

# **Response to Consultation on Draft Legislation (Wales) Bill**

**Dr Tom Hannant**

**Hillary Rodham Clinton School of Law, Swansea University**

[t.w.hannant@swansea.ac.uk](mailto:t.w.hannant@swansea.ac.uk)

## **Response to Questions 1 & 2**

This response to Part 1 of the draft Legislation (Wales) Bill is an extension to comments made at the Consultation Event at Swansea University on 4<sup>th</sup> June 2018.

### **A. Accessibility and Understanding**

A central motivation for the codification project envisaged by Part 1 of the draft Legislation (Wales) Bill is to improve the lot of ‘each of us as citizens who need to be able to better understand our rights’ (*Consultation Document on the Draft Legislation (Wales) Bill* (WG34368), p.7). The Bill intends to initiate a process that will result in every citizen being able to know what the law is, how it applies to them, and ultimately for them to make informed decisions about their conduct. These aims recall core rule of law ideals, and the vital human interests that underpin that value.

The *Consultation Document* acknowledges that there are two principal stages to this process of knowing what the law is: ‘Citizens must be able to *find* and *understand* the law with reasonable ease’ (p.10, my emphasis). Both stages are necessary conditions for satisfying the goal of enabling citizens to know what the law is. Perfectly understandable law will not be knowable if inaccessible. Nor can perfectly accessible law satisfy the underlying goal if it is not understandable.

Stage one, then, is finding the law. As the *Consultation Document* recognises, this aspect of accessibility is not guaranteed by publication of the law. To know what the law is, one must be able to locate *all* of the relevant law. For lay citizens to know what the law is, it must be possible to locate all of the relevant law without specialist knowledge. The envisaged codification project responds directly to this concern about locating the law (with one caveat, outlined in section B below) by seeking to bring together all legislation on a particular topic in a unified code. The citizen, in principle, is then able find any law over which they have uncertainty simply by reference to the general subject matter of their concern, e.g. housing, education, etc. Ease of locating the law is the principal focus of Part 1 of the Draft Bill. Insofar as the Bill imposes duties, it imposes duties primarily relating to ensuring the law can easily be located (s. 1, s.2 (1)-(3)).

Stage two is understanding the law. It is vitally important that the envisaged programme of codification treats promoting understanding of the law as equally important to improving ease of access. A citizen may be easily able to access a future Welsh Education Code, but unless that Code is written and presented in a way that is understandable to a lay citizen, mere ease of location will be of little utility. Of particular concern in this regard are, first, the sheer length and breadth of prospective Codes, if they are to incorporate all relevant

existing law. Second, the continued use of technical drafting language. Third, the continued use of complex, multi-part standards and definitions.

The *Consultation Document* does suggest that some simplification will be pursued together with consolidation and codification. The process will involve ‘modernising the language, drafting style and structure’ of the law (*Consultation Document*, p. 15). I have two concerns. First, it is unclear that simplification is mandatory under s.2 of the draft Bill. Consolidation and codification does not necessarily entail simplification. Even the *Consultation Document* prefers to describe the process as modernisation, not simplification. More modern drafting ought to be more understandable than outdated approaches, but that does not in itself guarantee the law will be sufficiently understandable to a lay person without legal advice. If simplification of the law is a necessary condition for achieving the aims of the Bill, should simplification be a mandatory consideration for the Counsel General’s programmes for improving accessibility? In particular, perhaps ‘simplification’ could be included alongside codification and consolidation in s. 2(3)(a) of the Draft Bill. Such a provision should guard against the risk of future Counsels General pursuing a costly and time-consuming codification project without heeding the need to improve ease of understanding, as far as possible.

Second, and more fundamentally, whether mandatory or voluntary, it is doubtful that sufficient simplification is a realistically attainable through codification. Why? The value of promoting understanding through simplification must be weighed in the balance with potential harms of simplification. Technical language, lengthy legislation, and complex legal standards are all conducive to precision. Over-simplification of the law inevitably impacts on this precision, with the result that legal certainty may be imperilled.

At a consultation event held at Swansea University on 4<sup>th</sup> June 2018, the Counsel General and his team indicated that simplification would be pursued principally in those areas of law that most affect ordinary citizens. This strategy seems right in principle. But it nevertheless falls short of the stated aim of codification. It seems highly improbable that there is substantial overlap between the following categories: (1) areas of law that most impact on citizens and (2) areas of law where simplification can be achieved without imperilling legal certainty. It is not the case that technical and precise definitions uniquely apply to specialised areas of activity. Indeed, sometimes the fact that ordinary citizens are affected by a law is an important reason to ensure that law is exactly drafted. Faced with a choice between precise drafting capable of guiding courts and facilitating confidence in legal advice, on the one hand, and simpler but less certain provisions, on the other, it is likely that future Assemblies will frequently opt for the former.

The question therefore remains, how can we facilitate understanding of the law for the unable to access legal advice? If I am right that it will sometimes be impossible to make important legal provisions both *accessible* and *understandable*, alternative means will have to be pursued. That may be reflected in s. 2(4)(a) of the Draft Bill, which *permits* the Counsel General to include in their programme for improving accessibility planned ‘activities intended to promote awareness and understanding of Welsh law’. These activities might usefully include simple user-guides or commentaries on complex yet high-impact areas of law, published on the Law Wales website and elsewhere. These guides could include reference to the relevant authoritative legal provisions. Although these would necessarily be

imperfect, since a simplified guide cannot perfectly articulate a complex statutory provision, such guides would at least give citizens a clear sense of the law in areas that affect them. ‘Commentaries’ are identified as a useful tool for facilitating bi-lingual practice (*Consultation Document*, p. 17). Under the above argument, they could also be essential components in the overall accessibility agenda.

Given the inbuilt limits of codification for enhancing understanding of the law, and the requirement for a broad approach to promoting understanding, could s. 2(4) be phrased in *mandatory* terms? Recourse to the Law Commission would remain optional under the drafting of s. 2(4)(b).

## **B. Codification and the Common Law**

At the consultation event at Swansea University on 4<sup>th</sup> June 2018, I suggested that legal codes risk becoming a false-friend to the lay citizen. My concern is that while relevant legislation will be compiled into codes, it is not proposed that common law rules would be similarly codified. As a result, citizens might consult the relevant code as to their legal rights and obligations, only to find a partial account of the relevant law. They might then receive an incomplete or even misleading understanding of what the law is.

In response, it was suggested that the effects of some judicial decisions would be integrated into future codes. For example, where a statutory provision has received judicial clarification, that clarification could be incorporated into the consolidated law. An example would be where a provision has been ‘read down’ under the Human Rights Act 1998, s. 3. This strategy is eminently sensible in itself. But the concern persists in respect of the wider common law. General common law rules and principles remain beyond the scope of the codification exercise. Here, the risk of codes acting as a false friend to the lay citizen remain.

I agree that there should be no attempt to codify the common law as it relates to devolved subject matters. Instead, once again, these concerns point to the importance of alternative means for facilitating access to and understanding of the law. User-guides or commentaries targeted at lay readers could equally encompass the new statutory codes and the common law, as appropriate, to present a holistic overview of the law in important areas. The importance of such measures as an essential addition to formal codification might again suggest that s. 2(4) should be made a mandatory part of the proposed codification agenda.