

**Submission to the Constitutional and Legislative Affairs Committee of the National
Assembly for Wales on Legislation (Wales) Bill**

Submitted by Swansea Law Clinic

This submission is being made by the Swansea Law Clinic, which is part of the Hillary Rodham Clinton School of Law at Swansea University.

The Clinic is a *pro bono* service and has been operating year-round since March 2017 when a Miscarriage of Justice Project was established. Since then we have been running projects in prison law, legal aid exceptional case funding, a Litigant Helpdesk in Swansea Civil Justice Centre, and, since November 2017, we have been providing an initial advice and assistance service. The latter involves face to face client interviews mainly, but not exclusively, in the following areas of law: housing, relationship breakdown, employment, equality, and consumer issues. Our model uses undergraduate and postgraduate law students as Student Advisers. They work under supervision and following ethical training they advise our clients. We aim to complement and not replace existing legal advice services as well as complementing provision that is eligible for legal aid.

We are also involved in public legal education which involves a range of activities but mainly involves informing school students as to their legal rights and responsibilities and, from time to time, journalism on access to justice matters.

Since the Clinic was founded almost two years ago, we have assisted through our legal advice and public legal education programmes over 500 people. It is our intention to use new technologies to scale our service further. Although most of our clients are members of the public our service is also available to small businesses.

A number of our projects work in association with a number of other organisations. The Miscarriage of Justice Project works with a charity, Inside Justice, and a solicitors' regulated practice and charity, the Centre for Criminal Appeals. The Prison Law Clinic works with the charity, the Prisoners' Advice Service and PACT. The Exceptional Case Funding Clinic receives support from the charity, the Public Law Project. We have run an outreach clinic at Maggie's Swansea, Singleton Hospital. The charity, Travelling Ahead, has referred cases to us, and we have referred cases to Advocate (formerly known as the Free Representation Unit). We also receive assistance from LawWorks Cymru and the Equality and Human Rights Commission Wales's Advisers' Helpline.

Our interest in this consultation is that we find that many of our clients are either finding it difficult to afford legal services and/or find the legal system complex. As a result, we are interested in all aspects of access to justice and public understanding of the law.

Executive Summary

We fully support the imposition of a statutory obligation on future governments in Wales to improve the accessibility of Welsh law under Part 1 of the Bill.

In our experience, our clients are not always aware of their rights and obligations under Welsh law and we believe this duty will enhance their awareness.

There is evidence that individuals, small businesses and the voluntary sector find Welsh law difficult to access and navigate. We think organising legislation by subject matter will assist them, as will the publication of up to date legislation online.

We hope that the accessibility programmes under section 2 of the Bill will take a broad approach to accessibility and it will not be confined to moving all legislation on a topic to legislative Codes. The accessibility programmes should also think about clarity of language, the removal of overlapping and inconsistent provisions, computational law principles, as well as new approaches to law making. We are also concerned to see the development of Codes being accompanied by explanatory texts.

The Housing (Wales) Act 2014 is an example of legislation that we use in our casework where the statutory language is clear, and is an example that could be followed in Codes.

The Bill, if enacted, will enhance access to justice in the Welsh language.

A broad and successful approach to accessibility programmes will be world-leading with economic as well as citizenship benefits.

