brought to trial, section 16 of the 1978 Act means that he or she can still be tried and punished under that law.

197. Section 32 of the Bill is intended to have the same effect as section 16 of the 1978 Act. The only change to the drafting is to make it clear, in section 32(a), that the reference to ‘any other thing’ includes common law rules. This addresses the issue mentioned in paragraph 79(f) of the 2017 policy consultation.

198. Like section 31, section 32 will operate where an Assembly Act or Welsh subordinate instrument repeals or revokes any –

- a. Assembly Act or Measure,
- b. subordinate legislation made under such an Act or Measure,
- c. Act of the UK Parliament,
- d. subordinate legislation made under such an Act, or
- e. any provision in any of the above kinds of legislation.

⁵² 11th Ed. 2017, paragraph 14.4.10.

⁵³ *Ibid.*

Section 33 “Re-enactment”

199. This section is equivalent to section 17(2) of the 1978 Act. This section is particularly useful in relation to consolidation of legislation⁵⁴, but it can be relied on in other circumstances. It operates where an Assembly Act or Welsh subordinate instrument repeals or revokes, and re-enacts, a provision in any –
- a. Assembly Act or Measure,
 - b. subordinate legislation made under such an Act or Measure,
 - c. Act of the UK Parliament, or
 - d. subordinate legislation made under such an Act.
200. In those cases, the operation of section 33(1) means that a reference in any of the above kinds of legislation to the provision which has been repealed or revoked is to be read as a reference to the provision as re-enacted.
201. In practice, this means that it is not necessary, as a matter of law, to amend references to the repealed provision so that they become references to the provision re-enacting that provision. However, in practice, wherever possible the repealing or revoking enactment (or another enactment) would make the necessary amendments to all references to the repealed provision. This is an important part of any law reform exercise.
202. On occasion, this is not always possible; the size and scale of the statute book means that it can be difficult, if not impossible, to track down every provision that should be amended. In such cases, section 33(1) will provide a useful backstop, and ensure that those provisions continue to operate.
203. Additionally, where a re-enactment goes further, or appears to go further, than a mere reproduction of the provision being repealed, there may be some doubt about whether section 33(1) applies. This means that caution is needed when relying on section 33(1), and again means that it is best regarded by legislative drafters as a backstop only to be relied on if necessary.
204. Section 33(1) differs from section 17(2)(a) of the 1978 Act in one regard; section 17(2)(a) only operates where the repeal and re-enactment are provided for in the same Act. Section 33(1) will operate where the repeal is provided for in one Assembly Act or Welsh subordinate instrument, and the re-enactment is provided for in a different Assembly Act or Welsh subordinate instrument. This will make it easier to rely on section 33(1), where necessary, without having to distort how a repeal and re-enactment is delivered. For example, in a

⁵⁴ Generally speaking, this is where existing law spread across a range of statutes is brought together into a single Act, without any significant change in the law.

consolidation exercise it may be desirable to have one Act setting out the consolidated law, and another Act which deals with all of the repeals and consequential amendments.

205. Section 33(2) and (3) are equivalent to section 17(3) of the 1978 Act. These subsections provide that any thing done under a repealed provision which has been re-enacted is to be treated as having been done under the re-enactment.
206. The Draft Bill does not contain provision equivalent to section 17(1) of the 1978 Act. That provision, which provides that when an Act repeals and substitutes a provision the repealed provision remains in force until the substitution comes into force, is in effect rendered redundant by modern drafting practice; legislation now generally makes provision about when both the repeal and the substitution come into force.
207. Section 33(4) extends the effect of subsection (1) so that it applies to references to re-enacted enactments found in deeds, and other instruments and documents. This reproduces the effect of section 23(3) of the 1978 Act.

Question 21: Do you agree with the approach taken in section 33 of the Draft Bill?

