ASSOCIATION OF LONDON WELSH LAWYERS
CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN

11 June 2018

ALWL'S RESPONSE TO THE WELSH GOVERNMENT CONSULTATION:

DRAFT LEGISLATION (WALES) BILL

Introduction:

1. The Association of London Welsh Lawyers ("**ALWL**") has about 250 members. Our membership includes judges, barristers, solicitors, legal executives and academics. The objects of the Association are as follows:

- To encourage and facilitate an understanding of the development of the law in Wales, of legal practice in Wales, and of the constitutional developments of Wales;

- To encourage and assist professional relationships between members of the Association and other members of the legal profession who have connections with or who are interested in Wales;

- To assist the development of the legal profession in or relating to Wales by any appropriate means, including mutual exchanges, placement and training programmes, the supply of information and equipment, or holding lectures and seminars;

- To participate in consultation exercises and to respond to them if required to do so.

2. ALWL welcomes the opportunity to contribute to this very important consultation exercise on the Draft Legislation (Wales) Bill ("**the Draft Bill**").

3. In order to draft ALWL's response, a working group has been formed, and this was made up of the following individuals:

    - Hefin Rees QC (39 Essex Chambers);
    - Gethin Thomas (39 Essex Chambers);
    - Gerard Forlin QC (Cornerstone Chambers);
    - Jonathan Haydn-Williams (Goodman Derrick LLP);
    - Emyr Thomas (Sharpe Pritchard LLP).

4. Further, to ascertain the views of the ALWL membership, a meeting was held on 8 March 2018 at which some 80 of our members attended, to consider the question of codification of Welsh law. The speakers who addressed this meeting included:

    - The Counsel General for Wales;
    - Lord (David) Lloyd-Jones (Supreme Court Judge and former Chair of The Law Commission); and
    - Nicholas Paines QC (Law Commissioner)[1].

[1] All three of these speeches can be found on the ALWL website.

Responses to Questions 1 & 2:

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?***

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

5. Whilst, in principle, ALWL agree that it is necessary to impose a statutory obligation on future governments in Wales to improve accessibility of Welsh law, the approach taken in Part 1 of the Draft Bill is not adequate to ensure that sufficient improvements to accessibility will actually be realised.

6. Part 1 of the Draft Bill fails to grasp the opportunity to take the greater stride that is needed in order to make a meaningful change to the serious issues surrounding accessibility to Welsh law. It also fails to properly reflect the important work of the Law Commission in its report: "*Form and Accessibility of the Law Applicable in Wales*" published in June 2016.

7. It is now two years down the line, with the Welsh Government having accepted the vast majority of the 32 recommendations made in that report. However, Part 1 of the Draft Bill fails to implement any of those recommendations, but rather hesitantly provides only for a duty to keep accessibility of Welsh law under review and suggests a very vague and general programme to improve accessibility of Welsh law, which will be difficult to monitor properly. We see this as a recipe for inactivity and procrastination.

8. ALWL would encourage the Welsh Government to be more bold and creative in its outlook, and to include a programme for codification. At a recent meeting of ALWL, which was attended by approximately 80 of our members, there was very clear support for the need to have a programme of codification.

9. As such, the task must be to pursue codification, and not consolidation. The Welsh Government should not miss the opportunity to pursue a more radical aim, with higher rewards.

10. Indeed, pursuing a programme of codification would be in keeping with Wales' history of codification. In the 10th Century Hywel Dda (Hywel the Good), who ruled over most of Wales, had the laws of Wales codified. Hywel is said to have summoned a meeting of those practiced in jurisprudence, and selected from them a group of 12. According to the *Book of Iorwerth*:

> *By the common counsel and agreement of the wise men who came there they examined the old laws, and some of them they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew.*

11. The process that the Welsh Government is recommended to follow by the Law Commission, which is strongly supported by ALWL, is not dissimilar to the task undertaken by Hywel Dda and the Welsh jurists in the 10th Century.

Codification and Consolidation: The need for a Programme of Codification:

12. The Consultation Paper does not fully commit to the Law Commission's primary recommendation in its *Form and Accessibility of the Law Applicable in Wales* report. The central task of making Welsh law more accessible is the need to codify Welsh law, not to '*consolidate and subsequently codify*.'[2]

[2] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), para 12.

The Distinction Between Codification and Consolidation:

13. Consolidation, as the Consultation Paper identifies, involves the bringing together of existing statutory provisions, spread across different statutes, into a rationalised single Act or series of related Acts. The process of consolidation may include the modernisation of the language, drafting style and structure.

