ASSOCIATION OF LONDON WELSH LAWYERS
CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN

9th October 2015

ALWL Responses to Law Commission's Consultation on the Form and Accessibility of the Law Applicable in Wales:

1 Introduction:

1.1 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.

1.2 ALWL welcomes the opportunity to contribute to this very important consultation exercise on the form and accessibility of law in Wales. 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)
- Nerys Jefford QC (Keating Chambers)
- William Hughes QC (9 – 12 Bell Yard Chambers)
- Bleddyn Phillips (Clifford Chance LLP)
- Emyr Thomas (Sharpe Pritchard LLP)
- Jonathan Haydn-Williams (Goodman Derrick LLP).

2 <u>Access to Justice:</u>

2.1 Access to justice is not simply about (1) the availability of legal advice and representation (at a cost that is either covered by state funding or reasonable charges by lawyers) or (2) the location of courts at a convenient point for the delivery of local justice.

2.2 It is also about (3) good, well-drafted law that is written in language that is intelligible, (4) laws that are organised in a way such as the laws on a particular subject can be found in one place and in an organised manner, and (5) as legislation is bilingual in Wales, this bilingualism enhances access to justice by drafting that produces texts that read fluently in each language and are not merely a translation from one to the other.

2.3 It is becoming increasingly difficult for legal practitioners to find out what the law is in Wales. This is unacceptable, as it is fundamental to the rule of law that we are all able to discover and understand the law under which we live.

2.4 We agree with the comment contained within the Consultation Paper that accessibility of law has at least 3 components: (1) availability, (2) navigability, and (3) clarity.

2.5 Legal practitioners have to grapple with the sheer volume of primary and secondary legislation and the frequency with which it is amended. In Wales, these difficulties have been compounded by reason of the incremental "*evolution of devolution*".

2.6 For example, functions under a large number of Acts of Parliament have been transferred to Welsh Ministers, but this is not apparent on the face of the Acts of Parliament in

question. Further complexity is introduced by the divergence of the law applicable in Wales from that applicable in England; a consequence of a fundamental difference in the political make-up of the two legislatures.

2.7 This divergence in the applicable laws will inevitably become more pronounced over time. Now is the time to seize the opportunity to ensure that the form of Welsh law is expressed in a clear and coherent way, and to ensure that there is proper access to the law that is applicable in Wales.

2.8 The scale of the divergence needs to be fully appreciated. Over a three-year period beginning in 2012, there have been 20 Assembly Bills, with two currently awaiting Royal Assent. In the period between 2007 and 2011, 22 Welsh Measures were passed. It is essential that there is a proper understanding of how these Bills / Measures differ from the laws of England & Wales. Nowhere is this conveniently set out, with the consequence that it is necessary to undertake a paper chase between primary legislation passed in Westminster, to compare and contrast for oneself, how this differs from the laws of Wales. That situation is unacceptable.

2.9 The position is, of course, even more complex when one considers secondary legislation. Since 1999, the Welsh Government (and its predecessors) has made more than 4,500 statutory instruments that apply to Wales, and a significant proportion of those instruments have created distinctive Welsh policy. Since the 2011 National Assembly election, the @Welsh Government has made 2,577 statutory instruments (9,764 pages) which apply to Wales (of which 727 contain distinctive Welsh policy).

2.10 There is now a great opportunity to codify Welsh law, and we believe that this opportunity should be seized. This can be done by concentrating initially on those areas where the divergence in law is most significant, for instance: housing and local government, planning, social services, and education. This approach would be very helpful to those seeking to access Welsh law, as currently on many subjects the legislation cannot be found in one place, but in a patchwork of primary and secondary legislation. This impedes the understanding of what rights and obligations apply to whom in which circumstances.

2.11 There is also considerable demand for greater access to Welsh law, and the Welsh Government needs to take the initiative to provide the means by which to meet this demand.

The recent website Law Wales is a welcome start, but it is not nearly enough to ensure that Welsh law is fully accessible. It is striking to note the statistic at paragraph 1.32 of the Consultation Paper, which reveals that over 2 million individuals visit the United Kingdom's online legislation service legislation.gov.uk every month.

2.12 The recent Silk Commission report on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales (2014) recognised this need at para 10.3.45:

> "It is sometimes difficult to establish what the law is that applies in Wales. Laws of Wales have been made by the UK Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens."

Consultation question 3-1: **We welcome consultees' views on the current legislative processes?**

Response:

3.1.1 The starting point to consider when expressing any view on the current legislative process is the nature of the devolution settlement. The current model of devolution involves devolved subjects and exceptions to those subjects. However, unlike in Scotland, there is a potential third category, namely subjects that are not devolved despite there being no mention of them. The consequence of this devolution model for Wales is that it lacks clarity and certainty, and considerable time is spent addressing potential arguments about whether provisions of a Bill relate to such undefined subject-matter. To resolve this lack of clarity and certainty, it would be helpful to move to a reserved powers model of devolution, as this would help meet the principles of clarity, coherence, effectiveness and efficiency that should be the hallmarks of any legislative process.

3.1.2 It is striking how few Assembly Members there are for the task in hand. There are only 60 Assembly Members, even though (1) the budget to be allocated to the Welsh Government Departments is £15.3 billion, (2) the number of civil servants in the Welsh

Government Civil Service consists of over 5,000, and (3) the scope and complexity of the Bills being passed is becoming ever more challenging.

3.1.3 To compare with Scotland, there are 129 members of the Scottish Parliament; and in Northern Ireland, there are 108 members.

