



Llywodraeth Cymru  
Welsh Government

Welsh Government  
Explanatory Memorandum

## **Legislation (Wales) Bill**

Date of introduction : 3 December 2018

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

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# Explanatory Memorandum to the Legislation (Wales) Bill

This Explanatory Memorandum has been prepared by the Office of the Legislative Counsel of the Welsh Government and is laid before the National Assembly for Wales.

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## **Member's declaration**

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In my view the provisions of the Legislation (Wales) Bill, introduced by me on 3 December 2018, would be within the legislative competence of the National Assembly for Wales.

Jeremy Miles AM

Counsel General for Wales  
Assembly Member in Charge of the Bill

3 December 2018

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## Index required under Standing Order 26.6A

Requirements of Standing Order 26.6		Location in Explanatory Memorandum
26.6 (i)	Member's statement on legislative competence	Member's statement Page 5
26.6 (ii)	Policy objectives of the Bill	Part 1, paragraphs 1 and 24 to 60
26.6 (iii)	Consideration of alternative ways to achieve policy objectives	Part 1, paragraphs 64 to 70 and Part 4, paragraphs 132 to 151 and 174 to 192
26.6 (iv)	Consultation on policy objectives, detail of the Bill and the Draft Bill	Part 2, paragraphs 88 to 93
26.6 (v)	Summary of outcomes of consultation	Part 2, paragraphs 94 to 97
26.6 (vi)	Reasons for not publishing Bill (or Part of Bill) as a draft	Part 2, paragraphs 101 to 107
26.6 (vii)	Summary of intentions of each of the provisions	Annex B – Explanatory Notes to the Legislation (Wales) Bill
26.6 (viii)	Best estimates of costs and savings	Part 4, Table 3 and paragraphs 158 to 166 and 201 to 207
26.6 (ix)	Benefits and dis-benefits (not financially quantifiable)	Part 4, Table 3 and paragraphs 167 and 208 to 211
26.6 (x)	Powers to make subordinate legislation	Part 3, including Table 2
26.6 (xi)	Report of the Auditor General on provisions charging expenditure on the Welsh Consolidated Fund	Not applicable (and see paragraph 127)
26.6 (xii)	Potential impact on the justice system	Part 5, paragraph 226

<b>Requirements of Standing Order 26.6</b>		<b>Location in Explanatory Memorandum</b>
26.6B	Table of derivations	Not applicable (but note Annex A)
26.6C	Schedule of wording of existing legislation significantly amended by the Bill	Not applicable

## Part 1 – Policy objectives of the Bill

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### Description

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1. The purpose of the Legislation (Wales) Bill is to make Welsh law more accessible, clear and straightforward to use. It makes provision about the interpretation and operation of Welsh legislation, and requires the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law.

### Current problems

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#### *The problems of inaccessible law*

2. Concerns have been raised for many years about the complexity of the law in the United Kingdom and the disorganised state of our vast and sprawling statute book. Much of the complexity derives from the proliferation of legislation over recent decades in the UK. The UK statute book is now vast and unmanageable.
3. This is a problem caused not only by the sheer volume of primary, secondary and quasi-legislation, but also because that legislation is amended, re-amended and re-made in inconsistent ways over time. This practice creates layers of legislation which may be related or interlinked in a number of different ways making the legislative landscape very difficult for lawyers to navigate let alone the affected citizen. In introducing this issue under a recent initiative to develop “Good law” the United Kingdom Office of the Parliamentary Office put it as follows:

*People find legislation difficult. The volume of statutes and regulations, their piecemeal structure, and their level of detail and frequent amendments, make legislation hard to understand and difficult to comply with. That can hinder economic activity. It can create burdens for businesses and communities. It can obstruct good government, and it can undermine the rule of law.*

4. Citizens struggle to find the law. But they must be able to find and understand the law with reasonable ease so they can enjoy the benefits, and respect the obligations, that the law confers or imposes on them. Given that access to justice more generally, notably through state funded legal advice, is under such threat, ensuring that people have a fighting chance of understanding the law is vital. It goes to the heart of a nation governed by the rule of law.