14. However, consolidation will generally aim to produce legislation that has the same legal effect as that which it replaces. This means that it will involve only minor amendment to the substance of the law. A consolidation exercise may, for example, remove ambiguities or inconsistencies in the existing law, or in 'pure consolidation' exercises, no amendment will be made at all.[3] A great deal of effort is therefore invested in a process that essentially preserves the substance of the legislation as it stands.

15. Codification also involves the bringing together of disparate statutory provisions governing a particular topic into a single Act. By contrast, however, codification has a number of important distinguishing features:

    a. Firstly, codification involves a greater measure of law reform than consolidation. This means that a process of codification can make changes to the substance of the law, in order to improve how the law operates.

    b. Secondly, codification requires that the single rationalised Act produced is preserved. Any amendment to the area of law governed by the code must be made by amendment to the code. This prevents the subsequent accretion of layers of amendments contained in separate pieces of legislation, which renders the law inaccessible again, after improvements had been made.

[3] Law Commission, *Form and Accessibility of the Law in Wales Consultation Paper,* CP No 223, paras 7.4 to 7.10; Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), para 24.

c. Thirdly, codification may also involve, as the Consultation Paper recognises, the incorporation of well settled judge-made case law into legislation.[4]

16. These features mean that codification has two important advantages over consolidation.

The Scope for Reform Through Codification:

17. Firstly, the greater measure of law reform that is involved in codification means that it can facilitate the removal of inconsistencies, ambiguities and remedy substantive problems. Such problems can arise from the accumulation of successive pieces of legislation covering the same subject matter.[5]

18. Moreover, the bringing of certain judge-made law into statute can further improve accessibility. This was achieved particularly successfully, for example, in the Partnership Act 1890. It will also have the benefits in relation to the Welsh language, as it would result in certain judge-made laws becoming bilingual.

19. Consolidation is limited in the improvements to accessibility it can achieve. This is because whilst it may modernise the language, drafting style and structure of legislation governing a particular area, with the removal of some ambiguity or inconsistency, it only affords a minimal opportunity for amendments.[6] As the Law Commission explained in its consultation paper:

> *There comes a point where the law is too confused and contradictory to be satisfactorily consolidated. Consolidation necessarily preserves the current state of the law, even if it is*

[4] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), para 29.
[5] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 2.16 to 2.18.
[6] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), para 24.

problematic…Consolidation involves throwing scarce resources at preserving the current state of the law, however problematic the features being preserved are.[7]

20. These problems are exacerbated by the fact that consolidation would also be a huge task. As Lord Lloyd-Jones explained in his speech at the ALWL meeting on 8 March 2018:

> *To produce a consolidated Welsh statute book would be an undertaking of massive proportions which, in my view, would be likely to take a generation to accomplish. It would require huge resources both in financial terms and in terms of the required number of skilled legislative counsel. It would also require to be a high priority within the Welsh Government and would require legislative time within the National Assembly.*

21. By contrast, codification would grant greater rewards for the resources it requires. Some degree of reform will be necessary in many areas in order to bring clarity and coherence to a subject matter governed by a code. This cannot be achieved by consolidation, but is a fundamental benefit of codification. Codification can enable areas where the law has become confused and contradictory to be made intelligible and coherent.

22. The Welsh Government has consistently indicated, through its implementation of the Renting Homes (Wales) Act 2016 for example, that it has a reforming zeal. A codification programme affords the Welsh Government opportunities to more easily effect progressive changes to the law that improve social justice. Codification can, therefore, also be a means through which the Welsh Government's wider political programme is expressed.

23. Codification also requires a thorough examination of the state of the current law in the area intended to be codified. This can highlight and remedy difficulties with the way in which the law operates in that area, which may not otherwise have been remedied. A

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[7] Law Commission, *Form and Accessibility of the Law in Wales Consultation Paper,* CP No 223, paras 8.129 to 8.130.

significant reform to a particular area of law, made by way of a code, can therefore be accompanied by a comprehensive set of amendments to more broadly improve that area. As such, codification is a better means of radical law making.

Preserving Codes:

24. The second advantage of codification over consolidation is that codes are intended to be preserved and maintained. This is recognised in Clause 2(3)(b) of the draft Bill. However, the draft Bill (and Consultation Paper) do not make clear how the Welsh Government envisages codes are to be preserved and maintained.