Section 34 “Referring to an Assembly Act by its short title after repeal”

208. Section 34 is equivalent to section 19(2) of the 1978 Act. All Assembly Acts have short and long titles. The long title is part of the Act itself, and is a (often lengthy) description of the contents of the Act. It must cover every element of the Act, but need not be particularly explanatory or clarificatory. It exists primarily for reasons relating to the legislative procedure⁵⁵, but the courts can (to a limited extent) use it as an aid in interpreting the Act. The short title of an Act is generally provided for in a provision in the Act itself, and as its name suggests it provides a short and convenient title which can be used in other legislation to refer to the Act. Section 34 will have the effect of preserving the validity of references to an Act by its short title even after the Act, and the provision which concerns its short title, have been repealed.
209. Section 34 of the Draft Bill (and section 19(2) of the 1978 Act) are necessary because of the longstanding practices in the UK Parliament and in the National Assembly in relation to long and short titles. While the convenience and necessity of having a short title is obvious, the long title is perhaps less useful as a tool for readers of Acts. Because of the somewhat archaic nature of the

⁵⁵ For example, in determining what the “scope” of a Bill is, to assist in deciding whether any particular amendment is sufficiently relevant to the Bill to be admissible.

long title, and its location in an Act⁵⁶, the extent to which it is used and relied upon in practice is debatable. An alternative could be an “overview” provision intended to describe the content of an Act, and help the reader navigate the content, in a more modern style. It has become common, particularly in longer and more complicated Assembly Acts, to include overview provisions to help readers understand the Act (or a particular Part or Schedule). Making greater use of overview provisions within an Act, or replacing the long title with something similar to an overview provision, is predominantly a matter of practice which the National Assembly could adopt if it considered it appropriate to do so.

Question 22: Should the continued use of long titles in modern drafting of Bills be reconsidered?

Supplementary provision

Section 35 “Interpretation of Part”

210. This section, in addition to section 4, provides for definitions of expressions used in Part 2 of the Bill. The effects of the definition of repeal and revoke are discussed above, in relation to sections 31 to 34 of the Draft Bill.

211. The definitions in this section do not apply outside of the Bill (unlike the definitions in Schedule 1 to the Bill, which will apply to all Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill will apply).

Section 36 “Interpretation Act 1978” and Schedule 2 “Amendment of the Interpretation Act 1978”

212. This section and Schedule provide for the amendment of the 1978 Act. The effects of these amendments have been considered where appropriate throughout this paper.

⁵⁶ Under the short title, before the words of enactment, and therefore before section 1.

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PART 3: OTHER MATTERS WHICH COULD BE ADDRESSED

213. In developing the Draft Bill we have begun to give consideration to other matters which may need to be dealt with by way of future legislation. Views on these are also sought.

Restatement of certain provisions in the Government of Wales Act 2006

214. We have considered the desirability of restating certain provisions of the Government of Wales Act 2006 in the Bill, particularly section 156 of that Act, which concerns the equality of the English language and Welsh language texts of bilingual legislation.

215. We can see benefits in setting out a fundamental rule like this in Part 2 of the Bill, but there are two issues with doing so. Firstly, on our proposed approach, Part 2 of the Bill will not apply to all Assembly Acts and Measures and subordinate legislation made under them. Further, section 156(1) also applies to bilingual subordinate legislation made by the UK Government (or any other person), and so will apply to a range of legislation which will not be subject to the Bill. To that end, section 156 itself (and not a provision in the Bill restating that section) would need to continue to operate in relation to a range of bilingual law.

216. The limits of the competence of the National Assembly are also an issue here. The rule in section 156 currently forms part of the law across the United Kingdom. This means that should it become necessary for any UK court to interpret bilingual law, this rule will apply. The National Assembly, however, cannot make legislation which extends beyond England and Wales⁵⁷.

217. We will continue to explore appropriate legislative mechanisms to allow for the restatement of section 156 of the Government of Wales Act 2006, whilst maintaining its current operation in relation to the law of the United Kingdom. We will also continue to consider the desirability of reproducing, and extending, the power set out in section 156(2).