3.1.4 To meet this demand, we would suggest that there is a need to either increase the number of Assembly Members from 60 to, say, 100; or to change the legislative process from a unicameral system to introduce a second legislative chamber with, say, 40 members of the second chamber to further scrutinise the work of the 60 Assembly Members.

3.1.5 The need for detailed scrutiny of draft Bills as they pass through the National Assembly is obvious. We would, however, raise a concern as to whether the Assembly Members are given adequate and proper support to enable them to fully engage in a detailed scrutiny of the legislation. Adequate support would include not only the necessary time for each individual Assembly Member to be able to fully scrutinise the draft Bills, but also for them to have access to expert resources in the various technical fields that are involved so as to put forward any reasoned amendments.

3.1.6 It is also noted that there is a high level of turnover in Assembly Members. In the 2011 election, over a third of the Assembly's membership changed with 23 new Assembly Members taking a set in the Fourth Assembly. This factor further supports the need for proper measures to be in place to give adequate resources to the Assembly Members in their scrutiny role.

3.1.7 The practice of providing Explanatory Memoranda is most welcome. As well as the current position where an Explanatory Memorandum would outline the policy objectives of the Bill, provide estimates of the costs to which the proposed legislation will give rise and give details of any consultation already understand, it would be helpful also to have a ready reckoner that identifies how the draft Bill, if passed, would change the current laws of England & Wales. By introducing such a measure, it would be possible at a first glance to understand what difference the Bill would make to the laws of England & Wales.

<u>Consultation question 3-2</u>: **Do consultees think that a special procedure for non-controversial Law Commission Bills should exist in the National Assembly?**

<u>Response</u>:

3.2.1 Yes.

3.2.2 We agree that Bills that are technical in nature require less scrutiny than ordinary Bills, or scrutiny of a more specialised kind. For instance, a consolidation Bill which simply re-enacts the law, making no significant changes to its substance, will require a different sort of scrutiny from a Bill which implements a radical policy agenda in a politically controversial area.

3.2.3 We agree that the procedures that apply in both Westminster and Scotland with respect to the introduction of Law Commission Bills should also apply in the National Assembly for Wales.

Consultation question 4-1: Do consultees think that the current practice strikes the right balance between simplicity and precision in legislation passed by the National Assembly?

4.1.1 In responding to this question, we have not conducted an audit of the legislation passed by the National Assembly; however we do consider that the aims of the Office of Legislative Counsel's Legislative Drafting Guidelines, as described in Chapter 4 of the consultation document, provide a sensible balance between simplicity and precision.

4.1.2 In the preface to the first edition of *Legislative Drafting* G.C. Thornton described the task of the draftsman as "not only to determine the law, but also to communicate it" and steps which go towards achieving this ideal are to be encouraged.

Consultation question 4-2: Would there be merit in publishing the Office of the Legislative Counsel's Legislative Drafting Guidelines?

4.2.1 Yes. Publishing the Legislative Drafting Guidelines would help to keep the profession up to date with the latest thinking on how best to draft legislation and it is hoped that guidance on, say, how best to draft clearly without using archaic language would be

adopted by lawyers, regardless of whether or not they are legislative drafters. It is noted that the Office of the Parliamentary Counsel publishes its *Drafting Guidance* online.

Consultation question 4-3: Do consultees currently experience difficulty reading amended legislation?

4.3.1 The task of reading amended legislation has been made relatively straightforward by the publication of amended legislation on subscription websites.

4.3.2 It is acknowledged that not all those with an interest in reading legislation (particularly non-professionals) will have access to subscription websites and we consider that, in those circumstances, readers of legislation will experience difficulty.

Consultation question 4-4: Should Keeling schedules be produced alongside Bills, where the Bill amends other pieces of legislation, and be published alongside the Bill in the explanatory notes?

4.4.1 We consider the publication of Keeling schedules in the explanatory notes to a Bill would be a helpful addition to the explanatory notes where the Bill proposes to significantly amend an Act.

4.4.2 We appreciate the point made in the consultation document concerning the additional cost and work that would be generated by the production of Keeling schedules and for this reason consider they ought to be produced when the Bills proposes to significantly amend an Act. The decision on whether a Bill amends an Act significantly can be taken on a case by case basis.

Consultation question 4-5: Should Keeling schedules be formal schedules to an amending Bill that become law when the Bill is enacted?

4.5.1 No. An error in a Keeling schedule which became law when the Bill is enacted would generate legal problems which can be avoided by, for instance, publishing the amended Act in the explanatory notes published alongside the Act or in another document which, like the explanatory notes, would be published as an aid to interpretation and would have no legal force.

4.5.2 We do not consider that it would be necessary to publish Keeling schedules on enactment if free-to-view websites published, in good time, the original and amended forms of all Acts.

Consultation question 4-6: What features would consultees like to see in Keeling schedules, or other documents showing amendments, to make the changes as clear as possible?

4.6.1 We would like to see Keeling schedules which set out the text that is to be omitted indicated by a strikethrough and the text which is to be introduced as underlined.

Consultation question 4-7: Do consultees find overviews helpful in navigating or understanding legislation?

4.7.1 Yes; however we consider it would be best if overviews were placed in the explanatory notes rather than in the statute itself.

Consultation 4-8: Do consultees have any concerns about overviews being used inappropriately to interpret the meaning of legislation?

4.8.1 Yes and for this reason consider overviews ought to be placed in the explanatory notes rather than in the statute.

Consultation 4-9: Do consultees find aspirational clauses a helpful addition to legislation?