Duty to keep accessibility under review

1. We would like to see a statutory obligation on future governments in Wales to keep the accessibility of Welsh law under review. This will create a discipline to ensure that the subject is periodically revisited, as a result, we feel the duty in section 1 of the Legislation (Wales) Bill (the Bill) has the potential to bring about behaviour change so that all actors involved in the law-making process will think of accessibility when making laws.
2. We know of few international precedents for a duty on government to keep the accessibility of law under review. Section 3 of New Zealand's Legislation Act 2012 contains an analogous duty, but we are not aware of any others. Therefore, we think that Part 1 of the Bill affords the potential not only to make the law more accessible for individuals in Wales but also to make Wales more economically competitive by making it easier for businesses to know their legal rights and obligations thereby reducing compliance costs. According to the University of Cumbria's Centre for Regional Economic Development (CRED), SMEs often do not have the expertise or resources to keep track of legislation and this increases their apprehension about having to deal with legal requirements.¹
3. Lord Lloyd Jones, a senior jurist and UK Supreme Court judge, has said that 'the complexity of [Welsh law] is now a huge problem'.² The complexity will only get worse: more primary and secondary legislation will be passed, laws will have to be domesticated following Brexit, and the current practice of passing amendments to legislation without accompanying text adds to the accretion of the problem. As a result, action needs to start to be taken at the earliest possible opportunity.
4. In our experience, our clients are not always aware of the rights and obligations which arise out of Welsh law and that are increasingly relevant to their day to day lives. In part, this could be to do with the difficulties inherent in accessing Welsh law with its different sources and confusing differences in terminology such as Measures and Acts, etc. Codes will have a tidying up effect, which will make it easier for them.
5. There have been reports that the voluntary sector finds the current system of accessing Welsh law burdensome.³
6. From our casework we have found that there could be more awareness of important Welsh legislation such as the Housing (Wales) Act 2014. In particular, our clients do not seem aware of when landlords need to be registered and licensed under the Act. Equally, they do not seem to be aware when agents need to be licensed under the

¹ CRED, *Business Perception of Regulatory Burden*, May 2012

² Lord Lloyd Jones, 'Codification of Welsh Law' Lecture delivered to the Association of London Welsh Lawyers on 8 March 2018, https://docs.wixstatic.com/ugd/ab7491_8c924cda0b7e4312b1e10fe9b8e7d501.pdf accessed on 16 January 2019

³ BBC Radio 4, *Law in Action*, (10 March 2011)

Act. In addition, we have heard from other practitioners specialising in the area that there is a lack of awareness of the Social Services and Well-being (Act) 2014.

7. There are other indicators that there is a specific Welsh dimension to access to justice issues. A report by Dr Nason of Bangor Law School found that: “Based on claims we know to be Welsh, there were 1.8 civil judicial review claims per 100,000 Welsh residents in both 2013/14 and 2014/15. On the other hand the number of claims per head of population in other locations has been consistently substantially higher, but has been falling in recent years.”⁴
8. The lack of judicial review claims in Wales relative to England is even more surprising when it is taken into account that: ‘The Welsh approach to regulation of public governance is distinctive; introducing new and unique duties on Welsh Ministers and public bodies...Social rights have been woven to the framework of public governance, with potential to ensure good governance, fairness and accountability’.⁵

Clarity

9. Making the law accessible is not just about finding it all in the same place, important though that will be. Using clear language is also important, and we commend the Housing (Wales) Act 2014 for its use of user-friendly language.
10. We hope that Codes will go beyond putting all legislation on a particular subject matter in one place, but also inconsistent and overlapping provisions will be removed when legislation is moved to Codes.

Availability of and changes to legal services

11. Our advice model aims to empower clients to resolve their problems by themselves, as much as possible. Similar models are followed by other advice agencies. Codification of laws by subject matter will assist them in this empowerment as they will find it easier to research the law themselves.
12. There is evidence that many families are being priced out of justice, so increasingly more people will have to research law themselves. A report produced by Professor Donald Hirsch of Loughborough University, commissioned by the Law Society of Wales and England, found that those that people on incomes already 10 per cent to 30 per cent below the minimum income standard are being excluded from legal aid.⁶ The situation is getting progressively worse as the means test threshold for legal aid has been frozen since 2010. So, in addition to cuts in the scope of legal aid since 2013 those who are eligible for legal aid are still, in some cases, unlikely to be able afford it and maintain a minimum acceptable standard of living.

⁴ Sarah Nason, *Understanding Administrative Justice in Wales* (Bangor University: 2015 p.107)

⁵ Submission to the Commission on Justice In Wales from Dr Simon Hoffman (Swansea University) at para. 3 <https://beta.gov.wales/submission-justice-commission-dr-simon-hoffman-swansea-university> accessed on 16 January 2019

⁶ Donald Hirsch, *Priced out of Justice? Means testing legal aid and making ends meet* (Centre for Research in Social Policy Loughborough University, March 2018)