⁵⁷ See section 108 (and after the relevant provisions of the Wales Act 2017 come into force, section 108A) of the Government of Wales Act 2006.

Arrangements for publishing Welsh law and the process of making and organising Statutory Instruments

218. In addition to the concerns about the size and complexity of the statute book, there has been criticism of the arrangements for publishing the law in the UK. Given that the statute book is already difficult to access, users of legislation need to be sure that when looking at a specific Act or Statutory Instrument they are looking at its most up to date version – in other words a version incorporating any amendments made to the legislation since it came into force. Although improvements are being made to legislation.gov.uk, the website operated by The National Archives, at present the only comprehensive sources of up to date legislation are those provided by commercial publishers for a fee.
219. There is again a Welsh dimension to this issue. As referred to above progress is being made to update legislation.gov.uk, however as yet there is no mechanism for updating the Welsh language text of legislation. In addition, there is no clear and specific provision setting out who is responsible for publishing Welsh laws. Unlike the case in Scotland⁵⁸ and Northern Ireland⁵⁹, there is no office of Queen’s Printer for Wales and there is no separate ‘series’ of Welsh Statutory Instruments⁶⁰. The Welsh Ministers intend to assess how existing arrangements could be modernised to better reflect the needs of Wales and the digital age.

Relationship between the Welsh language and English language text of legislation

220. Section 156(1) of the Government of Wales Act 2006 provides that the Welsh language and English language text of Welsh legislation is of “*equal standing*”. The implications of Welsh legislation being bilingual are considered in some detail by the Law Commission in its *Form and Accessibility* consultation paper and report⁶¹. We are considering whether anything should be done to further clarify the relationship between the two language versions when interpreting legislation. As part of this exercise we will also assess whether provision should be made to deal with the situation that could arise if bilingual Welsh law is amended in only one of the two languages by the UK Parliament or by a Minister of the Crown.

⁵⁸ The office of Queen’s Printer for Scotland was created by the Scotland Act 1998.

⁵⁹ A Government Printer for Northern Ireland is appointed by Her Majesty by letter patent.

⁶⁰ Although statutory instruments made by the Welsh Ministers are given a subsidiary number indicating their place in the sequence of Welsh instruments for the year in question, they form part of the UK Statutory Instruments series along with instruments made by UK Government Ministers. In contrast, there is an entirely separate series of “Scottish Statutory Instruments” and in Northern Ireland subordinate legislation is organised into “Statutory Rules”.

⁶¹ See Chapter 12 of both the Consultation Paper and Report.

Use of Welsh translation of enactments and bodies which do not have Welsh language titles or names

221. As part of the wider initiative to improve the accessibility of legislation, we are seeking views on the way in which the Welsh language text of legislation currently refers to enactments and other official documents not made in Welsh and to bodies which do not have names in the Welsh language.

Short titles of legislation

222. Titles of enactments made in languages other than Welsh have to date been translated into Welsh in Assembly Acts and Welsh subordinate legislation. To illustrate, section 8(11) of the Human Transplantation (Wales) Act 2013 provides as follows (emphasis added):

Where a person has appointed a person or persons under section 4 of the Human Tissue Act 2004 to deal after death with the issue of consent in relation to an activity done for the purpose of transplantation, the person is also to be treated as having made an appointment under this section in relation to the activity.

Pan fo person wedi penodi person neu bersonau o dan adran 4 o **Ddeddf Meinweoedd Dynol 2004** i ymdrin â'r mater o gydsynio mewn perthynas â gweithgaredd a wneir at ddibenion trawsblannu, mae'r person i'w drin hefyd fel un sydd wedi gwneud penodiad o dan yr adran hon mewn perthynas â'r gweithgaredd.