25. The Law Commission recommended that a code discipline be prescribed to establish that where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code. The Law Commission had initially envisaged that such a discipline be contained in primary legislation, but concluded that this would not be possible because, at the time of the report, it was outside the National Assembly's legislative competence.[8]

26. However, the Wales Act 2017 has since placed the National Assembly's legislative competence on the reserved powers, not conferred powers, model. It would, therefore, now be possible for the National Assembly to introduce a code discipline in legislation. A degree of flexibility would be required, but a clause could be included in the Draft Bill that stated:

> *Where there is a code in place, further legislation within the subject area of the code should only take effect by way of amending the code, in so far as is practicable*.[9]

[8] Law Commission, *Form and Accessibility of the Law in Wales Consultation Paper,* CP No 223, para 8.89; *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 4.34 to 4.45.
[9] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 4.40-4.41. In its final report, the Law Commission set out a procedure for deviating from the code discipline.

27. A code will, therefore, need to be recognised as such, prior to the legislative process.[10] This could be achieved by simply including a clause stating, for example, "*this Act is the Planning Code*." This will help to ensure that the benefits produced by a codification programme are protected. It will also require those instructing Legislative Counsel, when introducing changes to the law within the subject matter of a code, to consider how those changes can be most rationally accommodated within the existing code, rather than the easier, but less accessible, approach of creating further free-standing legislation.

28. Codifying a given subject matter should, ideally, result in the production of a single piece of primary legislation which would stand as the authoritative 'code'. Producing a number of 'principal Acts' governing a single subject area, as outlined in the Consultation Paper, is not as likely to be as accessible as producing a single code Act.[11] Whilst it may be that a broad subject area may require more than one code Act, it should generally be the aim of codification that a single code is produced.

29. Finally, the benefits of codification would be undermined if the single code Act becomes crowded by many pieces of secondary legislation. Welsh Government should also consider, in a given code governed area, whether the number of regulations can be reduced to one principal regulation (or as few as possible).

[10] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 4.11-4.25.
[11] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), para 27.

Process of Codification:

30. The Consultation Paper's suggestion that publication can be an adequate means of codification (by collating consolidated legislation) is not realistic.[12] Key to a successful codification exercise are Legislative Counsel. Publication is a process that is generally undertaken by editorial staff, who do not have the same level of expertise, experience nor institutional competence as Legislative Counsel.

31. Codification will necessarily involve some re-drafting, and not merely collating, multiple pieces of legislation into one code. Effective publication of legislation may make certain areas of law more easily available or even navigable, but will not improve their coherence or intelligibility. Accessibility requires that the law can not only be identified, but also that it is then understandable.

32. Organising legislation through publication is also not a substitute for codification through the legislative process, and the further scrutiny that will involve. Rather, a codification programme could be efficiently carried out through the National Assembly, by introducing the flexible streamlined legislative procedures recommended by the Law Commission.[13]

Programme to Improve Accessibility of Welsh law:

33. A rolling codification programme is therefore superior to a '*consolidation and subsequent codification programme*', of the kind described in the Consultation Paper. As explained above, codification is not simply the process of collating consolidated legislation and publishing it in one place. Codification is a means of rationalising and improving fragmented and inaccessible law, through re-drafting the legislation, and necessarily

[12] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 25 and 27.

[13] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 3.5 to 3.71. This is primarily a matter for the National Assembly.

involves some governmental policy input, and requires more legislative scrutiny through the National Assembly, than a consolidation could afford or warrant.

34. The Codification Programme will be a rolling gradual process that tackles inaccessibility subject area by subject area. There are a number of areas which are particularly inaccessible due (at least in part) to the divergence between the law made in Cardiff, and that made in Westminster, becoming increasingly pronounced. These areas are especially ripe for codification, and we suggest the following priorities should respectfully be considered:

    a. **Planning**: The Law Commission are currently working on a project to codify Welsh planning law, at the request of the Welsh Government.[14] The Law Commission's consultation paper was published in November 2017. The Law Commission has identified that the law governing the planning system is unnecessarily '*exceedingly complex*', particularly in Wales, due to the increasing divergence between the law in England and Wales.[15] For example, the Planning and Compulsory Purchase Act 2004, and subsequently, the Planning (Wales) Act 2015 have resulted in significant differences between the law as it applies to development in Wales, compared to England. The Law Commission has explained that it is convinced of the benefits of codifying, simplifying and modernising the legislation relating to Planning in Wales.[16]

    b. **Education**: Education law is particularly inaccessible. Education law in Wales, depending on how broadly it is defined, consists of between 17 and 40 Acts of Parliament, seven Measures and six Acts of the National Assembly and hundreds of statutory instruments.[17] Education law in Wales is complex and fragmented.

[14] Law Commission, *Planning Law in Wales Consultation Paper*, CP No 233.
[15] Law Commission, *Planning Law in Wales Consultation Paper*, CP No 233, paras
[16] Law Commission, *Planning Law in Wales Consultation Paper*, CP No 233, para 2.38 and Chapter 3.
[17] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, paras 7.2 to 7.8. This example was also referred to by Lord Lloyd-Jones in his recent speech to ALWL on 8 March 2018.