5. A clear, certain and accessible statute book is an economic asset. It gives citizens and those who wish to do business a more stable and settled legal framework. This in turn should help investment and growth, while still maintaining appropriate regulation.
6. The problems are particularly acute in Wales. Although the position is changing rapidly, and there is a growing body of law made by the National Assembly for Wales and the Welsh Ministers, it is still the case that the majority of the laws that apply to Wales apply also to England or to Great Britain or the UK as a whole. Our laws have in most part been inherited from the UK Parliament and do not, therefore, generally reflect the nation's political and constitutional position as it is today.
7. Some of the complexity derives from there being no formal body of Welsh law; strictly speaking we should not speak of "Welsh law", but of the laws of England and Wales – known by most of course as "English law". The absence of a Welsh legal jurisdiction (and associated body of law), therefore, is part of the reason why the legal landscape is confusing.
8. The nature of the UK constitution, coupled with the process of devolution of powers, therefore further complicates the statute book. The incremental and piecemeal approach to devolution of power, has led to confusion over where responsibilities lie. As an obvious example many powers conferred upon the Secretary of State by Acts of Parliament have now been transferred to the Welsh Ministers, but this is generally not apparent from the wording of the Acts themselves, making it appear that power continues to lie with the Secretary of State. And more generally, determining where the line is drawn between a matter that is devolved and a matter that is not, is considerably more difficult in Wales even than is the case in Scotland and Northern Ireland due to our more narrow and complex arrangements.
9. The UK's withdrawal from the European Union is likely to compound this problem. The exercise of incorporating law designed as international law, and based primarily on the creation of the single market, into domestic law will further exacerbate the problem of inaccessible law. The European Union (Withdrawal) Act 2018 will convert a large body of EU law into domestic law at the point of withdrawal, and enables subordinate legislation to amend that law that so that it can operate correctly outside the EU. Other legislation will also be required in connection with withdrawal from the EU, and the final position remains unclear, not least because much depends on the nature of the UK's future relationship with the EU. These changes will leave the statute book even more inaccessible unless further action is taken to rationalise the law.

## **Law Commission's report – Form and Accessibility of the Law Applicable in Wales**

10. At the Welsh Government's request the Law Commission of England and Wales included a project in their Twelfth Programme of Law Reform considering the "*Form and Accessibility of the Law Applicable in Wales*". In its concluding report published in June 2016 the Law Commission made 32 recommendations, nearly all of which have been accepted or accepted in principle by the Welsh Government.
11. At the heart of the Commission's report, and central to the task of making Welsh law more accessible, is the need to consolidate and subsequently codify Welsh law.
12. The Law Commissions (of England and Wales, and of Scotland) were created in the 1960s partly because of increasing concerns about the complex nature of the statute book. In explaining the rationale for creating the Commission (and for promoting what became the Law Commissions Act 1965), Sir Eric Fletcher, Minister without Portfolio, submitted to the UK Parliament<sup>1</sup> that:

*One of the hallmarks of a civilised society is that its laws should not only be just, but should be up to date, accessible and intelligible. The state of our law today does not satisfy those requirements.*
13. Despite the good intentions of, among others, Leslie (later, Lord) Scarman<sup>2</sup>, the statute book was not codified. Nor did the consolidation of legislation keep apace with the rapidly expanding statute book. In fact progress of law reform has now slowed as the statute book has continued to proliferate. Despite their only comparatively brief existence as a legislature and government, the National Assembly has passed 59 Measures or Acts since 2007 and the Welsh Ministers have made around 6,000 statutory instruments since 1999 – though this represents only a small fraction of the UK statute book.
14. The Law Commission and Welsh Government are very conscious of this. In making its recommendations the Commission was aware that existing systems were not working as they should to protect the system of statute law as a whole. It recognised also that these problems are particularly relevant in Wales due to our history and the nature of our system of devolution. The Welsh Government and Law Commission are clear that only a sustained effort over the long term can solve the problems. What is required is a permanent change to our law making processes. It was for these reasons that the Law Commission recommended that:

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<sup>1</sup> Hansard HC 8 February 1965 vol 706 cc47–158.