223. The Welsh language text provides "*Deddf Meinweoedd Dynol 2004*" as a courtesy title despite the fact that technically speaking, in law there is no Act of that name. The short title of the Act referred to is the "*Human Tissue Act 2004*"; that short title was bestowed upon that Act by section 61 of that Act, and that provision exists only in the English language.

224. This practice is well-established: the Welsh Government has followed this practice in the legislation it has produced since 1999. The UK Government began to use Welsh language courtesy titles in legislation implementing the Welsh Language Act 1967 and has continued to do so (under the Welsh Language Act 1993).

225. The practice of using courtesy titles is also commonly used in journalism, practical and academic legal writing, government publications and official translations of legislation. English-Welsh dictionaries and term banks also usually offer courtesy titles.

226. However, using a Welsh language title to refer to an English language only Act could potentially mislead readers into thinking that the legislation has been made in Welsh or is available in the Welsh language. The current practice may also blur the distinction between those enactments made by the National Assembly or the Welsh Ministers (which are bilingual) and those made by the UK Parliament or a Secretary of State (which are almost always not). Similarly, over time the current practice may also blur the distinction between legislation on subjects that are devolved and those that are not. This is because in a future consolidated and codified Welsh statute book, referring to legislation made in English only in English would give a strong indication that its subject matter was not devolved.
227. Since the Human Transplantation (Wales) Act 2013 (referred to above), Assembly Acts have, when referring to another Act, consistently included a citation of that Act's number or (in the case of a UK Parliament Act) chapter number. When referring to other Assembly Acts the "*anaw*" or "*dccc*" citation is used following by the Act's number for the year in question. For example, the Landfill Disposals Tax (Wales) Act 2017 refers to the "*Tax Collection and Management (Wales) Act 2016 (anaw 6)*". When referring to UK Parliament Acts the citation is, as mentioned above, to the Chapter number of the Act referred to. For example, the 2017 Act refers to the "*Finance Act 1996 (c. 8)*" or "*Deddf Cyllid 1996 (p. 8)*". This numerical citation could assist the reader to differentiate between the sources of the Acts (i.e. the National Assembly or the UK Parliament) and, therefore, whether it is bilingual. However, this citation system may not be widely understood.
228. The practice of giving Welsh courtesy titles has also been followed when the Welsh language text of legislation has referred to other documents that exist in English but not Welsh, such as EU directives and regulations, UN conventions and other international agreements. In those cases, the title or description of the document will identify the nature of the document and the institution by which it was made (and for EU instruments, the official reference number will be given).

Recent change to the current practice

229. Recent Government Bills introduced into the National Assembly have piloted a new approach to determine its effect on the accessibility of the Welsh text. In these Bills, the Welsh courtesy title of an English language only enactment has been included in the main text without a chapter number, but the English title and chapter number has been inserted in brackets and in italicised text directly after the Welsh courtesy title. So for example section 1 of the Trade Union (Wales) Act 2017 provides as follows:

Mae Deddf yr Undebau Llafur a Chysylltiadau Llafur (Cydgrynhoi) 1992 (*Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*)... wedi ei diwygio fel a ganlyn.

230. The chapter number is omitted from the Welsh courtesy title to avoid potentially misleading the reader that, were they to look for that Act by reference to its chapter number, the reader would find an Act with that Welsh language name.
231. However, this approach increases the length of the Welsh text. It also increases the amount of English language which appears in the Welsh text which could disrupt the Welsh sentence and affect its readability (an issue which may be particularly acute in relation to EU instruments and treaties as these often have longer titles than UK legislation). In any event, the English title is provided in the English text, and readers can read across from one language to the other (or toggle between texts on the HTML version on legislation.gov.uk).
232. There are alternatives to this approach such as:
- a. using the English language title followed by the Welsh language courtesy title in brackets;
 - b. using only the English language title;
 - c. using the Welsh language title, but defining it by reference to the English language title⁶²; or
 - d. using footnotes (something that is commonly done in subordinate legislation but not primary legislation).

Technological solutions may also be possible for those who read legislation online.