This is exacerbated by lack of clarity in distinguishing whether a given law is applicable to England and Wales, Wales only or England only. For example, section 569 of the Education Act 1996 contains 9 subsections: three of which apply to England and Wales, two apply only to England and two apply only to Wales.[18] Regrettably, this is not an uncommon problem. A code would provide a clear statement of the law as it applies to Wales, and it would not require the reader to dredge through masses of legislation, or to attempt to determine whether a particular section applies to Wales or not. Whilst codifying education law would be a substantial task, it would rectify its acute inaccessibility which will only continue to get worse over time. The mantle should be seized, and a comprehensive Welsh Education code should be a priority in a codification programme.

c. **Landlord and Tenancy**: In recent years, the Welsh Government has actively reformed housing law. Housing law in Wales has substantially diverged to that in England. In particular, the Welsh Government has implemented a number of progressive policies in relation to the law governing renting homes, predominantly through the Housing (Wales) Act 2014 and Renting Homes (Wales) Act 2016. Provisions governing landlord and tenancy are therefore spread across different pieces of legislation, and contained in statutory instruments in particular. However, in its current state, it would be a relatively straightforward task to codify the recently reformed legislative framework into a single 'renting homes' code. In its response to the Law Commission's consultation, the Association of Judges of Wales also noted the importance of ensuring that Welsh housing law is accessible to those in England as well as Wales, as '*many of the 400,000 rented properties in Wales are owned by people living outside Wales*.'[19] A code would ensure that the law governing housing law in Wales is clearly and

[18] Lord Lloyd- Jones, *Speech to ALWL* (8 March 2018). Lord Lloyd-Jones credited Keith Bush QC for this example.
[19] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, para 7.41.

coherently set out in a single place, and obviously distinguishable from the law applying in England.

35. ALWL also support consideration of the further areas that were proposed by the Law Commission as priorities for codification. These included social services law, law governing waste and the environment, and local government law.

36. Lord Thomas of Cwmgiedd, the former Lord Chief Justice of England & Wales, has explained that codification has '*the potential to make the greatest contribution to the future development of Welsh law*.' Lord Thomas observed that:

> *I can understand that in some respects consolidation of the law could be seen as a more attractive, and somewhat easier, option. However, I remain firmly of the view that codification presents a more sensible and long-term solution.*[20]

37. ALWL fully agree that codification is a more sensible and long-term solution, and should be pursued over consolidation.

Clause 1 of the Draft Bill: Duty to Keep Accessibility of Welsh Law Under Review:

38. Clause 1 of the Draft Bill is welcomed. The Counsel General, as the Welsh Government's chief legal adviser, should shoulder the Welsh Government's responsibility for improving the accessibility of devolved legislation in Wales. The measure of independence that the Counsel General enjoys from the government will also help to ensure that the Counsel General is able to exercise his or her duty impartially, so that the aim of keeping Welsh law accessible is not inadvertently subsumed by the Welsh Government of the day's objective of delivering its political policy goals.

[20] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, para 2.39.

39. The Consultation Paper does not expressly recognise the important role that the Office of the Legislative Counsel will need to perform, in order for the duty to be successfully exercised. The expertise of legislative drafters will be critical, both in identifying problems with, as well as solutions to, accessibility of Welsh law. This will necessarily require the allocation of sufficient resources to the Office of Legislative Counsel, so as to ensure a codification programme can be successfully delivered.

40. Indeed, the Law Commission suggested the establishment of a dedicated Code Office, for the purpose of carrying out the codification programme, as well as maintaining the codes once implemented.[21] The Law Commission recommended that the Code Office should be distinct from the Office of the Legislative Counsel. However, it would be led by the First Legislative Counsel and would contain legislative counsel specifically dedicated to the codification programme. The Code Office would be within the responsibility of the Counsel General. This would help to ensure that the codification programme has sufficient dedicated resources, and make the process administratively efficient. ALWL suggest that this recommendation be given full consideration by the Welsh Government.

41. In any event, whether the codification programme and post-codification maintenance are carried out by a team within the Office of Legislative Counsel, or through the establishment of a Code Office, it is of fundamental importance to the programme's success that sufficient resources are invested in it.

Clause 2 of the Draft Bill: Programme to Improve Accessibility of Welsh Law:

42. As worded currently, Clause 2(1) is too vague as to identify what actually will be done to achieve accessibility. A more concrete obligation should be prescribed in legislation. Therefore, Clause 2(1) should instead state:

[21] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366.

