

**RESPONSE BY THE LAW COMMISSION OF ENGLAND AND WALES TO THE WELSH GOVERNMENT'S
CONSULTATION DOCUMENT ON THE DRAFT LEGISLATION (WALES) BILL**

1. The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. The driving principle of all our law reform work is to ensure that the law is fair, modern, accessible and as cost-effective as possible. We believe that, for the law to be fair, it must be capable of being understood by the courts, legal practitioners and citizens.
2. We are committed to performing our statutory task for the benefit of the people of Wales as much as for the people of England. We have established processes and firm relationships with the Welsh Government and the National Assembly, which allow us to take on useful and productive law reform for Wales. In particular the Wales Act 2014 amended the Law Commissions Act so as to enable us to enter into an agreed Protocol with the Welsh Government setting out the approach that the Commission and Welsh Ministers will jointly take to the Commission's law reform work in Wales. The Act also gives a new power to the Welsh Ministers to refer law reform work directly to the Commission and requires Welsh Ministers to report annually to the Assembly about the implementation of our reports relating to Welsh devolved matters. As our then Chairman, Sir David Lloyd Jones observed:

"The Protocol and the Wales Act 2014 represent a landmark in the development of a productive working relationship between the Commission and the Welsh Government. They set out how we will work together in relation to Welsh devolved matters of law reform, placing obligations on both; and how the Welsh Government will account to the National Assembly for its response to the Commission's work."

3. This consultation response is confined to questions 1 and 2 in the consultation document: *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? If so, do you agree with the approach taken in Part 1 of the Draft Bill to impose such an obligation?* We strongly agree with both.
4. In our report for the Welsh Government on *The Form and Accessibility of the Law Applicable in Wales/Ffurfi a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru*, published in 2016, we noted the need for the law to be clear and accessible; we surveyed the reasons why the law in Wales had become inaccessible; these were in part a reflection of problems of inaccessibility affecting the United Kingdom as a whole, but were compounded in Wales by the nature and process of devolution. Our analysis was similar to that contained in the present consultation document. To address these problems, we recommended that the Welsh Government pursue a policy of codification, executed in accordance with our further recommendations. Our conception of codification was that legislation whose subject-matter is within the competence of the Assembly and is currently scattered across the statute book is brought together in a piece of Assembly legislation, accompanied by reform as appropriate; and that future legislation in the subject area of a code should take effect by way of amending the code.
5. Our further recommendations included recommendations that those areas in which the law was in most need of this treatment should be identified and the process of codification set in train; that the

Welsh Government should institute regular programmes of codification; and that the Counsel General should be obliged to present a codification programme to the National Assembly, and to report to the Assembly on the progress of the programme at regular intervals. We made a number of ancillary recommendations, including as to flexible, streamlined legislative procedures within the Assembly for codification Bills.

6. We were very pleased that the Welsh Government accepted, or accepted in principle, all but one of our recommendations. We also welcomed the Counsel General's announcement in April 2017 of the launch of a pilot programme of consolidation, codification and better publication of legislation. He also explained that the Welsh Government saw a code not simply (as we had conceived it) as a piece of Assembly legislation, but rather as a collection of related primary legislation, secondary legislation and guidance; this view of codification is set out in paragraphs 25 to 30 of the consultation document. We had envisaged that codified primary legislation would continue to be accompanied by secondary legislation and guidance, all of which we suggested should be accessible together through the Law Wales portal; we accordingly see no conflict of substance between the Welsh Government's conception and ours.
7. One of the constituents of the pilot programme has been the codification of planning law, on which we have also been undertaking a project for the Welsh Government. We plan to publish a report in the autumn, and are working with the Office of the Legislative Counsel on draft legislation. Our contribution principally takes the form of public consultation, and the formulation of recommendations, on what we have for convenience called "technical reforms" to be made at the same time as restating the existing fragmented legislation in an Assembly Bill.
8. Technical reform falls short of introducing new substantive policy, but goes further than traditional consolidation in the direction of improving the resulting legislation; one of the unsatisfactory features of traditional consolidation is that effort is put into reproducing features of the existing law that are not in truth worth preserving. Our work on planning law takes advantage of the opportunity that is presented, at the same time as restating the legislation, to make improvements to it such as clarifying its meaning, omitting obsolete provisions and mechanisms, streamlining procedures under the legislation, or removing anomalies and inconsistencies. It is not merely a desktop exercise; consultation is vital in order to ensure that the right judgements are made on, for example, what is a desirable form of streamlining, what meaning should be given to an ambiguous provision or whether a provision is obsolete.
9. We note that the consultation document describes consolidation as involving "no or only minor amendments to the substance of the law" (paragraph 24), and describes codification as a method of organising and publishing the law once it has been consolidated (paragraph 25). We hope that the advantages offered by the more ambitious approach to consolidation recommended in our report, of which the eventual new Planning Bill will be an example, will prove attractive to the Welsh Assembly and Government.
10. Placing the Counsel General under a duty to keep the accessibility of Welsh law under review (section 1 of the draft Bill), together with the Counsel General's and Welsh Ministers' joint duty to present a programme of activities to each newly elected Assembly and report periodically on its progress (section 2) are in our view an eminently suitable way of giving effect to our recommendations. We welcome the provision made in draft section 2 for the programme to include activities undertaken in collaboration with ourselves; our participation will of course have to be in accordance with our own statutory powers, but we see the Welsh Ministers' power to refer projects directly to us as a convenient means of achieving this.