233. We are also considering whether to end the practice of citing an Act's number or, in the case of a UK Parliament Act, its chapter number on the face of legislation. The UK Government and Northern Ireland Executive have moved away from including these numbers, except in Schedules of amendments and repeals where Acts are listed chronologically; and the Scottish Government has stopped using them altogether. If the numbers are not helpful to readers, there is an argument for taking the same approach as the UK Government in both the English and Welsh language texts of Welsh legislation. Reference numbers would still be given for subordinate legislation and EU instruments (which may be harder to identify correctly). There is an argument, however, that these

⁶² For example: *Ystyr "Deddf Plant 2004" yw Children Act 2004 (c. 31)*.

numbers may help readers differentiate between references to Acts of the Assembly and references to Acts of Parliament, and between Acts of Parliament (which exist in English only) and Welsh language courtesy titles of those Acts (as set out above).

Bodies with no Welsh language names

234. Where a body is established and named in an Assembly Act, the body is given a name in both English and Welsh. So, for example, section 2 of the Tax Collection and Management (Wales) Act 2016 creates the “*Welsh Revenue Authority or Awdurdod Cyllid Cymru*”. This is also frequently done in Acts of Parliament despite the Act itself not being bilingual. For example, HMRC are given both a Welsh language and English language name by section 4 of the Commissioners for Revenue and Customs Act 2005 which enables Assembly legislation to refer both to “*Her Majesty’s Revenue and Customs*” and to “*Cyllid a Thollau Ei Mawrhydi*”.
235. Where, however, a body has not been given a Welsh name by statute, the Welsh Government’s current approach is to give it a Welsh courtesy title. For example, the English language text of section 4 of the Tax Collection and Management (Wales) Act 2016 refers to the “*Scottish Parliament*” while the Welsh language text refers to “*Senedd yr Alban*”. Not surprisingly, no Welsh name was provided for the Scottish Parliament by section 1 of the Scotland Act 1998 but it is still commonly known as “*Senedd yr Alban*” in Welsh. Similarly, the Welsh language text of section 16 of the Human Transplantation Act 2013 contains references to “*Awdurdod Meinweoedd Dynol*” which is a translation of the “*Human Tissue Authority*” despite the fact that the Authority – in law – only has an English language name.
236. Welsh language courtesy titles are also used for bodies and offices which are not established by statute, for example the UK Parliament is known as “*Senedd y Deyrnas Unedig*”. Private companies and charities are not given courtesy titles and are referred to in the Welsh language text by the names registered at Companies House or the Charity Commission.
237. This current practice could be considered misleading. Take for example “*Revenue Scotland*” or “*Cyllid yr Alban*” which is a relatively new body. In this case, using “*Cyllid yr Alban*” could potentially mislead readers as there is no body with that name and it is unlikely to be well-known. However, the accessibility issue is sometimes more nuanced. For example, would using “*Senedd yr Alban*” instead of Scottish Parliament really mislead a reader? Or is it the case that it is such a well-known phrase and the words themselves are so unambiguous that there would be so little gain by way of legal clarity in using

the English name that it would be acceptable to use the Welsh courtesy title in legislation?

238. If we were to adopt a principle that courtesy titles were no longer used, and instead use only Welsh names where they exist, this could lead to peculiar outcomes. For example, tax legislation may need to refer to both Revenue Scotland and HMRC in the same section or run of sections. In the Welsh language text, HMRC would then be given its Welsh name but Revenue Scotland would be referred to in English. It would not be possible for a reader to understand the principle behind that decision from the face of the legislation itself.
239. Another general disadvantage would be that there would be an increase in the amount of English language in the Welsh text, and this could distract the Welsh reader or make the Welsh text difficult to read.
240. Finally, it should be noted that adopting a general principle and consistent approach is more difficult in relation to bodies than for titles of Acts. For example, if a change was made so that only the English language name was used where a body only has an English language name then commonly understood and known names such as “*Senedd y Deyrnas Unedig*” (the UK Parliament) would not be used. Similarly adopting both names in such cases could be of little or no assistance to the reader.
241. In summary, the current practice of translating references to legislation and bodies that have English language titles or names only may be misleading in some cases. The alternatives set out above may tackle the issue, and could be of wider benefit to making the law more accessible. However, there is also a view that the existing practice causes few problems and that negatives that may also arise in adopting a different approach outweigh the benefits.