> The Welsh Ministers and the Counsel General must prepare a codification programme in order to improve the accessibility of Welsh law (additional words underlined for emphasis).

43. In order to implement a programme of codification, streamlined legislative procedures to facilitate codification are needed, so that the amount of time codification bills require in the National Assembly is minimised. This is a matter for the National Assembly to determine, through its standing orders.[22]

44. The timing of a programme of codification being prepared for each term of the National Assembly, as set out in Clause 2(2) of the draft Bill, is supported. The general mechanics of the programme prescribed in Clauses 2(5) to (6) are also supported.

45. ALWL respectfully invite the Welsh Government to reconsider the inclusion of consolidation in Clause 2(3)(a) of the draft Bill, for the reasons given above at paragraphs 15 to 30. ALWL's view is that codification should be pursued exclusively.

46. However, further activities, as envisaged by Clause 2(3), should also be pursued. For example, some periodical technical reviews of the codes will be necessary, as they are amended over time, to ensure that the clarity and intelligibility of the codes are not eroded. This would need to be undertaken by Legislative Counsel, and would be the kind of task undertaken by a Code Office.

47. It is also important that the programme must also facilitate the use of the Welsh language, and Clause 2(3)(c) is supported. Equally, Clause 2(4), which encourages further activities intended to promote awareness and understanding of Welsh law, is also laudable. Further explanation of the kinds of the activities the Welsh Government currently

[22] Law Commission, *Form and Accessibility of the Law in Wales Report*, Law Com No 366, Chapter 3.

envisage would be welcome. In particular, collaboration with the Law Commission, as referred to under Clause 2(4)(b), will likely be critical to the successful delivery of a comprehensive codification programme.

48. Moreover, Clause 2(7) is welcomed. It is right that the Counsel General should be held accountable to the National Assembly for the exercise of this obligation. For example, the Constitutional and Legislative Affairs Committee of the National Assembly could produce a termly report on the steps taken by the Counsel General towards improving the accessibility of the law, in order to ensure progress is made.

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

49. ALWL agree on the need for a new interpretation Act for Wales. Scotland and Northern Ireland have their own Acts dealing with statutory interpretation, and it is now time for Wales also to have its own legislation that is fit for purpose.

50. The process of statutory interpretation is to determine the meaning and effect of legislation, and how it operates. The purpose is to shorten and simplify legislation and promote consistency in its language, form and operation. A well drafted interpretation act could have significant benefits to the accessibility of law in Wales and is, therefore, a worthy cause to pursue.

51. At present, all of the legislation applying in Wales is interpreted by reference to the Interpretation Act 1978 ("**the 1978 Act**") (which is an Act of the UK Parliament), which is now 40 years old. The 1978 Act predates the devolution settlement for Wales, and there is no Welsh language text of the 1978 Act, which presents a serious obstacle to those seeking to use the Welsh language as a language of the law.

52. The task in considering the approach to the application of Part 2 of the Draft Bill is to test the definitions used in Part 2 to ensure that it meets the modern requirements for Wales, as some of the rules and definitions in the 1978 Act are not relevant in relation to law

applying to Wales only. There is clearly a need for the Draft Bill to ensure that it works best for the future statute book, as the body of legislation made by the National Assembly and Welsh Ministers will continue to grow, often in a divergent way to the statutes being passed at Westminster.

53. We also need to ensure that improvements are made on the previous approach adopted in the 1978 Act, which is not as clear and accessible as it could be. As observed in the Welsh Government's policy consultation held in 2017[23], some of the provisions are ambiguous or have caused problems in practice, some are arguably redundant, and some are simply out of date.

54. This poses quite a practical problem, as the 1978 Act will continue to apply in relation to some of the law applying in Wales; most notably, all law found in Acts of the UK Parliament.

55. The Draft Bill, therefore, must make it abundantly clear what is covered by the Draft Bill and what is not covered; otherwise, this could be a recipe for further confusion.

56. ALWL agree that it would be sensible to have a simple way of identifying which interpretation act applies in going forward. The easiest way to achieve that is to bring Part 2 of the Draft Bill into force on 1 January of the year after it is passed. This will mean that the indication of the year included in the Acts and Measures will, without more, suffice to indicate whether the 1978 Act or the Bill applies to that legislation.

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?***

57. Section 3(3) of the Draft Bill provides for circumstances in which a rule in the Bill does not apply to a particular Assembly Act. Section 3(3) of the Draft Bill is different to the

[23] Welsh Government (2017) Interpreting Welsh legislation: Considering an Interpretation Act for Wales.

approach adopted in the 1978 Act. Most, but not all, of the rules in the 1978 Act are expressed as applying "unless the contrary intention appears".