<sup>2</sup> The first chairman of the Law Commission of England and Wales.

*The Welsh Government should institute regular programmes of codification (Recommendation 14); and*

*The Counsel General should be obliged to present a codification programme, and report to the National Assembly on the progress of the programme at regular intervals (Recommendation 15).*

15. The Welsh Government has accepted both recommendations, and proposes to implement them through Part 1 of the Bill, which requires all future governments to develop programmes to improve access to Welsh law. The policy intentions for Part 1 of the Bill are set out below.

### ***The problems of statutory interpretation***

16. The Law Commission also recommended that:

*...the Welsh Government and the National Assembly consider, and keep under review, the practical benefits of introducing an Interpretation Act of the Assembly (Recommendation 25).*

17. Statutory interpretation is the process of determining the meaning and effect of legislation, and how it operates. This can be a complex process. Acts prescribing rules on how laws are to be interpreted are a typical feature of legal jurisdictions across the common law world. Their purpose is to shorten and simplify legislation and promote consistency in its language, form and operation.
18. Since 1850 when the first Interpretation Act was passed by the UK Parliament<sup>3</sup>, most if not all legislatures have made statutory provision on how their legislation is to be interpreted. There is, therefore, an Act of this nature that applies to legislation in, for example, Scotland and Northern Ireland, and at federal and state or provincial levels in Australia and Canada. Wales, by contrast, does not have its own Act. Instead all of the legislation applying in Wales is presently interpreted by reference to an Act of the UK Parliament: the Interpretation Act 1978 (the 1978 Act).
19. The 1978 Act is now 40 years old and is not as clear and accessible as it could be. Some of the provisions are ambiguous or have caused problems in practice, some are arguably redundant, and some are simply out of date. It would therefore benefit from modernisation.

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<sup>3</sup> “An Act for shortening the language used in Acts of Parliament”, also known as Lord Brougham’s Act.

20. This is especially true in a Welsh context as the Act predates the devolution settlement for Wales. Some of the rules and definitions in the 1978 Act are not relevant to law applying to Wales only (for example, a number of the words and terms defined in Schedule 1 to the Act such as, 'London borough'). Several provisions in the Act do not apply at all in relation to legislation made by the National Assembly.
21. Also of concern is the fact that the 1978 Act, as an Act of the UK Parliament, was enacted in English only. Although it was amended in 2007 so as to apply to Acts and Measures of the National Assembly and subordinate legislation made under such Acts and Measures, there is no Welsh language text of the 1978 Act. The lack of a bilingual interpretation Act is an obstacle to those seeking to use the Welsh language as a language of the law, because:
- a. the core rules about the interpretation and operation of legislation applying in Wales are not available in the Welsh language; and
  - b. the absence of a Welsh language equivalent of the definitions of the words and phrases set out in Schedule 1 to the 1978 Act means that in order to fully understand the legal effect of the Welsh language text it may be necessary to cross-refer to the English language text of the same legislation in combination with any relevant definitions or provisions in the 1978 Act.
22. These deficiencies were noted by the Law Commission in their 2016 report, as well as by the Constitutional and Legislative Affairs Committee of the Fourth Assembly<sup>4</sup>; and stakeholders responding to the Welsh Government's policy consultation<sup>5</sup>.
23. Further, in accordance with section 156 of the Government of Wales Act 2006 (GoWA 2006) the Welsh language and English language are of equal standing in Assembly Acts and Measures and subordinate legislation enacted or made in both English and Welsh. Some stakeholders, in response to the Welsh Government's policy consultation, commented that the absence of bilingual provisions on interpreting legislation means that the Welsh language is being treated less favourably. The clear view of stakeholders was that action to address this should be taken.

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<sup>4</sup> Constitutional and Legislative Affairs Committee (of the Fourth Assembly) (2015) *Making Laws in Wales*.