Question 23: Do you have any views on the other matters which could be addressed by way of future legislation (as set out in Part 3 of the Consultation Paper)?

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PART 4: IMPACT ASSESSMENTS

Regulatory Impact Assessment

242. The Welsh Government has prepared a Draft Regulatory Impact Assessment (RIA) for the Draft Bill, a copy of which may be found on the consultation web-page. This sets out the options considered for addressing the issues of accessibility and statutory interpretation of Welsh law, and for each option outlines the potential costs and benefits.

243. Your views on the Draft RIA are sought, particularly in respect of the analysis of the costs and benefits for the preferred options of legislating. If the Welsh Government proceeds with legislation following this consultation, a full RIA will be prepared. Comments on the Draft RIA will therefore assist in developing a well-costed assessment of the options considered.

<p>Question 24: Do you have any comments on the Draft Regulatory Impact Assessment for the Draft Bill?</p>

Welsh language Impact Assessment

244. The benefits and impacts for the Welsh language of potential reform are set out in this paper, but the Welsh Government has undertaken a formal Welsh language impact assessment for the Draft Bill. A copy may be found on the consultation web-page. Any comments on this would be welcome, and in addition questions 26 and 27 of the consultation seek views on the effects of the proposed policy.

Children's Rights Impact Assessment

245. As part of the earlier policy consultation the Welsh Government published a Children's Rights Impact Assessment. This has been reviewed and revised in light of the findings of that consultation, and to take account of the further development of the Draft Bill. A copy of the revised assessment may be found on the consultation web-page, and comments on this are welcomed.

Equality and Human Rights Impact Assessment

246. The consultation web-page also includes a copy of the Equality and Human Rights Impact Assessment undertaken by the Welsh Government for the Draft Bill. Comments on this would also be welcome.

Question 25: Do you have any comments on the draft impact assessments for Welsh Language, Children's Rights, or Equality and Human Rights?

Other impacts

247. This consultation paper asks a number of specific questions. If you have identified any related issues which we have not specifically addressed (including potential impacts that we have not touched upon) the consultation response form provides an opportunity for you to set these out at the end.

Annex A – Words and expressions defined in Schedule 1 to the Interpretation Act 1978 not included in the Draft Legislation (Wales) Bill

The following words and expressions are defined in Schedule 1 to the Interpretation Act 1978 and are not included in Schedule 1 to the Draft Legislation (Wales) Bill.

“Act”
“Associated state”
“Bank of Ireland”
“British Islands”
“British overseas territory”
“British possession”
“Building regulations”
“Central funds”
“Charity Commission”
“Church Commissioners”
“Civil Partnership”
“Colonial legislature”, and “legislature” in relation to a British possession
“Colony”
“Commencement”
“Committed for trial”
“Comptroller and Auditor General”
“Consular officer”
“The Corporation Tax Acts”
“Court of Judicature”
“Court of summary jurisdiction”, “summary conviction” and “Summary Jurisdiction Acts”
“Crown Estate Commissioners”
“Enactment”
“Governor-General”, and “Governor” in relation to a British possession
“The Immigration Acts”
“The Income Tax Acts”
“Land Clauses Acts”
“Local land charges register”
“Local policing body”
“London borough”, “inner London borough”, and “outer London borough”
“National Debt Commissioners”
“Northern Ireland legislation”
“Officer of a provider of probation services”
“Officer of Revenue and Customs”
“Ordnance Map”

