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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?

While it can hardly be *necessary* to impose a duty upon government to make the law accessible, it is certainly one way of doing so. In his award-winning work, *The Rule of Law*, the late Lord Bingham of Cornhill expressed the view that one of the ingredients of the rule of law in a modern Western democracy was that the law should be accessible, and as far as possible intelligible, clear and predictable. A bill, therefore, which states one of its purposes to be "to promote the accessibility of Welsh law" cannot but be welcomed and applauded.

However, there is a difference between law and legislation. The principal focus of the draft bill is making Welsh legislation accessible, although the reference to "any other enactment, *or rule of law*" [emphasis added] in the proposed section 1(2)(c) would permit of other sources of law being included. The Consultation Document however makes it clear that enacted law is the principal focus of the exercise, and this perhaps should be given greater emphasis in order to avoid expectations being disappointed. Making enacted law accessible is in and of itself a laudable and worthwhile objective, and is also in all probability a necessary first step towards making the law generally accessible. If however the citizen is led to believe that a consolidated or codified text of enacted law is a sufficient source from which to identify their rights and duties, their disappointment on discovering that this is not the case could undermine the credibility of the exercise as a whole. The more modest, albeit highly ambitious, objective of making enacted law accessible should be absolutely clear from the start.

The exercise inevitably raises the question of the intended readership of enacted law. Legislation is usually enacted in order to make changes to the law, albeit that sometimes the purpose may be to consolidate and thereby clarify existing legal rules. Bills are drafted in order to allow the legislature to address in principle and in detail whether to approve the changes proposed. When passed, the enacted statute records the changes that have been made. Neither is an attempt to state the law on the subject under discussion in a comprehensive manner for the benefit of the citizen end-user. Consolidation and codification for the benefit of the citizen end-user has therefore as its purpose a change in the nature of the statute book.

Arguably the change is overdue. Good law should always be easily available to and understandable by those who seek access to it. Such accessibility should be an essential element of all legislation regardless of its purpose.

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

The mechanism proposed enforces the obligation politically, through accountability to the legislature for performance of the duty. The weakness of the proposal is that, as it is the legislature which enacts or approves legislation, it shares in the responsibility for ensuring that the structures of consolidation and codification are not disturbed. In some measure it is policing itself. The same would not be true if there were a hierarchy of laws according to which citizens could enforce the duty through the courts, but that is not the legal system which we currently inhabit. In many areas of Welsh law-making, legislators appear to be straining to create situations which the existing legal order is not shaped to accommodate. This is one of them. Whether the proposed structure will deliver the accessibility it seeks to further will be more a matter of political will than legal structure.

The temptation to consider that creating a duty to make laws accessible is equivalent to delivering accessibility needs to be avoided. It is not and should not be the purpose of legislation to signal good intentions. Meeting the statutory requirements (publishing programmes; promoting activities; etc.) while not actually reforming the statute book needs to be viewed from the outset as failure.

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

The existence of interpretation provisions pertinent to the understanding of an enactment in a place outside of that enactment militates against accessibility. It is an example of law being made for judges and lawyers rather than for the layperson/citizen. The existence of more than one Interpretation Act with a rule as to which is to apply to specific items of legislation exacerbates the problem. Nevertheless, if the programme of consolidation and codification proceeds, the problem should diminish and possibly ultimately disappear. During that period of transition, which is not likely to be short, it is vitally important for accessibility that the lay reader knows exactly which set of interpretation provisions applies to an enactment being read. With on-line texts, this could be flagged in the same manner as National Archives indicate whether pieces of legislation are fully up-to-date on legislation.gov.uk. In print copies, it would be useful to have stated which provisions apply, for instance in the same section as the short title or the section containing interpretation provisions specific to the Act. If the Act were amending Westminster legislation by insertion, the section could state which provisions applied to which parts of the enactment. One assumes that restatements of laws outside of competence could be modified so as to conform with Welsh interpretation provisions so as gradually to consign the problem to history.

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?

Paragraph (b) obviously poses problems for accessibility, but is probably justifiable as a necessary insurance against an over mechanical approach to implementing interpretation provisions.

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?