4.9.1 No. We consider aspirational clauses lack clarity since, as identified in the consultation document, they make it "difficult to be certain of the rights and obligations the legislation transfers" (see paragraph 4.67). We consider it would be preferable if the explanatory notes explained the aspiration of each provision.

Consultation question 4-10: Do consultees find the Interpretation Act 1978 and its Scottish and Northern Irish equivalents useful?

4.10.1 We find the Interpretation Act 1978 incredibly helpful; we have not had cause to use its Scottish and Northern Irish equivalents.

Consultation question 4-11: Do consultees think that there should be an Interpretation Act for Wales at this stage?

Consultation question 4-12: What do consultees think the benefits of an Interpretation Act for Wales would be? What would an Interpretation Act for Wales need to cover?

In response to consultation questions 4-11 and 4-12, we consider it would seem sensible if a consultation exercise were undertaken in respect of a draft document which set out (i) Welsh legal terminology and (ii) definitions and / or pairings of English and Welsh language expressions with a view to this document becoming an Interpretation Act for Wales.

Consultation question 6-1: Should the Government's responsibility for the publication of statute law free of charge be the subject of a statutory duty?

Response:

6.1.1 Yes. The ALWL consider it a fundamental to a democratic society that its' public should have ready access to the legislation that governs it. We are strongly of the opinion that it is incumbent upon the UK Government, whatever its political makeup, to ensure that the statutory powers of the Executive should be readily available to all, and available without penalty of cost.

6.1.2 The UK Government bears the responsibility of ensuring UK Statute law is available to the public. The Queen's Printer publishes English and Welsh primary and subordinate legislation which is taken as the authoritative version; there is, at present, no obligation to publish legislation online. The Legislation that is available online is very rarely the authoritative version of an Act of Parliament or subordinate legislation.

6.1.3 We are conscious that the National Assembly for Wales has generally legislated new Measures (2007–2011) and Acts (2011 – present) in three areas of great importance to the Welsh people – Education, Health and Housing. Establishing *the current law* in Wales presents its own unique difficulties for lawyers, let alone members of the public anxious to ascertain the correct legal position. (We note the comments at para 6.22 highlighting the type of issues that would require addressing). These difficulties are manifest when one takes into consideration that text or even online legislation is very rarely the authoritative version of an Act of Parliament or subordinate legislation.

Consultation question 6-2: If so, should the duty extend to making legislation available

online?

Response:

6.2.1 Yes. The ALWL endorse the approach adopted in New Zealand.

6.2.2 The Legislation Act 2012, s 6(2) obliges the NZ Government, through the Parliamentary Counsel Office, to publish legislation in both printed and electronic from, with such versions presumed to be correct. The geographical layout of New Zealand is the accommodation of its citizens is, in many ways, reflective of how the population in Wales is accommodated within its boundaries.

6.2.3 On the one hand there are pockets of busy City and Town based conurbations, together with less populated rural areas. It is those citizens in more remote areas (without ready access to copy text legislation) for whom the facility of an up to date online legislation will be of the most benefit.

Consultation question 6-3: Do consultees think it important that an online legislation database for Wales clearly identifies the legislation of the United Kingdom Parliament, and parts of that legislation, that apply to Wales?

Response:

6.3.1 Yes. Welsh law is intertwined with UK law.

6.3.2 The Measures and Acts introduced by the National Assembly for Wales are, by necessity, brought into force to reflect local requirements and sensibilities that are generated in our country. Whilst the Consultation Paper has identified various legislative resources available online to users, we note that research informs that most who access such sites assume the (UK) legislation being viewed is up to date, when most often it is not.

6.3.3 We note, by way of example, that the Planning legislation in Wales is demonstrative of the type of statutory differences reflected by local legislation when compared to similar legislation in England. This is exactly the type of scenario that would be of great benefit to those having to negotiate the often time-consuming and difficult exercise of establishing *the* law as it applies in Wales.

6.3.4 Whist we note the observations at para 6.14 regarding the demise of the "Wales Legislation Online", the ALWL endorses the Welsh Government/Westlaw UK partnership in designing a new Cyfraith Cymru/Law Wales online service. We also consider that the proposal to organise the guide into devolved subject fields a sensible one.

Consultation question 6-4: Do consultees attach importance to legislation being accessible through a general web search?

Response:

6.4.1 Yes. In all likelihood, most legislative searches are commenced using a popular search engine such as Google or Yahoo.

6.4.2 We agree that any online search for Welsh legislation should be as simple and as easy as possible.

Consultation question 6-5: Do consultees consider that legislation should be accessible through a database's internal search engine, including being searchable by subject matter?

Response:

6.5.1 The ALWL agree that unless an individual knows the title of the legislation being sought, finding the correct statute through a search engine will be time consuming, problematic and potentially fruitless. This is particularly pertinent when consideration is given to the fact that in order to establish the current law in Wales, EU, UK and Welsh legislation will all have to be considered.

6.5.2 UK legislation can generally be searched for by reference to name, type or year of enactment. Specialist legal websites (both government and commercial) usually have facility to search for particular words or phrases common in separate but potentially relevant legislation. This of course has the benefit of linking Statutes and Statutory Instruments.

6.5.3 We recognise that this falls short of enabling the user to search for subject matter. We therefore repeat our earlier comments with regard to the establishment of Cyfraith

Cymru/Law Wales in which it is envisaged legislation can be searched for by subject matter. We support any innovation or tool that eases the use in online searches.

<u>Consultation question 6-6</u>: Should Welsh language legislation be capable of being viewed alongside English language legislation on legislation.gov.uk?