“Parliamentary Election”
“PAYE income”
“PAYE regulations”
“Police and crime commissioner”
“Police area”
“Police Service of Northern Ireland”
“Provider of probation services”
“Registered” (in relation to nurses and midwives)
“Registered medical practitioner”
“Registered provider of social housing” and “private registered provider of social housing”
“Sewerage undertaker”
“Sheriff”
“Statutory maximum”
“The Tax Acts”
“Trust of land” and “trustees of land”
“Water undertaker”

The provision in Schedule 1 to the 1978 Act on the “construction of certain expressions relating to offences” has been included in the main list of defined words and expressions in Schedule 1 to the Bill.

Schedule 1 to the Bill does not contain the provision in Schedule 1 to the 1978 Act about the “construction of certain references to relationships”, on the ground that this provision is a signpost to section 1 of the Family Law Reform Act 1987 and so should be dealt with on a case by case basis as necessary.

Consultation Response Form

Your name:

Organisation (if applicable):

email / telephone number:

Your address:

Question 1: Do you agree that it is necessary to impose a statutory obligation on future governments in Wales in order to improve accessibility of Welsh law?

Question 2: If so, do you agree with the approach taken in Part 1 of the Draft Bill to impose such an obligation?

Question 3: Do you agree with the approach to application of Part 2 of the Draft Bill?

Question 4: Do you agree with the approach in section 3(3) of the Draft Bill, which disapplies a particular rule if the context otherwise requires?

Question 5: Do you consider the definition of “Wales” should be by reference to the local authority areas of Wales, or by some other means?

Question 6: Do you have any comments on what has, or has not been, included in Schedule 1 to the Draft Bill?

Question 7: Do you agree with the approach in section 7 of the Draft Bill?

Question 8: Do you agree with the proposed approach taken in section 8 of the Draft Bill?

Question 9: Do you agree with the inclusion of section 9 in the Draft Bill?

Question 10: Do you agree with the approach taken on service of documents in section 13 of the Draft Bill?

Question 11: Do you agree with the approach for deemed service (in section 14 of the Draft Bill) or do you consider there is a more precise workable alternative?

Question 12: Do you agree with the approach taken in section 16 of the Draft Bill?

Question 13: Do you agree with the inclusion of duties in section 18 of the Draft Bill?

Question 14: Do you agree with the inclusion of section 19 in the Draft Bill?

Question 15: Do you agree with the inclusion of section 20 in Draft Bill?

Question 16: Do you agree with the approach taken in section 22 of the Draft Bill?

Question 17: Do you think the Draft Bill should make provision on duplication of criminal offences (section 26), or should we follow the approach taken in Scotland and leave this as a matter dealt with in the 1978 Act?

Question 18: Should the Draft Bill make provision about Acts binding the Crown (section 27), or should this be addressed in another way?

Question 19: Do you agree with the approach taken in section 30 of the Draft Bill?

Question 20: Do you consider that section 35(2)(a) of the Draft Bill provides an accurate reflection of the common law provision?

Question 21: Do you agree with the approach taken in section 33 of the Draft Bill?

Question 22: Should the continued use of long titles in modern drafting of Bills be reconsidered?

Question 23: Do you have any views on the other matters which could be addressed by way of future legislation (as set out in Part 3 of the Consultation Paper)?

Question 24: Do you have any comments on the Draft Regulatory Impact Assessment for the Draft Bill?

Question 25: Do you have any comments on the draft impact assessments for Welsh Language, Children's Rights, or Equality and Human Rights?

Question 26: We would like to know your views on the effect developing the Draft Bill could have on the Welsh language, in particular in respect of:

- i) helping people to use Welsh, and
- ii) treating the Welsh language no less favourably than English.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Question 27: Please also explain how you believe the Draft Bill could be formulated or changed so as to have:

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Question 28: We have asked a number of specific questions. If you have views on any related issues that we have not specifically addressed, please set them out here:

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: