

Consultation Response Form

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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?

It is agreed that such a statutory obligation is necessary. It is clear that people in Wales face significant difficulties in accessing Welsh law, and that there are reasons why these problems are likely to increase, not least as Welsh law continues to diverge further from that of England (and of England and Wales). The impenetrability of Welsh law following the progress of devolution, and the resulting impact on access to justice clearly risks undermining the rule of law.

The commitment of future governments needs to be put onto a longer-term footing so that efforts to improve accessibility are not damaged by short-term (and even medium-term) policy initiatives.

Commenced, partially completed, reforms to legislation (including, though depending on context, partial consolidation/codification) run the risk of rendering the law even less coherent and comprehensible, and at considerable wasted expense. Programmes to improve accessibility of Welsh law must be fully thought through, piloted (with pilots fully evaluated) and properly resourced from the outset.

A statutory duty sends a clear message about the importance of the programmes to improve accessibility of Welsh law, and places Government under greater accountability to the Assembly. A non-statutory commitment would be insufficiently robust as a means to express a duty so important to the future of justice in Wales, not least as the UK prepares to leave the European Union with all the legislative complexity involved.

Bangor University's research into public law issues suggests that in some contexts (especially in the area of judicial review) people in Wales are less likely to seek redress through the courts against public body decision-making than their English counterparts. There are many and complex reasons for this, but at least part of the explanation is likely to be due to lack of access to, and understanding of, relevant law. Steps have to be taken to remedy this situation.

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

We agree with the approach taken. However, we raise some general comments.

We note there is no definition of exactly what is meant by consolidation and codification and we remain slightly uneasy with use of the term ‘Code’ at all, because of disagreement over its meaning (its use as a term of legal and constitutional art, versus more colloquial expression for example). Providing some short definition of the meaning of consolidation and codification in this context, on the face of the legislation, might bring greater clarity in terms of explaining the nature and scope of the Counsel General’s statutory duty. However, we appreciate that this might also come at the expense of flexibility for the future, including in accommodating the evolving form and status of the Codes themselves. What codification means with respect to one area of Welsh law may be different to what it means in another, for example. On balance, if it is not appropriate to define consolidation/codification in the legislation Bill itself, it should then be ensured that the meaning of consolidation/codification in relation to each specific aspect of future programmes is defined at the outset of that programme.

The Consultation paper states in para 38 that: ‘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)’. Consultation, particularly on the perspectives of those bearing duties and granted rights under legislation, is crucial to improving the accessibility of law. Para 38 goes on to state: ‘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’. Engaging with users of particular categories of legislation, and specific forms of legal redress measures, has proven notoriously difficult for researchers, it can be extremely time-consuming (and costly as a result) and there are sometimes concerns around the protection of users’ data.¹ Further issues arise around attempting to engage ‘non-users’ who are (by definition) much more difficult to identify. Substantial thought should be given to the nature, extent and timescale of consultation. Including a statutory duty to consult in the Bill could also be considered. It is possible that a statutory duty to consult would send a further important message about ensuring that law and justice in Wales develops in a way that best engages citizens. Though as with giving further information about the nature of codification, there is a danger that statutory expression would bring its own complexity and limit flexibility; less may be more in this context. In any case, we would reiterate the importance of consultation – that it is as widespread as possible,

¹ For these difficulties see e.g., UK Administrative Justice Institute, *A Research Roadmap for Administrative Justice* (February 2018) - <https://ukaji.org/ukaji-research-roadmap-consultation/>

engages a broad range of ‘users’ and strives to identify and engage current ‘non-users’.

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:

We note that the Bill refers to working with the Law Commission, and other activities that the Welsh Ministers and Counsel General consider appropriate. We wish to point out here that there are opportunities to work with a range of researchers in Wales (in the Welsh University’s, think tanks and other NGOs), in the context of both consolidating/codifying particular areas of Welsh law, and making that law more accessible. However, academics are often disincentivised from conducting research into specific Welsh law subjects. Writing explanatory commentary about a particular topic such as the Welsh law of community care or local government, or even a broader field such as administrative justice in Wales, is likely to be a low priority for academics under pressure to produce work that is world-leading in terms of its originality and significance in order to satisfy the demands of the Research Excellence Framework (REF). Realistically in order to sustain a research career (and with that, job security for the future), academics must focus on producing work that is of recognised international excellence. This is not to say that research relating only to Wales cannot be of world-leading quality, but to meet this standard there must be something highly original about the methods applied or conceptualisations developed, and findings must have obvious and direct relevance beyond Wales.