<u>Response:</u>

6.6.1 Yes. However, we are conscious that direct translations of certain English words or phrases do not have an equivalent in the Welsh language, which could in turn lead to misunderstanding or misinterpretation of Statute.

6.6.2 We also appreciate that the translation and keeping up to date of legislation is both time consuming and expensive.

6.6.3 Nonetheless, given the Government and the National Assembly for Wales commitment to the Welsh language, the ALWL consider it imperative that access to Welsh language versions of legislation be the equal of those in the English language.

<u>Consultation question 6-7</u>: Do consultees agree that a database of legislation applicable in Wales should be organised by subject matter, following the *Defralex* model structure, with clear and detailed subdivisions? Should this be done by way of links from *Cyfraith Cymru /Law Wales* to legislation.gov.uk or in a section of legislation.gov.uk?

<u>Response</u>:

6.7.1 Yes. Please see our comments in relation to questions 6.3 and 6.5 post.

6.7.2 Legislation is most often than not presented online by Government or Commercial services by type of Statute or Statutory Instrument, year or title. We agree that organisation of legislation by subject matter would greatly simplify the search process.

6.7.3 This is particularly pertinent in Wales where the law in a devolved area is often an unwieldy complicated mixture of Westminster and Welsh legislation. The Defralex model is to be commended. We would encourage links from both Cyfraith Cymru/Law Wales to legislation.gov.uk and within it.

Consultation question 6-8: Should legislation available on an online legal database for Wales be editable by volunteer legal experts?

Response:

6.8.1 We acknowledge that the monitoring and updating of a legislative database for Wales is essential if such a facility is to have any chance of success, recognition and use. We also acknowledge that the onerous task of doing so would be both costly and time consuming, but nonetheless of great benefit and importance.

6.8.2 We do caution that however well-intentioned it may be to get "volunteer legal experts' to undertake this task (presumably for free or minimal cost), it does generate a perception that this important task would be undertaken "on the cheap'.

6.8.3 Without the appropriate peer review of this work, and other safeguards, we ask rhetorically what would be the public perception of such a facility in those circumstances?

6.8.4 It would be a tremendous shame if due to corner-cutting in not ensuring a top-quality online product, that the online public, both legal and lay users, would perceive such a venture as unreliable and not fit for purpose.

Consultation question 6-9: If so, what safeguards should be put in place?

Response:

6.9.1 We have noted our concerns above if such a course were to be adopted.

6.9.2 The ALWL consider that it essential that a committee of suitably qualified academic and practitioner lawyers be available to 'peer review' the proposed changes and updating of the database, before such changes are made online.

6.9.3 It would be most unfortunate to have the type of problem that sites such as Wikipedia occasionally encounter when a 'rogue' contributor sabotages or adulterates an entry.

Consultation question 6-10: Do consultees find explanatory notes helpful? Could they be improved?

Response:

6.10.1 Explanatory notes are a useful tool for those scrutinising Bills and Acts to establish purpose and effect of the provisions to which they refer. Explanatory notes are also a useful tool to aid the accessibility of legislation.

Consultation question 6-11: How could explanatory notes best be presented?

Response:

6.11.1 The addition of hyperlinks to Explanatory notes would allow easy access to other relevant material, including the Explanatory notes of other related / relevant legislation.

6.11.2 The ability to view Legislation together with detailed Explanatory notes is encouraged. We do urge that consideration be given to include Explanatory Notes for Measures and Acts of the National Assembly for Wales.

Consultation question 6-12: Should guidance and/or commentary be included on an online legislation resource for Wales? If so, how detailed should its coverage be?

Response:

6.12.1 Accurate guidance or commentary is designed to assist the user to ascertain what the applicable law is and comply with its requirements. Legislation is often drafted in such a way as to inhibit the non-legally trained or qualified person. Guidance can be of great assistance in negotiating the applicable law, provided it is accurate.

6.12.2 With regard to Welsh law, such guidance should be as detailed and accurate as is possible. The example given at para 6.90-6.91 highlights how important ensuring having correct guidance is, not just in this specific instance of a Welsh 'legal minefield', but as to UK legislation generally.

Consultation question 6-13: Have consultees experienced difficulties due to the limited availability of textbooks on the law applicable to Wales?

6.13.1 The Consultation identifies the scarcity of current Welsh law textbooks. The absence of such publications may be reflective of how complicated many areas of Welsh law are. The

task of assimilating, commenting, presenting a definitive academic and legal tome on the law in Wales would undoubtedly be a time consuming task for the most able of Welsh lawyers.

6.13.2 Any potential author(s) would have to consider with care whether the market for such a publication would be rather limited when consideration is given to the time and effort required to write the definitive Welsh law publication. Furthermore, any potential author(s) would perhaps consider that such the time and effort that would have to be expended would not a worthwhile exercise, compared to other potential projects.

Consultation question 6-14: What do consultees think can and should be done in order to promote accessibility to the law in the form of textbooks?

Response:

6.14.1 We consider that Welsh Governmental support, both financial and resource wise, may encourage potential authors to write new textbooks on Welsh law given the potential hurdles we highlight above.

Consultation question 7-1: Do consultees think there should be procedures in the National Assembly for Technical Legislative Reform, such as consolidation bills?

Response:

7.1.1 Certainly yes.

7.1.2 This provides, if properly managed and controlled, better access to the legal framework, a simpler and more efficient means of understanding the legislation, a modern and up to date repository of our core statutes and a more stable and longer lasting environment in which to administer speedy and accurate reference to the relevant legal documents.