58. Section 3(3) of the Draft Bill is narrower in its approach when compared with the 1978 Act, in that it makes it less likely that a rule in the Draft Bill would be found not to apply. This approach would bring greater certainty to the reader, and is more likely to result in the drafters of future legislation expressly stating that a future Act or instrument would disappply a rule 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?***

59. The definition of "*Wales*" is provided in section 158(1) of the Government of Wales Act 2006 ("**the 2006 Act**"). This definition expands the definition in the 1978 Act to include "*the sea adjacent to Wales out as far as the seaward boundary of the territorial sea*".

60. ALWL consider that a consistent approach needs to be adopted to the definition of "*Wales*", and do not think that there should be any change to the definition to that which is contained 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?***

61. ALWL would ask why is a "financial year' defined as a year ending with 31 March? Companies choose different financial year ends. Some businesses prefer to align the end of their financial year with the tax year (to 5 April). Might it be better not to give a definition of this term, or perhaps to add "unless the context otherwise indicates"?

62. "Writing" seems narrowly defined, albeit it is an inclusionary definition, rather than an exclusionary one. We would also invite the Welsh Government to consider inserting the words, "including by electronic means accessible on a screen" after "in a visible form".

63. We also wonder whether some reference should be made to the visible form being "permanent or permanently accessible". The latter is capable of covering emails and other electronic methods of communication, in that the visible image is not always on a screen, but is always accessible on one from the storage source or device.

64. "Permanent" does not mean "to infinity", as clearly all methods of writing are liable to decay and destruction, even stone tablets. Maybe "non-transient" would be a better expression to use.

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

65. Might this be put in a more 'positive' way, i.e. "… words denoting a gender are to be read as referring to all genders"? That expression is now often used in commercial documents.

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

66. Yes.

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

67. No.

68. More usually, if one refers to a period of 7 days from, say, 1 March, the period ends at midnight on 7 March. If, as in the draft Bill one includes 1 March, the period would end at midnight on 6 March. The latter is likely, in fact, to have been a period of less than 7 days in that it assumes that the doer of the time limited action would have been able to start work at 00:01 hrs on 1 March - an unlikely event. The former approach works in favour of the person who has to comply with the time limit, by in effect assuming that the work is begun at midnight on 1 March, the reality being that it will probably be begun during regular working hours.

69. Including the day of which the period begins can catch people out and cause injustice. For example, under the pre-1997 Rules of the Supreme Court, there was a period of 14 days to acknowledge service of a Writ, including the day of service. It often used to catch out unrepresented defendants (and some solicitors too), as they made the usual assumption that the day on which the period began to run did not include the day of service.

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

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?***

70. We will address these together.

Service by Post:

71. In s.14, we consider that the term "in the ordinary course of post" should be defined in Schedule 1. We suggest: 'In the ordinary course of post: "two days in the case of first class post and four days in the case of second class post, in each case excluding weekends and bank holidays".

Service by Email:

72. We have serious concern about including electronic means as a form of service for the following reasons:

    a. The unreliability of electronic means of communication, not least in parts of Wales where internet access remains poor and unreliable;

    b. The risk of hacking and fraudulent emails being sent;

c. The risk of email spam 'filters' and the like blocking emails entirely or placing them in 'quarantine' and possibly remaining unnoticed by the recipient for days or for ever (filters are increasingly sensitive due to increased hacking and the like);

d. The risk of emails not being stored securely in the sender's or recipient's records and liable to hacking (for instance there was a major attack last year which affected much of the National Health Service).

73. In our view, therefore, email should only be used to supplement postal service and that should be expressly stated, e.g.: "A document may only be served electronically in order to supplement postal service and the day on which an electronically served document is deemed served shall be the same as the date on which the document is deemed served by post".

Question 12*: Do you agree with the approach taken in section 16 of the Draft Bill?*[24]

74. Subject to one qualification relating to the inclusion of duties (set out below), the approach taken to section 16 of the Draft Bill is agreed. In particular:

a. Section 16 is made much clearer than its equivalent, section 13 of the Interpretation Act 1978, by not specifying the kinds of power that may be exercised (under subsection 16(1)), and setting out exactly when the power can be relied upon (under subsection 16(4)).

b. Section 16(5) and section 3(3) of the Draft Bill are also welcome for making clear when section 13 may not be relied upon, or when it is subject to conditions or limitations.

[24] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 131 to 132.

75. However, further consideration should be given as to whether duties ought to be included within the scope of section 16. There is a risk that the inclusion of duties within section 16 could give rise to uncertainty.