In a recent article, Julia Anna Bargenda and Shona Wilson Stark note that there may be some connection between the pull of codification and the lack of relevant legal commentary. They propose:

In Wales, the case for codification to carve out a national identity is more compelling because it could be said that Wales now has its own “living system of law” after losing its legal identity centuries ago. In addition, Welsh lawyers have a dearth of textbooks to look to for guidance when the law is unclear. Having “so many excellent textbooks” has been cited as a reason why codification is not needed in Scotland. The best textbooks provide accessible digests of the law which cut down the time needed to wade through all the primary sources.²

However, as the authors themselves note, there is no realistic stark choice between, on the one hand, a code so detailed that academic/practitioner commentary is unnecessary, and on the other a morass of heterogeneous sources that cannot be understood at all without textbooks or other explanatory material. Continental Codes

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

are coupled with interpretive works that can extend to near biblical proportions – that codification equals greater clarity and accessibility is not necessarily true. What is clear is that to ensure that Wales benefits from the best of both worlds (and doesn't suffer from the worst of them) there has to be a clear partnership between legislators, practitioners and academic lawyers going forward. One aspect of this will be to ensure the development of appropriate skills and expertise over time.

The focus of most England and Wales law degrees tends to be largely on common law principle and some statutory interpretation, there is little to no analysis of legislative drafting methods and skills. To a great extent this is the nature of learning in a common law system, being 'ground-up' reasoning from facts rather than reasoning 'top-down' from abstract legal rules and principles provided in relevant Codes. Anecdotally we have observed this difference between top-down and ground-up approaches in the different ways students studying Bangor Law School's double degree in the law of England and Wales and French law, respectively approach legal problems (prior to learning the more specific skills of their 'second' jurisdiction). Providing broad training in so-called 'common law method' (ground-up) is a highly attractive export factor of England and Wales law degrees, as perceived by international (mainly non-EU) students, and as such must be maintained.

Nevertheless, oft neglected drafting skills are likely to be of great importance to Wales going forwards as a consequence of devolution (and Brexit) even in the absence of specific consolidation and codification programmes. It would be beneficial to explore further how researchers (both academic and other) can be supported to master relevant skills, to pass these skills on to students, and more broadly to contribute to developing consolidation programmes and to suggesting initiatives to improve the promulgation and accessibility of legislation. The proposal (expressed by Supreme Court Justice Lord Lloyd-Jones, among others) to establish some form of institute for Welsh law and justice issues is important here, as such an institution could form a bridge between Government and researchers, and help to develop a co-ordinated research agenda in legislative drafting and legal accessibility. Welsh Law Schools can also do more to develop the drafting aspects of their curricula (this is likely to be challenging, but could be considered alongside continuing re-evaluation of legal education in light of the new Solicitors Qualifying Exam (SQE)).

Alongside the disincentives for academics to provide analysis and commentary on Welsh law, funding for research into public law issues (many of which affect the least advantaged people in society the most) tends to be more sparsely available than for research into commercial subjects where there are more obvious and immediate economic impacts. It is largely over public law matters where Wales has legislative competence, and where codification is already under way (planning law). We note [para 18] that funding to support other aspects of the programme to improve the accessibility of legislation would be funded by costs absorbed in the normal course

of business and additional Welsh Government funding on a case-by-case basis. Thought could be given to how Welsh Government can engage with researchers in this context, including with respect to sources of funding.

We note that the Codes themselves are not proposed as single continental style documents but rather as constellations of legislation. Whilst it would technically be possible to develop each Code as single document and still maintain a traditional (England and Wales) hierarchy of legal norms (primary and secondary provisions) it is accepted that attempting to do this would introduce its own complexity, especially in terms of the necessary brevity of expression. Such all-encompassing Codes as single documents would not fit at all easily with centuries of common law development. In any case, whatever format the Codes take, a central issue, perhaps the most important issue, in their drafting is going to be how users navigate connections between various provisions (in individual documents and across those documents). It is clear that the use of technology is going to be crucial to achieving this in practice (for the majority of citizens), though complex issues will remain around ensuring appropriate provision for those without regular and reliable internet access. Continuing to develop and support emerging specialisms in artificial intelligence and law in Wales, and partnerships between Welsh Law Schools and Computer Science Schools/Departments is of increasing importance, as is developing and implementing a clear programme of public legal education commencing at primary/gynradd level.

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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:

Data protection

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations.

In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We

may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

Names or addresses we redact might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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The contact details for the Information Commissioner's Office are:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Telephone: 01625 545 745 or 0303 123 1113

Website: ico.org.uk

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the GDPR, please see contact details below:

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Welsh Government
Cathays Park
CARDIFF
CF10 3NQ

Email Address: Data.ProtectionOfficer@gov.wales