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?

The objective of consolidation / codification is an important one. It's clear that this project is a long-term one. In theory, it shouldn't be necessary to *impose* an obligation on successive governments to improve accessibility. Indeed, this isn't what the provision does: it places a duty on successive Counsel Generals to keep the position under review and requires successive Welsh Ministers and Counsel Generals to jointly publish a programme designed to achieve that objective.

The reality is that underpinning the requirement as a duty will inject momentum into a proposition that may have less force as a pure policy objective. Given that the project will take years, or even decades, to implement and refine, this is a neat way of keeping it on track.

"*Accessibility*" is an interesting choice of word. It seems to us that it has, as its focus, the administrative accessibility of the form (v. substance) of law – which, again, seems to be right. One of the biggest challenges will be to ensure consistency in approach to the exercise – which we pick up in more detail below.

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 to the joint accountability of Counsel Generals and Welsh Ministers (now and in the future) to design the programme – although the duty to review solely rests with the Counsel General.

The current draft does raise a few questions though:

Is the definition of "Welsh law" in s 1(2) the right one?

- It refers to "Acts and Measures of the National Assembly for Wales…" Part 2 refers to "Assembly Acts" (which applies to the Bill pursuant to section 3(1)(c)).

Is there a potential for internal inconsistency in the Bill? Could this be read disjunctively, i.e. "Acts" (i.e. UK/ Assembly) and (separately) Measures?

- Should the duty and programme relate only to "Welsh law" so defined? The Consultation paper refers to the prospect of re-enacting Westminster legislation, so it becomes "Welsh law". The discussion in the Consultation paper is of the prospect of bringing all law applicable to Wales (whether originally enacted by Westminster or in Cardiff Bay – by subject matter) into one place – not just a re-organisation or classification of existing "Welsh law" (so defined). On this basis, does the Bill/ duty/ proposed programme(s) go far enough?

- On this above basis, we take it that section 1(2)(c) relates to any law where the subject matter is devolved to Wales – and so, despite the seemingly wide "any other enactment…", it doesn't capture the above point. Query also whether "or rule of law" is the best description, given the potential for confusion with the expression as it is commonly understood in constitutional law (or perhaps this should be "rules of law")?

We understand that, in New Zealand, their programme for codification is consulted upon when it is launched in a similar way to the proposed approach in Part 1. This may be unnecessary, overly cumbersome, and/or slow progress, in what will already be a huge task – but there may be a way to do this in a way which is proportionate (streamlined?) and useful to Government.

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

Yes, we agree with the approach to apply Part 2 of the Draft Bill to both primary and subordinate future Welsh legislation. Generally, we welcome the potential introduction of a tailored statutory interpretation Act for Wales, given that Welsh legislation has previously been interpreted in line with the general Interpretation Act 1978. We agree with the Government's view that the 1978 Act has now become outdated, and much of its provisions do not have the same application, if at all, in Wales.

We also agree with the proposal not to introduce retrospective application of the interpretation provisions. Given that legislation enacted before the Draft Bill has already been interpreted in line with the 1978 Act, we see no reason why this should not continue for the sake of precedence and continuity. In this regard, we welcome the Welsh Government's findings that the equivalent legislation in Scotland faced no difficulties in introducing a non-retrospective interpretation Act.

As for the co-existence of the Draft Bill with the 1978 Act, we consider that an explanation as to which interpretation Act is to apply to any future legislation should be included in that specific legislation's Explanatory Notes. This will avoid the

potentially complex need to amend existing legislation and should incur little time and administrative expense for the legislature in drafting future legislation.

As for the Draft Bill in general terms:

- Certain parts appear to be legacies from Westminster legislation and we query their relevance in a Welsh law context – particularly when we're seeking to consolidate/ simplify/ reduce the body of law to be traversed. E.g. section 21 specifies that "enactment" includes Acts of the Scottish Parliament and NI legislation. We expect there is a reason for the link to other devolved administrations, but this is not entirely clear to us.

- Do certain provisions require a little more detail or clarification? E.g. section 23 (References to EU instruments) refers to EU instruments amended, extended, or applied prior to the coming into force of the relevant Welsh law – but the last part of the section "the reference is a reference to the EU instrument as amended, extended, or applied" does not specify that the amendment, extension of application is as was prior to coming into force of local law (although it's implied).

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?

Yes, we agree with this approach. Some legislation will need to be drafted and interpreted to include wider (or even narrower) definitions than those generally contained within the Draft Bill. For example, definitions in a highly technical legislative act may require interpretation above and beyond that contained in the Draft Bill.

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?

Given that the definition of "England" under the 1978 Act is made by reference to the areas of counties in England, we consider that an equally consistent approach should be applied to defining "Wales".