7.1.3 This though has to be caveated : technical legislative reform should be just that - an administrative easing of cumbersome procedures and tautologous wording where,

through careful drafting, duplication, obsolete and redundant provisions are jettisoned in favour of a more streamlined and comprehensive code of the relevant legal statutory framework. It should not impinge upon, or impact in any way, substantive reworking of the law which would require a more fundamental parliamentary review of the legislation in question.

7.1.4 Which brings one to what some might seem as the core issue : qui custos custodiet - or in this context, who is to determine what is a substantive change to the legal statute in question and / or what is more of a purely technical redrafting of the relevant legislation? Legal draftsmen / women are too often caught up (quite rightly one suspects) in dealing with, and addressing, primary legislation and substantive reform - without having to deal with what they might consider to be less important 'consolidation' issues - worthy as that might be.

7.1.5 This comes down again to another core concern - funding. Who is to determine how the very limited resources are to be prioritised - and what is to take precedence in the legal drafting hierarchy?

<u>Consultation question 7-2</u>: Do consultees think that there is a need for consolidation in Wales? If so, do consultees have a view on a particular area of the law in Wales that would benefit from a consolidation exercise?

<u>Response</u>:

7.2.1 Again the answer must be yes.

7.2.2 However, just as there are caveats in our response to Question 7-1, so too there must be qualifications to this simple 'Yes' answer. A balance and analysis of the costs and benefits to be derived from any potential consolidation exercise needs to be undertaken in respect of any set of legislative reforms.

7.2.3 If one considers that in any consolidation exercise, an assessment of the extent of substantive change which might necessarily derive from the purely technical amendments to the laws in question would need to be carefully analysed, such that a full and proper understanding of the time, cost and impact of such change is clearly grasped.

Then one can and should examine in some detail, and in this context, the five 'core' Case Studies outlined in the Consultation Paper.

7.2.3 One might imagine, for example, without being an expert in any particular one of the Case Study areas in question, that a Consolidation exercise in the sphere of Town and Country Planning or Local Government, where there is a long established cadre of legislation, might lend itself more readily to an overhaul or streamlining exercise in a way that a more rapidly developing and dynamic area of the law such as Social Care or Education or the Environment, might not. In these latter three areas, reform and changes to the present legislative framework appears to be very fast moving and time demanding where any consolidation exercise might, one imagines, also result in the need to examine more substantive changes in the underlying legislation - resulting in a more costly and time consuming consolidation exercise. The same might not be as evident in the realm of other, more 'established, areas of law such as Planning and Local Government where consolidation might be more readily attainable and less controversial.

Consultation question 7-3: We welcome consultees' views on the drawbacks and benefits of each of the models of consolidation described above, including pure consolidation and consolidation combined with law reform?

Response:

7.3.1 The analysis presented at Section 7.59 of the Consultation Paper is particularly helpful in responding to this Question outlining, as it does, the need to consider at least six elements in developing a suitable model including how long the process might take, who should do the drafting, the nature of the consolidation required (full reform or simply pure consolidation), the relative costs of each model and the degree of legislative scrutiny required.

7.3.2 In both the New Zealand and New South Wales jurisdictions considered by the Consultation Paper, a distinct emphasis upon pure consolidation other than consolidation combined with law reform appears to have been the favoured solution resulting in the Legislation Act 2012 in New Zealand and a putative Bill in NSW. Each of these legislative goals is to try and ensure a revisionary process whereby after an appropriate consultation

period, the Government proposes and presents to Parliament a revision Bill which in effect re-enacts earlier law in a form that makes it more accessible - and easier to follow! There are in built safeguards within the legislative process to help ensure that substantive reform does not inadvertently 'creep in thorough the back door' and Part 2 of the 2012 Act in New Zealand, for example, provides (in Section 31) for 13 guidelines setting out detailed requirements and powers of a revision.

7.3.3 Similarly, in NSW, 'miscellaneous provision' bills carry out a number of functions again geared towards 'pure' consolidation through e.g. the repeal of obsolete Acts or simply correcting typographical errors or errors of grammar or syntax. More interestingly in the context of the NSW model is the ability to make 'minor and non-controversial' amendments where the definition of the same is more flexible than the definitions applicable to Law Commission consolidations or pure consolidations. While the guidelines state that 'generally speaking' certain matters will not be included (ref Section 7.78 of the Consultation Paper) it does not take much circumspection to conclude that this might give rise to a rather broader than thin edge to the wedge which could in turn lead to more substantive reform than might have been intended and, with it, a more convoluted and costly consolidation process.

7.3.4 In summary therefore, one's preference might be to follow the New Zealand model which not only appears to offer a more simplified and thus easier to follow (and less costly) precedent but, very importantly, is also a common law jurisdiction which has similar characteristics to Wales in terms of economy, population size and a unicameral legislature.

<u>Consultation question 7-4</u>: We invite consultees to provide examples and evidence of the problems they experience from a lack of consultation, in terms of time or other costs. IN addition we ask consultees to provide examples and evidence of the costs and benefits they think would result from consolidation.

<u>Response</u>:

7.4.1 The answer to this Question has in large part already been offered in the responses given to Question 7-1, 7-2 and 7-3.

7.4.2 In essence, the complexity of unravelling intricate and convoluted provisions across a plethora of, at times, loosely connected pieces of legislation, adds enormously to the time and thus cost of providing clear answers and guidance to clients. This in turn can lead to frustration and a risk of providing incomplete advice in cases, for example, where an obscure piece of legislation might impact a more central, core statutory provision. This could then give rise to a prolonged legal process of appeal and further hearing(s) which would exacerbate the costs and timely conclusion of a case.