13. This means that individuals are being forced to navigate the legal system by themselves on such potentially life changing issues as eviction and severe housing disrepairs. There is evidence that the public read legislation with the National Archives recording 2 million visitors per week to their legislation.gov.uk website.⁷ This further increases the need to make the process of finding the law as simple as possible in order for people in such situations to better enforce their rights.
14. New business models for delivering legal services which are emerging such as limited retainers, also known as unbundling, mean that individuals and small businesses are doing more of their own legal work in order to make the cost of legal services affordable. As the Court of Appeal in *Minkin v Lesley Landsberg* (2015) has approved unbundling then it is reasonable to assume that they will form part of the landscape for legal services for the foreseeable future, and that members of the public and small businesses will be navigating legislation without legal advisers.
15. There is a good economic case for imposing the obligation under s1 of the Bill. There has been research that has found that small businesses are a hard to reach group for lawyers.⁸ There is further evidence that small businesses have a tendency to ignore legal problems or try to resolve them by themselves. The proposed obligation would assist small businesses in finding the law and assessing their legal rights and obligations which will assist in making their operations more efficient.
16. The obligation addresses the unavailability of many laws which apply only in Wales passed by the UK Parliament in the Welsh language. It therefore has the potential to significantly enhance accessibility of laws for those who wish to access them in the Welsh language.

Publication of legislation

17. We want to see all Welsh law being available online. Section 9 of New Zealand's Legislation Act 2012 places a duty on the Chief Legislative Counsel to be accessible and, as far as is reasonably practicable, downloadable from the Internet. Up to date versions of current law which are available electronically free of charge ought to be available to members of the public. At the moment, UK legislation, including Welsh law, on the legislation.gov.uk website hosted by the National Archives is not always up to date. Although there are warning notices on the website there is no information which assists members of the public in making sure that they can find up to date information.
18. In order to aid understanding of the law as it applies to members of the public in their circumstances, we want to see a situation where they can easily identify currently in force legislation or even tailor searches of legislative databases to their own legal needs. We would like to see accessibility programmes under section 2 of the Bill explore whether computational law principles could be applied to achieve this.

⁷ Office of the Parliamentary Counsel, *When laws become too complex* (March 2013).

⁸ Legal Services Board, *The legal needs of small businesses 2013 – 17* Available at: <https://research.legalservicesboard.org.uk/news/latest-research-18/> Accessed on 4 June 2018

Cross cutting legislation

19. There is legislation which potentially affects the public's legal position which cannot be incorporated into Codes because it is cross cutting and cannot be limited by subject matter such as the Human Rights Act 1998. In addition, there is specifically Wales-only legislation which creates duties which are cross cutting and could also potentially affect the legitimacy of legislation. Welsh Ministers must have 'due regard' to the UN Convention on the Rights of the Child (UNCRC) in 'all their functions' when 'exercising any of their functions' under section 1 of the Children and Young Persons (Wales) Measure 2011. In addition, public bodies must contribute to well-being goals in accordance with the sustainable development principle under section 3 of the Well-being of Future Generations Act (Wales) Act 2015.
20. We accept that the purpose of Codes is to find all applicable law in one place. It would not be the best place to engage in 'how to use' legislation discussions particularly as Law Wales already exists as a forum for such discussion. However, we would like to see brief reference to cross cutting legislation in explanatory memoranda to Codes themselves so that members of the public were at least alerted to the need, on occasion, to read Codes in conjunction with other legislation.

Explanatory material

21. Similarly, we support the idea of including primary and secondary legislation, as well as soft law, within Codes but are concerned that members of the public are not always aware of the hierarchy of legal norms. We would like to see some brief explanation of hierarchy of legal norms in explanatory memoranda to all Codes with cross reference to more detailed explanation on the Law Wales website.
22. We would like to see thought given not just to using text in explanatory material but also other ways of presenting information such as visualisations. At present, legislation and accompanying explanatory material only uses text and we feel it is time to be more innovative.

Accessibility programmes

23. The Bill does not define accessibility, which we see as a potential strength of the legislation. New Zealand's Legislation (Act) 2012 defines accessibility narrowly and we think the accessibility programmes under s.2 of the Bill could be more wide ranging, flexible and innovative than the New Zealand model by looking at public legal education, computational law principles, participative law-making and setting standards for clear and simple legislation.