

Response to Welsh Government Consultation on Draft Legislation (Wales) Bill

Submitted by Swansea Law Clinic

This evidence is being submitted on behalf of the Swansea Law Clinic, which is part of the Swansea University Legal Centre, and is located within the Hillary Rodham Clinton School of Law at Swansea University.

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

In our first year of operation up until March 2018 one hundred and fifty-two student advisers assisted fifty-two clients. These numbers will expand as the Clinic develops. It is our intention to use new technologies to scale our service. Although most of our clients are members of the public our service is also available to small businesses.

A number of our projects work in association with a number of other organisations. The Miscarriage of Justice Project works with a charity, Inside Justice, and a solicitors' regulated practice and charity, the Centre for Criminal Appeals. The Prison Law Clinic works with the charity, the Prisoners' Advice Service. The Exceptional Case Funding Clinic receives support from the charity, the Public Law Project. We have run an outreach clinic at Maggie's Swansea, Singleton Hospital. We also receive assistance from LawWorks Cymru and the Equality and Human Rights Commission's Advisers' Helpline.

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

In our response we refer to laws whose territorial application is limited to Wales as Wales-only laws.

Executive Summary of our response

Question One.

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

By its very nature, the obligation is ongoing so needs to be imposed on future Welsh governments.

It is difficult for members of the public to find the law which is relevant to their situation, this is a growing problem, and prompt action is needed.

There is also a need to ensure that current legislation is freely available as the legislation.gov.uk website is not always up to date.

There will be growing numbers of people who will have to solve all or part of their legal problems by themselves without legal representation, which creates a further need for improved accessibility of Wales-only law.

It will significantly enhance the availability of Wales-only laws in the Welsh language.

Question two

We agree with the approach in taken Part 1 of the Draft Bill as far as it goes but, in some respects, would like it to go further particularly in terms of identifying currently in force legislation.

We would like to see in force legislation be easily identifiable. We think there are a number of options for achieving this.

Although we do not see Codes as the primary forum for 'how to use legislation' discussions, we would like Codes alert the public to the existence of cross cutting legislation which sits outside Codes in explanatory memoranda.

Similarly, we would like to see members of the public altered to the hierarchy of legal norms in explanatory memoranda to Codes.

Question One: 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?

- a) Yes, we do think it is necessary to impose a statutory obligation on future governments in Wales in order to improve the accessibility of Wales-only law.
- b) We applaud the ambition behind this proposal, which promises to make Wales-only law more accessible to members of the public and small businesses. The scale of ambition behind the proposal means that it cannot easily be accomplished within the term of one Assembly, so it is right to impose an obligation on future governments. In any event, even if it could be accomplished within the term of one Assembly the Codes would rapidly lose their currency as they will need to be amended.
- c) By its very nature the obligation needs to be long-term. If a Code were to come into force and a future Welsh Government were to introduce legislation on the same subject matter as the Code but in separate legislation, then the Code would be robbed of its efficacy, as the purpose of the Code is to find all the law on a particular subject matter in one place.
- d) Lord Lloyd Jones, a senior jurist and UK Supreme Court judge, has said that 'prompt action is needed' in terms of simplifying the situation when it comes to finding applicable laws and 'this needs to be set in motion soon while the position is still remediable'. The complexity will only get worse: more primary and secondary legislation will be passed, laws will have to be domesticated following Brexit, and the current practice of passing amendments to legislation without accompanying text adds to the accretion of the problem. As a result, action needs to start to be taken at the earliest possible opportunity.
- e) In our experience, our clients are not always aware of the rights and obligations which arise out of Wales-only law and that are increasingly relevant to their day to day lives. In part, this could be to do with the different sources of Wales-only law and confusing differences in terminology such as Measures and Acts, etc. Codes will have a tidying up effect, which will make it easier for them.
- f) From our casework we have found that there could be more awareness of important Wales-only legislation such as the Renting Homes (Wales) Act 2016. Moving to Codes will herald a new way of categorising laws. Instead of categorising laws in chronological order according to date of enactment, laws will be categorised by subject matter. We believe this will be of greater assistance in raising awareness amongst our clients as to where to locate laws which are relevant to their particular situation.
- g) Our advice model aims to empower clients to resolve their problems by themselves, as much as possible. Similar models are followed by other advice agencies.