<sup>5</sup> Welsh Government (2017) *Interpreting Welsh legislation: Considering an interpretation Act for Wales*.

## Policy objectives

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### ***Accessibility of Welsh law***

24. The policy objective is to improve the accessibility of Welsh law. It is intended that this be achieved by keeping it under review on an ongoing basis, and implementing a sustained programme of activity aimed at improving the accessibility of the law.
25. For Welsh law to be accessible it needs to be clear and certain in its effect, as well as being easily available and navigable. This needs to be the case not only in respect of individual Acts or Statutory Instruments, but also collectively – all of the law on a particular subject and the statute book as a whole.
26. Considerable resource and expertise in the UK has traditionally been devoted to specific legislative projects, especially the development and drafting of primary legislation. There is an understanding of the importance of the rule of law, and the need to ensure that all new law is legally precise and understandable. There is, however, less focus on statute law collectively and the long-term impact each change in the law has on the statute book more generally. As stated by the UK Parliamentary Counsel's Office in a report instigated as part of its "good law" initiative<sup>6</sup>:  
  

*...pieces of legislation need to be regarded not just as documents in their own right, but as parts of a larger mosaic of legislation. It is the aggregate to which the user will have access to.*
27. The Bill requires the Counsel General to keep the accessibility of Welsh law under review. Although resolving the issues will require collective effort within the National Assembly, the Welsh Government and beyond; we propose that the Counsel General be given the responsibility of overseeing the accessibility of Welsh law as a whole. This would enable a long term focus to be brought to what will need to be a sustained effort to bring order to Welsh law and make it more accessible.
28. The Counsel General's obligation will also be relevant when the Welsh Ministers are considering whether to propose new legislation. In such situations regard should be had to how the approach taken to legislating could impact upon the accessibility of the law. This does not, however, mean that the Welsh Ministers would have to legislate in a particular way in any individual case.

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<sup>6</sup> Office of the Parliamentary Counsel (2013) 'When laws become too complex – review by the Office of the Parliamentary Counsel into the causes of complex legislation'

29. The Bill also proposes that for each Assembly term (starting with the first term that begins after section 2 of the Bill comes into force) the Welsh Ministers and the Counsel General must develop and implement a programme of activity designed to improve the accessibility of Welsh law.
30. The specific content of each programme will be a matter for the Welsh Ministers and the Counsel General of the time, but each programme must make provision to consolidate and codify Welsh law<sup>7</sup>, maintain codified law and to facilitate use of the Welsh language.
31. Crucial to the success of consolidating and codifying the law is that both continue over the long term and become an accepted part of the culture of law making in Wales. This means accepting that the law is constantly evolving and must, even after it has first been consolidated, be revisited periodically to ensure that it remains well ordered and accessible. It also means maintaining the overall structure – not the content, which will always change in accordance with policy and political wishes – of the statute book. Once the law is consolidated and codified we should only move away from the new structure in exceptional circumstances.
32. In 1999 the first laws were made in Welsh for several centuries. Since then, more and more law has of course been made bilingually. It remains, however, comparatively novel and a large proportion of the laws that fall within devolved competence still exist in English only. Considerable effort is made to produce law bilingually and while evidence suggests that a significant proportion of those accessing the law do so in Welsh<sup>8</sup>, more needs to be done to assist those who wish to use the language. Another requirement for the programmes, therefore, is that in improving the accessibility of the law steps will be taken to facilitate use of the Welsh language in the law, in public administration and more generally.
33. The Bill also envisages that each programme will include proposals to promote Welsh law for example by raising awareness of significant changes in the law or the existence of divergent Welsh law more generally.
34. The Welsh Government hosts a website, Cyfraith Cymru/Law Wales<sup>9</sup>, which provides information about Wales' constitutional arrangements and law made in Wales. This website also provides links to some of the primary and subordinate

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<sup>7</sup> Paragraphs 15 to 18 of the Explanatory Notes provide further explanation on what is meant by consolidating and codifying the law.