As it currently stands, the definition of "Wales" in the Draft Bill is confusing – it applies the same meaning as that found in the Government of Wales Act 2006, which only deals with the inclusion of the "sea adjacent to Wales" as forming part of its definition.

Given that the Draft Bill is intended to be, in part, an interpretation act tailored for Wales, perhaps a new and clean definition could be included here for "Wales", which includes both the "local authority" and "sea boundary" elements of the definition.

We consider that this *clean* approach would be better in general. Cross-referencing to definitions already contained within other legislation will mean that the reader will be required to navigate across three (or more) potential legislative provisions: the new Act, this interpretation Act, and the Act cross-referenced within this interpretation Act.

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

We agree that most of the definitions as listed in Annex A to the consultation should be omitted, given their lack of relevance or applicability in Wales. However, we wonder whether it would be wise to include the following:

- Welsh Language Commissioner – given the volume of legislation surrounding the Welsh language (and the volume likely to come, particularly if the aims of the Draft Bill are followed through), it may be wise to include a definition of the Commissioner.

While we appreciate the Government's intention to only include definitions which are completely necessary in Schedule 1, we would be interested to know why the following have been omitted (given that they are likely to form part of many devolved legal subject areas):

- Building regulations
- Commencement
- Enactment, and
- Registered medical practitioner.

Finally, the following are contained within the Scottish equivalent interpretation Act, which may be worth considering including within Schedule 1:

- Document
- Functions, and
- Local authority.

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

We agree with the approach in section 7, which we consider to be more gender-neutral than the 1978 Act. The 1978 Act has a similar equivalent, though only refers to "masculine" and "feminine" gender.

We would add that we would generally expect future Assembly legislation to be gender neutral.

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

We agree with the objective behind section 8. Although it seems to us that the position is implicit, an express term should help resolve ambiguity.

This provision needs to be read consistently with section 156 of the Government of Wales Act 2006 though, to provide for dealing with the potential for ambiguity between English and Welsh in Welsh law. An ordinary reading of section 8 (in isolation) appears to go to potential alternative interpretations between certain words or their derivatives in English (or, in the Welsh translation, in Welsh). This is obviously something which is being considered pursuant to paras 214-220 of the Consultation. We agree this needs some further thought. We're not sure whether, or how, section 8 and section 156 correlate.

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

We can see the benefit of the provision as a backstop. Generally, when we see these sorts of provisions in rules, such as those for civil procedure, there is usually an accompanying illustration as to how the backstop works. The clause might benefit from that, although we recognise this goes against the grain somewhat in terms of simplification, etc.

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

We understand the rationale for this approach. Naturally, we would expect that, in each case, the burden of proof for the purposes of establishing that the service meets the relevant criteria will be on the sender. The provision may benefit from that clarification.

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?

We would agree that this is a workable method for when service is deemed to be effective. The section might benefit from the inclusion of word "validly", i.e. (s 14(b)):

> *"in the case of a document served electronically, on the day on which the electronic communication is* ***validly*** *sent"*.

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

Yes, we agree with the approach taken in section 16 of the Bill. It is clear from the inclusion of section 16(2) of the Draft Bill, the period by which the power or duty can be exercised or discharged.

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

No comment.

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

We agree.

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

We are curious as to whether there are any instances where a piece of legislation specifically prevents directions made under it from being varied, substituted, or withdrawn? If there are such instances, then this is a sensible inclusion, as it will result in the reduction of unnecessary provisions in future legislation. If there are no such instances, then this section seems unnecessary. However, if this section reduces the likelihood of future unnecessary provisions, and assuming that this is the purpose of this section, it is a worthwhile inclusion.

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

We agree with the aim and approach. As the Scottish legislation did, this section will settle the uncertainty contained in section 20 of the Interpretation Act 1978.

When comparing this section to its equivalent sections in the 1978 Act and Interpretation and Legislative Reform (Scotland) Act 2010, this section 22 is more clearly drafted.

However, there have been two omissions from this section. Firstly, the words 'unless the contrary intention appears' from the 1978 Act is not included. By its removal, we infer that it is the preference of the Welsh Ministers that the inclusion of a contrary intention in future legislation is discouraged, although still possible. If this is the position, we agree with it. Secondly, the bracketed sentence at the end of section 14(2) of the 2010 Act has also not been included in this section 22. This sentence is a helpful addition, particularly for a layperson, and its insertion should be considered.

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?

As we understand it, there are three options;

1. This section 27 as drafted – stipulating that all Acts bind the Crown unless provided otherwise. The disadvantage of this option is as outlined in paragraphs 176 – 178 of the consultation document.