7.4.3 A pure consolidation exercise, again for the reasons already adumbrated in detail above, would go some way towards alleviating the burden and cost of having to trawl through a morasse of legislation to the general detriment of the public whom it is meant to serve.

Consultation question 8-1: Do consultees agree that the objective of codification in Wales should be to bring the common law into statutory form, and/or reorganise statute law?

Response:

8.1.1 We agree that the objective of codification in Wales should be both to bring the common law into statutory form and to reorganise statute law. We will address each in turn.

Codification to bring the common law into statutory form

8.1.2 In para. 8.6, "the common law" is described as "the law made and declared by judges in deciding individual cases". Footnote 3 states that the terms "judge-made law" or "case-law" will be used in the remainder of the discussion. However, we respectfully note that that terminology has not been used consistently in the Draft Report and we suggest that the clarity of the Report, when published, would be improved by adopting the term "judge-made law" instead of "the common law", where the context admits. We will adopt the term "judge-made law" rather than "the common law", reserving use of "the common law" for reference to the nature of the jurisdiction, e.g. in contradistinction to "civil law" jurisdictions.

8.1.3 Our support for codification to bring judge-made law into statutory form is based on the following propositions:

(a) When carried out before, it has worked well in practice. Examples are given in para. 8.12, including the Partnership Act 1890, which has stood the test of 125 years.

(b) It should improve the accessibility and certainty of the law (see para. 8.75), both for the public and professionals (lawyers and others, such as accountants, surveyors and public officials):

(1) The process of identification and interpretation of judge-made law is a process which is not accessible to those not trained in it. Discerning the *ratio decidendi* of a case in which three or more appeal judges have given separate judgments and then deciding whether that takes precedent over decisions in other cases, is one of the key skills to be acquired over several years of legal training. This places a barrier between the public and the law, which can be overcome by those who have access to legal advice. But, given the decreasing availability of public funding, access to the law is increasingly available only to those who are able and willing to pay for legal advice.

(2) Certainty is not one of the "selling points" of judge-made law. Aside from the frequent difficulty in discerning what the current judicial position is on any particular legal point, on which the best lawyers may disagree, the doctrine of precedent does not prevent the law from being changed frequently by means of judges "distinguishing" previous decisions or declaring them to be *"per incuriam"* or *"obiter dicta"*. It may take a Supreme Court decision to impose some certainty, but even then the Supreme Court is entitled to disregard its own decisions in the future.

(3) That is not to say that there is no place for "judge-made law" in an area of law which has been codified. The code will be the authoritative and comprehensive source of the law, but judges will apply and interpret the code and that may lead to judges in future cases following such decisions in accordance with the present rules of precedent.

(4) Regular reviews of a code will afford the opportunity to consider the accretion of judges' interpretative decisions as to the meaning of the code and to codify those decisions by means of amendments to the code (or to overturn the decisions if the elected law-makers consider that to be the appropriate course).

(c) Judge-made law may have drawbacks in bi-lingual parts of the substantive law of a common law jurisdiction:

(1) If the law is authentic in both languages and if it is considered that judges who apply such law will need to be bi-lingual, the "pool" of judges who make decisions on bi-lingual law will be a small one, perhaps resulting in them having disproportionate law making power when compared with that of the elected law makers. Codified law, in which the judges do not make law but interpret the code, with the opportunity for the elected legislature from time to time to update the code and accept or reject such interpretative case law, perhaps allows for a better balance of power between the judiciary and the legislature.

(2) If statute law is to be authentic in both languages, would court decisions, and the reasoning for them, also need to be available and authentic in both languages? If law is to be found in the decisions of judges, one assumes that that would have to be the case, adding a considerable burden of additional work and cost. If the sole authoritative source of the law were a code, the work of drafting and maintaining it in two languages should be manageable. Whilst judge-made decisions would have relevance as to the interpretation of the code, their significance would be limited, especially if the code were regularly updated so as to incorporate or reject such judicial interpretation. Hence, the need for dual language - or translated - judgments would be less.

Codification to reorganise statute law

8.1.4 Our support for codification to re-organise statute law is based on the following propositions:

(1) It would make the existing statute law in the codified area more accessible and easier to understand. Rather than having to consider a number of different statutes, perhaps with titles unrelated to the topic of law being researched, the relevant law could all be found in one enactment with a title that accurately labelled its content.

(2) It would make for better and more accessible law in the future. Rather than piecemeal amendment, repeal or addition by means of separate Acts or parts of Acts, the changes would be made to the code *in situ*, without proliferation or fragmentation.

(3) We note the observation in para. 8.14 that codification of statutes, as opposed to consolidation, is associated with "substantive legal reform" as well as with the future course of the law (as just referred to in our preceding para. (2)).

Consultation question 8-2: Do consultees agree that each code should constitute the authoritative and comprehensive statement of the law relating to a particular subject?

Response:

8.2.1 Yes. We also agree that there should not be a single code as in the USA, but a series of distinct and separate codes, each of which is the authoritative and comprehensive statement of the law in a specified field.

Consultation question 8-3: Do consultees agree that the coverage of each code should be part of the subject-matter for consultation as each codifying project is undertaken, but that the list of legislative competences of the National Assembly should represent a starting point?

Response:

8.3.1 Yes.

Consultation question 8-4: Should the National Assembly be given the power in statute to enact both codes and Acts of the Assembly? Where there is a code in place, should further legislation within the subject area of the code only take effect by way of amending the code?