Wales has been defined in terms of its territorial subdivisions since the sixteenth-century Acts of Union which shired Wales and the Marches by the grouping of hundreds. This approach has continued, with the Interpretation Act 1978 defining Wales in terms of local authority areas, and the Government of Wales Act adding to that the maritime Welsh zone. Wales has a different meaning in the Welsh Church Acts, but the approach to definition is the same – namely the parishes which are part of the Church in Wales' dioceses. Given that the Assembly does not have competence to amend section 158(1) of GoWA 2006, within which Wales is defined, it is unclear that a Welsh Interpretation Act can do more than restate the existing definition – i.e., to change the meaning of Wales in the Interpretation Acts would affect the meaning in the 2006 Act.

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

The first official UK parliamentary draftsman, Henry, later Lord, Thring, advised that definitions should be used to indicate where a term included or excluded something where otherwise there would exist a doubt as to its inclusion or exclusion. He counselled against attempting to define terms with a scientific precision where their ordinary meaning was clear and exact. He opposed attaching meanings to terms which were at variance with their ordinary usage.

The definitions in the draft Schedule appear to satisfy Thring's principles. It may well be that further terms will be added to the Schedule, but in so doing Thring's principles should continue to be observed.

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

Yes. It neatly sidesteps any issues about gender preference and the like.

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

Yes – but with one reservation regarding the Welsh version. The provision is clearly meant to cover variations necessitated by the presence of mutations in the Welsh language. The meaning of the text in Welsh would be much clearer if specific mention was made of *treigliadau*. This may be a section where the two language versions do not need to reflect each slavishly, although there would be little harm in referring to *mutations* in the English version.

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

Yes.

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

This is an example of a provision which is likely to be overtaken by technological developments which are not currently foreseeable. Consideration might be given to attempting to future proof the provision by teasing out the underlying principles which are being employed as well as spelling them out in relation to the post and electronic

communications. A power might then be added to allow Welsh Ministers to make similar provision in relation to other forms of communication, subject to affirmative resolution procedure before the Assembly in each case.

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?

See above, the answer to Question 10.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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?

No comment.

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

No comment.

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

Yes.

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

Yes.

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

Yes.

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

The advent of purpose clauses and overview clauses has not been uncontroversial. Many still hold that they are out of place among legislative provisions. Good overview clauses can be extremely beneficial in helping the reader navigate a complex piece of legislation, and purpose clauses undoubtedly reflect the development of purposive approaches to statutory interpretation. There are excellent examples of both in Welsh legislation. There is no gainsaying, however, that on occasion one or other duplicates what is to be found in the long title of an Act. That is not to say that they make long titles redundant. Each serves a different purpose. The long title informs the reader as to what the Act does; the overview provision how and where in the Act it is done; the purpose clause why it is being done. As long as the use of each is kept in mind, each will retain its usefulness. The purpose each serves needs to be carefully kept in mind on each occasion that one is drafted or amended, as is the use that can be made of Explanatory Memoranda to achieve these goals.

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)?

Lord Thring's opposition to attaching meanings to terms which were at variance with their ordinary usage is particularly pertinent to the definition of terms in more than one language. The accessibility of a text is reduced if the meaning of terms used in it are at variance with ordinary usage. Such a result is bound to occur if a word is defined according to the meaning of a word in another language. Such a 'shoe-horning' of words into the meaning of words in another language is arguably what is permitted by provisions such as section 156(2) of the Government of Wales Act 2006, allowing Welsh Ministers "to provide in respect of any Welsh word or phrase that… it is to be taken as having the same meaning as the English word or phrase specified", the use of which power has been wisely eschewed.

The power does however have its uses, and could properly be employed to give pieces of English-only legislation their equivalent Welsh short titles for the purpose of citation in other legislative texts and before the courts. The same could be done with the titles of bodies having no official Welsh name, thereby removing scope for a variety of unofficial titles coming into use. Care would need to be taken to discover whether any unofficial titles were already in regular use. Power to provide such official titles and names for such purposes could be given to the Welsh Ministers subject to affirmative resolution procedure before the Assembly following a statutory consultation with interested parties. A procedure should be put in place to enable the Assembly to approve or disapprove of such naming on an individual basis without requiring the approval of a multiplicity of instruments.