76. A power is entirely discretionary, and so the person or body upon whom that power is conferred can decide whether or not to exercise that power, prior to its conferring legislation coming into force (subject to the limitations in subsection 16(3)).

77. By contrast, a duty necessarily imposes an obligation on the duty holder. They must discharge that duty. Indeed, that is the essential difference between a power and a positive duty.[25] If a duty falls within the scope of section 16, uncertainty may therefore arise as to whether or not that results in the duty holder becoming obliged to discharge that duty, prior to the relevant duty-imposing legislation coming into force.

78. The inclusion of the permissive 'may' in both subsections 16(2) and (3) could arguably address this issue. Those subsections state that a relevant duty '<u>may</u>' be discharged, within a particular period and subject to certain conditions. Therefore, discharging the duty could be discretionary, prior to the duty-imposing legislation coming into force. However, if that is the case, and 'duties' as included under section 16 are not obligatory, then the substantive distinction between powers and duties collapses.

79. On the other hand, those subsections could also be interpreted as setting conditions precedent, upon the satisfaction of which a duty, by its nature, will implicitly become obligatory. It is not clear that this is what the Consultation Paper intends. Moreover, if that interpretation is correct, it is conceptually and practically unsatisfactory to impose statutory duties on a person or body before the relevant statute comes into force. It would potentially make such duties legally enforceable, even though, for example, the legislation is never actually brought into force after royal assent.

80. In addition, obligations would be imposed consequent on conditions that are not sufficiently clear for that purpose. Determining whether discharging a duty is 'necessary

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[25] Sections 15(1) and (2) of the Draft Bill define 'powers' and 'duties': the former '<u>may</u> be exercised on more than one occasion and from time to time', whereas the latter 'is continuous and <u>must</u> be discharged as occasion requires.' (emphasis added) See also Interpretation and Legislative Reform (Scotland) Act 2010, section 7.

and expedient for the purpose of giving full effect to' the relevant legislation may give rise to too much uncertainty for the purposes of imposing a potentially enforceable obligation.[26]

81. In any event, whether 'duties' need to be included for section 16 to have the intended effect is an issue of semantics. The term 'power' can be used as shorthand for a 'discretionary power' as in section 15(1) of the Draft Bill, but it can also be employed more broadly to refer to any statutory authority to do something (whether that authority *must* or *may* be exercised). Therefore, in any event, as a positive duty may well carry a corresponding authority to do something, it will likely be the case that the implied powers necessary to do that something would fall within the scope of section 16, even if section 16 did not expressly include reference to 'duties'.

82. For example, if a Welsh Minister was under a duty to consider whether or not to grant planning permission, the Minister would necessarily have the power to grant or refuse planning permission.[27] If those powers met the conditions of section 16 of the Draft Bill, they could be exercisable by the duty holder, regardless of whether 'duties' are specifically included.

83. It is, therefore, difficult to see what the inclusion of the reference to duties in section 16 adds. As such, the justification for the inclusion of duties, given the potential difficulties outlined above, is not clearly made out in the Consultation Paper.[28]

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[26] Whilst, by contrast, section 16(3) is sufficiently certain for the purpose of determining whether or not a discretionary power may be exercised (which does not carry the same concerns over enforceability, nor are there any other consequences in the event that a power is failed to be exercised prior to the relevant legislation coming into force).

[27] Assuming, for the sake of argument that such powers are not expressly provided for in the relevant legislation.

[28] The equivalent section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 does not include reference to duties.

Question 13*: Do you agree with the inclusion of duties in section 18 of the Draft Bill?*[29]

84. Where a Welsh Minister has a positive duty to make subordinate legislation, that duty will necessarily carry an implicit corresponding statutory power to make that legislation. As such, section 18(1) of the Bill would be reasonably likely to apply to a duty to make subordinate legislation, even if it did not specifically mention 'duties'.

85. Indeed, it is equally reasonably likely that a court would interpret section 14 of the 1978 Act as applying to duties, as well as discretionary powers, to make subordinate legislation. Both constitute the statutory authority by which a Minister is able to make subordinate legislation. In the absence of the positive duty to make a particular piece of subordinate legislation imposed under a given Act, a Minister would not otherwise have the power to make that subordinate legislation.

86. Nonetheless, section 14A of the Interpretation Act 1978, which was added by section 59(2) of the Enterprise and Regulatory Reform Act 2013 does differentiate between powers and duties to make subordinate legislation. This, therefore, could create some doubt as to whether section 14 applies to both duties and powers. As such, given that specifying the inclusion of 'duties' in section 18 would not otherwise be problematic, the additional clarification it provides is supported.