Response:

8.4.1 Yes to both questions.

Consultation question 8-5: Do consultees think it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes?

Response:

8.5.1 In principle, yes.

8.5.2 We agree with the provisional view in para. 8.93, that the oversight functions set out in para. 8.92 could be undertaken by the National Assembly.

Consultation question 8-6: Should standing orders make provision for a formal motion to be put that a bill that has passed all its stages should stand as a code and for a formal motion removing code status from an enactment?

Response:

8.6.1 That seems sensible.

Consultation question 8-7: Should a motion that an enactment stand as a code be in the name of the member in charge of the bill, or both of that member and of the Presiding Officer?

Response:

8.7.1 It would seem sensible for both the member in charge of the Bill and the Presiding Officer to have input on the matter.

Consultation question 8-8: Should the Presiding Officer determine whether a Bill falls within the subject area of a code, in whole or in part?

Response:

8.8.1 We do not have an opinion on this question.

Consultation question 8-9: Should managing the technicalities of incorporating amending text into a code; undertaking periodic technical reviews; and managing the process of identifying more substantial defects and promoting amendments to correct them be undertaken by a Code Office in the Assembly? Who should staff the Code Office?

Response:

8.9.1 Clearly, responsibility for these matters should be allocated appropriately and unambiguously.

8.9.2 As indicated in our response to Q. 8-5, it would be desirable for the National Assembly to set up a distinct office or department to support the development and maintenance of Welsh codes. As to who should staff the Code Office, we are not in a position to comment.

Consultation question 8-10: Do consultees agree that the technical editorial changes necessary to accommodate amendments to a code should not be subject to approval by the Assembly?

Response:

8.10.1 To provide that changes, even of a "technical editorial" nature, should not be subject to approval by the Assembly could lead to lack of confidence in the Assembly's oversight process, especially if the perception of what is "technical editorial" became stretched.

Consultation question 8-11: Do consultees agree that the relevant subject Committee should consider whether a minor amendment to the wording of the code should require formal approval by the Assembly?

Response:

8.11.1 We agree, in that the relevant subject Committee would be made up of elected legislators, rather than officials.

8.11.2 Presumably, the Committee would have delegated authority from the Assembly, so that the issue for the Committee would be whether formal approval by the full Assembly was required.

Consultation question 8-12: Should such amendments as require approval be put to the Assembly for formal approval on a simple motion, without provision for their further amendment to be considered?

Response:

8.12.1 Yes.

Consultation question 8-13: Should a shortened version of the normal legislative process be used to pass Bills that correct substantial defects in the code?

Response:

8.13.1 Yes.

Consultation question 8-14: Do consultees think it would be possible, where a Bill is introduced pursuant to a codification programme, to draft a rule limiting amendments to bills to those designed to ensure better codification, rather than alternative substantive provision?

Response:

8.14.1 We note that the authors of the Draft Report "put this idea forward tentatively" and state that "Whether it is possible to draft, and if drafted, possible to enforce, such a rule are specialist matters peculiar to legislative standing orders, in which the Assembly authorities have greater expertise and experience than we do".

8.14.2 We are in no better position to comment than the authors of the Draft Report and will therefore not seek to do so.

Consultation question 8-15: Do consultees think that the Welsh Government, in consultation with the National Assembly for Wales, the Law Commission and others,

should draw up a programme of codification with a view to developing Welsh codes on the model we describe for those areas of the law in which it would be beneficial to do so?

Response:

8.15.1 The short answer is "yes". We agree with the final sentence of the Consultation Paper that "the earlier that the programme is put in train, the earlier all of the benefits of an accessible, modern, simple and rational law will be felt by the people, and economy, of Wales".

8.15.2 As to the model described in the Consultation Paper:

(a) Of the four methodologies referred to in para. 8.139 of:

(1) full scale law reform projects;

(2) codification-led law reform projects;

(3) consolidation;

(4) Welsh Government programme legislation;

unless we have misunderstood the Consultation Paper, it appears that the authors' preference is for (2), whilst accepting that "different approaches will be suitable for different areas of the law" (para. 8.142). We would support that approach.

(b) We note that the authors of the Consultation Paper:

(1) State in para. 8.77 that "The drafting of the … codes should … continue to aim for a level of specificity appropriate to a common law jurisdiction, rather than attempt to draft in a less detailed style of continental codes. This does not mean that Welsh legislation should not continue to experiment with innovations like purpose and overview sections …".

(2) Refer in para. 8.6 to Parliamentary legislation which "is itself detailed in style and seeks to cover every possibility that occurs to the drafter, unlike the broad principles of the continental codes".

(3) State in para. 8.72 that "we consider that the possibility of making legislation in new ways provides a real opportunity to create a novel and more embedded form for common law codification".

(c) We would not advocate that codification of Welsh law follows the approach of those codes of the jurisdictions of continental Europe which derive from the Napoleonic Code (itself inspired by Justinian's 6th century codification of Roman Law) or from other continental European codes which pre-date the Napoleonic Code. If inspiration is to be obtained from the past, Wales has its own history of codification to look back to (see para. 2.2 and below).

(d) However, the notion that Welsh codification should follow an approach in which the statute "seeks to cover every possibility that occurs to the drafter" is not one which we consider conducive to producing clear and accessible legislation. The present "Westminster" statute book contains legislation which has followed that approach and legislation that has not. In our view, it is the latter which often better achieves the aims of clarity and accessibility.