2. A provision that all Acts do not bind the Crown unless provided otherwise – as was considered in the Scottish consultation preceding the Interpretation and Legislative Reform (Scotland) Act 2010. The disadvantage of this option is that it would effectively overrule the current common law position as to whether a piece of legislation should bind the Crown. This could have unintended consequences *e.g.* a scenario where the common law would have determined that an aspect of an Act does apply to the Crown, but if the Act itself was silent, then this provision would result in the Crown being outside the legislation when, properly, it should be within it. This is probably the least desirable option.

3. Do nothing. Allow the common law to continue to operate as it currently does and wait to see if Parliament makes any changes as urged by Lady Hale (see below).

As outlined in the consultation, the current situation is clearly not satisfactory. Lady Hale urged Parliament to look more closely at this in *R (on the application of Black) v Secretary of State for Justice [2017] UKSC 8*, so a change to the common law rule could occur in the near future – which may abolish the current rule or reverse the presumption. This section 27 pre-empts any change by Parliament and follows the final position taken by Scotland in the 2010 Act. This is probably the most sensible option – being the lesser of two uncertainties. This option will result in the unsatisfactory scenario outlined in paragraph 178, but, this scenario, problematic as it is, is likely to occur much less frequently when compared to the general underlying uncertainty that currently exists for all Acts and subordinate legislation in determining whether that legislation binds the Crown.

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

This is an uncontroversial and practical addition. It will result in fewer so called "housekeeping provisions" that are included in every Act. This approach is in line with the Act's purpose of making the law more accessible – as it will help streamline future legislation.

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

We think that this section 35(2)(a) does accurately reflect the common law provision as laid down in *Moakes v Blackwell Colliery* [1925] All ER Rep Ext 773. We note that there is no equivalent provision in the 1978 Act or 2010 Act. Our assumption is that the main intention of including this provision, like elsewhere in this Bill, is to present existing legal principles formally and in the medium of Welsh in order to improve accessibility.

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

Yes, this is a significant part of the consolidation objective of the Bill. It is the correct approach to widen the scope of the 1978 Act to ensure that the repeal and re-enactment are not restricted to the same Act. By allowing the repeal of an enactment from one Act or instrument, and its subsequent re-enactment in a different Act or instrument, this section will allow a more efficient consolidation of existing law.

We also agree that this section 33 will make a useful backstop. The consequential amendments exercise – amending all references to affected provisions in a new Act – is often a significant and time-consuming task. The introduction of a more detailed and explicit backstop provision is welcome.

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

We have no strong view.

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)?

Note comments above regarding section 156 of the Government of Wales Act 2006. The Government consulted on this issue last year. We understand that some issues have been raised with how section 156 operates in practice, and we're inclined to agree.

The Consultation document refers to approaches in bilingual jurisdictions such as Hong Kong and Canada. The approach in Canada was traversed in a Report by the Legislation Committee of the Welsh Assembly twelve years ago and, in our view, there are various lessons there which can be revisited in terms of connecting these two dots, e.g. national body for standardising legal terminology, co-drafting, etc.

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

Note our comments above in response to Question 1.

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

No comment.

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?

Note our comments elsewhere regarding section 156 of the Government of Wales Act 2006. It stands to reason that having a truly bilingual body of Welsh law will enhance the use of Welsh and ensuring the Welsh language is treated no less favourably than English in Wales.

The interpretative provisions of the Draft Bill will be particularly important. Ultimately, if (as must be the case) the English and Welsh versions have equal status, the central question will be how any unintended conflict in their literal meaning will be resolved. Note our comments generally in Question 8 on the potential for ambiguity, and Question 23 on the lessons learnt from Canada.

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 further comments.

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:

- In our view, technological advances represent both an opportunity and a potential hindrance in the ambitions behind the proposals. As lawyers in private practice, we rely upon an array of legal databases to ensure that the law we advise on is up to date. Those databases connect to a wealth of commentary

which aides our interpretation. Publicly available databases are generally less sophisticated and, if we may be so bold, less reliable versions of similar products. For example, it's not always clear whether legislation available via gov.uk is the up to date, amended version, etc (the inter-connection links between legislative provisions are often faulty). We have some concerns as to the availability and viability of a platform which corrects these issues – and how it will fit with existing (subscription only) providers.

- There are some challenges in terms of the semantics of what is proposed. The commentary we have seen defines "consolidating" and "codifying Acts" in a slightly different way to in the Consultation (e.g. Halsbury's says: "*The purpose of a codifying Act is to present an orderly and authoritative statement of the leading rules of law on a given subject, whether they are to be found in statute law or common law. The difference between a consolidation Act and a codifying Act is thus that the latter, unlike the former, incorporates common law rules not previously codified…*" We note the reference in para 29 of the Consultation to the prospect, but unlikelihood, of the process incorporating codification of common law. We would have concerns about this, not least because of the prospect of inconsistency in approach. A wholesale codification would be practically impossible (and probably undesirable given the prospect for change and the separation of powers) – but a partial codification would be even less desirable in our view.

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: ☐