A similar approach could also be employed to standardize legal terminology in the Welsh language so as to avoid and overcome the long-standing problem of variation and inconsistency in the use of legal terms. While care would need to be taken not to impose

meanings which were at variance with ordinary usage, the approach could be serviceable in the case of terms coined for use in English law with a single, specified meaning or having a statutory definition.

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

No.

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

No.

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?

The creation of codes of law relating to specific areas of devolved competence will do much to make Welsh law accessible. The comprehensiveness of the codes will be key to the achievement of this, and the competence to restate the law on matters outside of competence (GoWA 2006, Schedule 7B, para. 13(1)) will be key to achieving that comprehensiveness. Such restatements will also allow the law in those areas to be expressed in both Welsh and English. The question therefore arises as to whether the English text of a law which is restated is to be treated as having been enacted at the same time as the Welsh text so that both texts are to be treated as being of equal standing (GoWA 2006, s.156(1)). If not, the Welsh text of the codification will be of two kinds: partly of equal status with the English text and partly not. If this is the case, the difference needs to apparent for the reader to be aware of it. It would be beneficial for this issue to be resolved – and ideally resolved in favour of the equal status principle applying to restated enactments – in advance of codification taking place.

It is submitted that how the courts approach the task of interpreting bilingual legislation in accordance with GoWA 2006, s.156(1) is best left to the courts to determine and develop.

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.

No comment.

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:

The existence of electronic access to legislation in some measure makes traditional interpretation mechanisms anachronistic. Electronic texts furnish the possibility of the reader being able to access the meaning of a word in a text simply by placing the cursor upon it, or even being able to access the judicial interpretation of a term by means of a hyperlink. In many respects, these technological innovations are being employed to serve the pre-existing condition of the statute book rather than it being accepted that they will transform the nature of the statute book itself. Indeed, the term 'statute book' is itself somewhat anachronistic.

Indeed, it could be argued that the concept of an Interpretation Act is rooted in a literal approach to statutory interpretation which itself belongs to the past. Eighty years ago, in an article in the *Canadian Bar Review*, Professor John Willis of Dalhousie University, reflected on the changing nature of legislation in the common law world. He noted that whereas statutes had once been drafted to inform judges and lawyers of how the law was being changed, by the time he was writing "the function of most modern statutes… is to tell some lay man, not some court, to do something". He saw the "growth of social reform legislation, addressed as it is to laymen, such as civil servants and commissions" as having an effect upon the way legislation was drafted and subsequently interpreted. The language of the drafter needed to be accessible to persons other than trained lawyers, and as a consequence, its interpretation became less focussed upon the literal meaning of the words used and more upon the purpose which the enactment sought to achieve (John Willis, "Statutory Interpretation in a Nutshell", (1938) 16 *Canadian Bar Review* 1, at 10-11).

The first Interpretation Act was passed in 1889, twenty years after the creation of a drafting office for the UK Government headed by Lord Thring. The move away from precise, technical drafting and narrow, literal interpretation was already occurring. Contrast Jervis CJ's statement in the 1850s that "if the precise words used are plain and unambiguous… we are bound to construe them in their ordinary sense, even though it leads… to an absurdity or a manifest injustice" (*Abley* v *Dale*, 11 CB 391) with Willes J's words in 1871 that "the language of an Act is to be read according to its ordinary grammatical construction… unless so reading it would entail some absurdity, repugnancy or injustice" (*Abel* v *Lee*, LR 6 CP 365, at 370). In more recent times, the growth of purposive interpretation may have prepared the way for legislative provisions which can be aspirational and not merely prescriptive.

While it is perhaps too soon to embrace such possibilities fully, care needs to be taken that choices being made at the present time will not obstruct or complicate further inevitable, eventual change.

This consultation has had as its focus the accessibility of legislation. There remains the wider question of the accessibility of the total body of law which applies in Wales on a given subject. Making that readily available in a concise form would be a considerable service to lawyers, citizens, business and more. With a distinct body of Welsh law still in its infancy, that greater goal can and should be kept in view.

Thank you for your consideration of our response.

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