(e) An example of the latter type of legislation is the Unfair Contract Terms Act 1977 ("UCTA") – a sparingly drafted statute which relies upon the principle of reasonableness to protect against unfair contract terms and notices. Whilst setting out some principles, such as that reasonableness is to be determined as at the time of entering into a contract, it leaves the decision as to what is reasonable in any particular case to the courts.

(f) In the present context, it is perhaps worth observing that:

(1) UCTA was enacted to remedy the unfairness caused by contract terms or notices which excluded or limited liability for breach of contract or

negligence. The courts had tried to counter that unfairness by means of judge-made law, most notably by means of Lord Denning's use of the concept of "fundamental breach"[1]. A sigh of relief seemed to pervade the judgments of Lord Wilberforce and the other Law Lords in *Photo Production v Securicor*[2] as they overruled the Denning's doctrine, noting that, with the entry into force of UCTA, the English courts no longer needed to strain principles of contract law in order to protect consumers.

(2) For a while, UCTA perhaps had the "one-stop shop" nature of a code, succeeding in an area where judge-made law had failed, the judges now applying and interpreting the "code". However, its effective status as a code was ended by a European Union Directive, which required the introduction of the separate Unfair Contract Terms in Consumer Contracts Regulations 1994 (subsequently re-enacted), which provided parallel - and in fact more detailed - protection for consumers. It remains to be seen whether the recently introduced Consumer Rights Act 2015, which incorporates, in a single statute, provisions from both UCTA and the successor to the Regulations, will gain effective code status.

(iii) And so, finally, to Wales' own history of codification:

(a) In para. 2.2 it is recalled that in the 10th century Hywel Dda (Hywel the Good), who ruled over most of Wales, had the laws of Wales codified.

(b) Hywel is said to have summoned a meeting of those practiced in jurisprudence and to have selected from them a group of 12. According to the Book of Iorwerth:

---

[1] A legal device to avoid the unfair aspects of exclusion and limitation of liability clauses in contracts by treating the whole contract, including those clauses, as discharged and inapplicable.

[2] [1980] A.C. 827.

"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".

Although over 1,000 years ago, that process does not seem 100 miles from the process of codification proposed in the Law Commission's Draft Report.

<u>Consultation question 9-1</u>: We ask consultees whether a "legislative impact" assessment should be added to the list of impact assessments undertaken during the course of policy development in the Welsh Government.

<u>Response:</u>

9.1.1 We favour the addition of "legislative impact" to the current list of impact assessments.

9.1.2 The law making function of the Welsh Government raises particular issues which differ in substance or degree from those encountered in other legislative forums, including the impact and relationship of legislation to existing Welsh and UK legislation and to the common law (in circumstances where that may then develop differently in different jurisdictions within the United Kingdom).

9.1.3 These considerations seem to us to militate in favour of express consideration of "legislative impact" and to provide the Welsh Government with the opportunity to do so before Welsh legislation expands into the forest of legislation we are familiar with elsewhere.

9.1.4 We recognise that there are disadvantages to this approach as set out in the Consultation Paper.

9.1.5 The inclusion of "legislative impact" or "legal impact" as one of a number of impact assessments does not necessarily lead to the conclusion that it would govern policy (paragraph 9.74). It is simply one of the impacts to be taken into account in policy making. In any event, if such an impact assessment were to reveal that a substantive policy change could only be implemented through legislation likely to prove problematic in terms of operation, interpretation, enforcement etc., that could and should be a

relevant policy consideration in when, how and in what form legislation is brought forward.

9.1.6 For similar reasons, we see less to fear in policy officials as lawyers and vice versa than is implied by paragraph 9.76. Consideration of legislative impact would, we would hope, illuminate the relationship between policy makers and lawyers (and indeed policy and law) and promote productive interaction rather than simply turn one into the other.

Consultation question 9-2: We ask consultees whether a Welsh Legislative Design and Advisory Committee should be created?

Response:

9.2.1 We are not persuaded that such a formal committee is necessary for the reasons set out in the consultation paper – principally that it would merely reorganise the process of legislative development and drafting and add little other than a further layer of bureaucracy.

9.2.2 We note that the paper, whilst explaining in some detail the past, present and proposed system of legislative design and advice in New Zealand, provides little evidence of a positive impact on legislation arising from the involvement of the model committees.

Consultation question 9-3: We would also welcome consultees' views on alternative models?

Response:

9.3.1 We think there is much to be said for the more informal approach of consulting, on a subject and legislation specific basis, with the academic community, practising lawyers and other "stakeholders".

9.3.2 This is an established part of the legislative process in so far as the content and often the detailed provisions of Bills before Parliament receive widespread publicity and comment in the relevant social, business and / or legal community.

9.3.4 We should have thought that it would be open to the Counsel General and other government lawyers to undertake informal consultation at earlier stages where they

consider it helpful and appropriate but we do not see the need to impose any formal requirements, which in themselves might require legislation and insuperable challenges of drafting.

Consultation question 9-4: We would welcome evidence on the costs and benefits of each of these models?

Response:

9.4.1 We are not in a position as an Association to provide such evidence.

10. **Conclusion**:

10.1 We thank The Law Commission for initiating this very important debate on the form and accessibility of the law applicable in Wales, and look forward to seeing the report that is prepared next year.

10.2 I would also like to thank those members of the Association who have contributed to the drafting of this response, which include: Nerys Jefford QC, William Hughes QC, Emyr Thomas, Bleddyn Phillips and Jonathan Haydn-Williams.

HEFIN REES QC

(Chairman of the Association of London Welsh Lawyers)