87. Furthermore, on a matter of drafting, the current wording of section 18(1) could be made slightly clearer as follows:

> *A power to make subordinate legislation conferred by an Assembly Act may be exercised to amend, revoke, or re-enact any subordinate legislation made under that power.*

88. As currently drafted, section 18(1) could potentially be misinterpreted as meaning:

[29] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 135 to 140.

A power to make subordinate legislation conferred by an Assembly Act may be exercised to amend, revoke, or re-enact any subordinate legislation made under that Act.

Question 14*: Do you agree with the inclusion of section 19 in the Draft Bill?*[30]

89. The inclusion of section 19 in the Draft Bill is agreed. The clarity it provides is welcomed.

Question 15: ***Do you agree with the inclusion of section 20 in Draft Bill?***[31]

90. Subject to the observation about 'powers' and 'duties' as explained above, the inclusion of section 20 in the Draft Bill is agreed. It is further agreed that no other provisions on direction-giving powers and duties should be included.

Question 16: ***Do you agree with the approach taken in section 22 of the Draft Bill?***[32]

91. The approach taken to section 22 of the Draft Bill is strongly agreed. In particular, it is helpful to clarify that the referenced enactment ('B') may have been amended, extended or applied 'before, on or after the coming into force of A', as specified by subsection 22(1)(b).

Question 18*: Should the Draft Bill make provision about Acts binding the Crown (section 27), or should this be addressed in another way?*[33]

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[30] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 141 to 142.
[31] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 143 to 145.
[32] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 148 to 151.
[33] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 171 to 181.

92. The Draft Bill has rightly addressed the Supreme Court's call to consider the merits of abolishing the rule or reversing the current presumption.[34] The problems inherent in the common law approach to the application of legislation to the Crown are manifold. Section 27 of the Draft Bill is supported. Reversing the presumption has 'the merit of clarity and certainty' commended by Lady Hale in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81.[35] Whilst recognising the potential difficulties outlined at paragraphs 176 to 178 of the Consultation Paper, section 27 would nonetheless undoubtedly be a significant improvement on the current operation of the common law rule.

93. Section 27's equivalent in the Interpretation and Legislative Reform (Scotland) Act 2010 (section 20) also adds:

> (2) Any rule of law under which the Crown is by necessary implication bound by an Act of the Scottish Parliament or a Scottish instrument is abolished.

94. Arguably, the abolition of the common law is implicit in the reversal of the presumption set out in section 27 (and section 20(1) of the Interpretation and Legislative Reform (Scotland) Act 2010). Nonetheless, for the purposes of clarification and finality, an additional subsection could be added to section 27, which could be worded in broadly similar terms to subsection 20(2) of the Scottish equivalent.

Question 19*: Do you agree with the approach taken in section 30 of the Draft Bill?*[36]

95. The approach taken in section 30 of the Draft Bill is agreed. It is a sensible measure, and the aim of shortening future Assembly Acts is commended.

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[34] *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81, paras 33 to 35.
[35] *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81, para 34.
[36] Welsh Government Consultation Document, *Draft Legislation (Wales) Bill* (20 March 2018), paras 182 to 183.

Conclusions:

96. Part 1 of the Draft Bill fails to grasp the opportunity to take the greater stride that is needed in order to make a meaningful change to the serious issues surrounding accessibility to Welsh law. It also fails to properly reflect the important work of the Law Commission in its report: "*Form and Accessibility of the Law Applicable in Wales*" published in June 2016.

97. ALWL would encourage the Welsh Government to be more bold and creative in its outlook, and to include a programme for codification. At a recent meeting of ALWL, which was attended by approximately 80 of our members, there was very clear support for the need to have a programme of codification. ALWL's strong preference would be to pursue codification, and not consolidation. The Welsh Government should not miss the opportunity to pursue a more radical aim, with higher rewards.

98. In his recent speech to the ALWL, Lord Lloyd-Jones observed that, in relation to inaccessibility of the law in Wales:

> *At this early stage in the history of devolution in Wales the position remains remediable. While, comprehensive codes covering the entirety of the devolved areas would be a massive undertaking, prompt action focussed on specific areas could confer real benefits within a relatively short term. But it seems to me that this needs to be set in motion soon while the position is still remediable.*

99. Therefore, ALWL urge the Welsh Government to promptly pursue a rolling programme to produce comprehensive codes, beginning with the specific subject areas suggested above of planning, education, and landlord & tenancy. Once these initial codes have been drafted, a Code Office would then move onto preparing codes for social services law, the law governing waste and the environment, and local government law.

100. ALWL is grateful for the opportunity to respond to the Welsh Government's important consultation. If the ALWL can be of any further assistance, please do not hesitate to contact us.

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