Codification of laws by subject matter will assist them in this empowerment as they will find it easier to research the law themselves.

- h) There is evidence that many families are being priced out of justice, so increasingly more people will have to research law themselves. A report produced by Professor Donald Hirsch of Loughborough University, commissioned by the Law Society of Wales and England, found that those that people on incomes already 10 per cent to 30 per cent below the minimum income standard are being excluded from legal aid.¹ The situation is getting progressively worse as the means test threshold for legal aid has been frozen since 2010. So, in addition to cuts in the scope of legal aid since 2013 those who are eligible for legal aid are still, in some cases, unlikely to be able afford it and maintain a minimum acceptable standard of living. This means that individuals are being forced to navigate the legal system by themselves on such potentially life changing issues as eviction and severe housing disrepairs. This further increases the need to make the process of finding the law as simple as possible in order for people in such situations to better enforce their rights.
- i) There is a good economic case for imposing the obligation. There has been research that has found that small businesses are a hard to reach group for lawyers.² There is further evidence that small businesses have a tendency to ignore legal problems or try to resolve them by themselves. The proposed obligation would assist small businesses in finding the law and assessing their legal rights and obligations which will assist in making their operations more efficient.
- j) New business models which are emerging such as limited retainers, also known as unbundling, mean that individuals and small businesses are doing more of their own legal work in order to make the cost of legal services affordable. As the Court of Appeal in *Minkin v Lesley Landsberg* (2015) has approved unbundling then it is reasonable to assume that they will form part of the landscape for legal services for the foreseeable future, and that members of the public and small businesses will be navigating legislation without legal advisers.
- k) The obligation addresses the unavailability of many Wales-only laws in the Welsh language. It therefore has the potential to significantly enhance accessibility of laws for those who wish to access them in the Welsh language.
- l) Up to date versions of current law which are available electronically free of charge ought to be available to members of the public. At the moment, UK legislation, including Wales-only law, on the legislation.gov.uk website hosted by the National Archives is not always up to date. The obligation in section one of Part 1 of the Bill will address this problem. Although there are warning notices on the website there is no information which assists members of the public in making sure that they can find up to date information.

¹ Donald Hirsch, *Priced out of Justice? Means testing legal aid and making ends meet* (Centre for Research in Social Policy Loughborough University, March 2018)

² Legal Services Board, *The legal needs of small businesses 2013 – 17* Available at: <https://research.legalservicesboard.org.uk/news/latest-research-18/> Accessed on 4 June 2018

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

- a) Yes, we agree with the approach in taken Part 1 of the Draft Bill as far as it goes. However, in some respects, at some stage, we would like it to go further.
- b) In order to aid understanding of the law as it applies to members of the public in their situation we want to see a situation where they can easily identify currently in force legislation.
- c) One option would be a version of the Codes that would only include legislation which has come into force.
- d) A second option would be a freely available list of in force primary and secondary legislation.
- e) A third option would be to eventually move to a position where the official version of the Codes is published electronically and that the website on which it is published is searchable in point of time. However, given the problems with broadband connectivity in parts of Wales at the moment this is something best left to some future date.
- f) Ideally, and again in order to facilitate the public's understanding of the law, we would also like to see the Codes not include legislation which has been superseded by later legislation and has only been impliedly repealed.
- g) There is legislation which potentially affects the public's legal position which cannot be incorporated into Codes because it is cross cutting and cannot be limited by subject matter such as the Human Rights Act 1998. In addition, there is specifically Wales-only legislation which creates duties which are cross cutting and could also potentially affect the legitimacy of legislation. Welsh Ministers must have 'due regard' to the UN Convention on the Rights of the Child (UNCRC) in 'all their functions' when 'exercising any of their functions' under section 1 of the Children and Young Persons (Wales) Measure 2011. In addition, public bodies must contribute to well-being goals in accordance with the sustainable development principle under section 3 of the Well-being of Future Generations Act (Wales) Act 2015.
- h) We accept that the purpose of Codes is to find all applicable law in one place. It would not be the best place to engage in 'how to use' legislation discussions particularly as Law Wales already exists as a forum for such discussion. However, we would like to see brief reference to cross cutting legislation in explanatory memoranda to Codes themselves so that members of the public were at least alerted to the need, on occasion, to read Codes in conjunction with other legislation.

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