<sup>8</sup> Statistics provided in 2015 by The National Archives to the Constitutional and Legislative Affairs Committee's inquiry, *Making Laws in Wales*, showed that 19% of visits to Acts and Measures of the Assembly on legislation.gov.uk between October and December 2014 were to the Welsh language texts.

<sup>9</sup> Accessible at: <http://law.gov.wales/?lang=en>

legislation published on the legislation.gov.uk website of The National Archives. The Welsh Government wishes to further develop Cyfraith Cymru/Law Wales, and over the long term intends to use the website as a method for presenting the Codes of Welsh law. Future programmes aimed at improving accessibility of Welsh law could include projects to increase the explanatory material available via both the Cyfraith Cymru/Law Wales website, and working with The National Archives to ensure that Welsh law published on legislation.gov.uk is available bilingually and in an up-to-date form<sup>10</sup>.

35. The Welsh Ministers and the Counsel General may also include other activities in a programme if they consider that such activities will make Welsh law more accessible. This may include entering into arrangements with the Law Commission, as is done now, to pursue projects of reform that will improve accessibility.
36. In preparing a programme it will be important to take the views of the public. The main purpose of such an exercise would be to ensure focus on those areas of law most in need of consolidation and which have most impact on users of legislation (be they public bodies, business or the citizen). It is anticipated that a programme will be prepared in draft and consulted upon, before being agreed by the Welsh Ministers and Counsel General and laid before the National Assembly.
37. Whilst the approach to any consultation will be a matter for the Government of the time, it is interesting to note a recent consultation undertaken by the New Zealand Parliamentary Counsel Office, on behalf of the Attorney General, on a proposed law consolidation programme for the new Parliament<sup>11</sup>. That consultation set out the projects which would be undertaken during the period of the programme together with the grounds for proposing the projects.
38. Further detail on sections 1 and 2 of the Bill is given in paragraphs 10 to 25 of the Explanatory Notes – see Annex B.

### ***The need to legislate on the accessibility of the law***

39. We are conscious that there is a certain paradox in legislating to impose a duty to make Welsh law more accessible. This is because one of the means of making law more accessible is to have less of it. We should not in principle produce new law where this is not necessary.

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<sup>10</sup> Primary responsibility for the day-to-day publication of legislation will remain with The National Archives.

<sup>11</sup> Available at: <http://www.pco.govt.nz/revision-consultation-2018/>

40. The concept of imposing a duty of this sort on government is inspired in part by the Law Commissions Act 1965. Also relevant were conclusions drawn more recently by the New Zealand Law Commission, which considered similar issues under the stewardship of Sir Geoffrey Palmer QC, a constitutional lawyer and former Prime Minister and Attorney General. In its 2009 report *Presentation of New Zealand Statute Law* the Law Commission of New Zealand, working in conjunction the Parliamentary Counsel Office, concluded:

*...that to make a real difference to the accessibility of the New Zealand statute book it is essential that a systemic programme of revision of the statute book be undertaken.*

41. The Commission went on to recommend that the Attorney General should be placed under an obligation to put in place a long term programme of consolidation of the law, something which was eventually implemented by section 30 of the Legislation Act 2012. New Zealand took this step because by comparison with other Commonwealth jurisdictions (or indeed with those jurisdictions with long traditions of codifying the law) their statute book had become large, complex and unwieldy. In Canada and Australia, for example, since inheriting legislation of the UK Parliament as dominion states, each jurisdiction has to a greater or lesser extent rationalised its legislation and periodically undertaken wholesale, systematic consolidation.
42. For its part, the Law Commission (of England and Wales) was conscious that existing systems within the UK for facilitating or encouraging rationalisation of the statute book had not been successful. It was also, no doubt, conscious that with the limited resources available to it, the Commission would not be able to undertake significant consolidation of the law on the Welsh Government's behalf. Something different was, therefore, required. It is for those reasons that the proposal to impose an obligation on all Welsh Governments to codify the law was made.
43. The process of incorporating European law into domestic law with the necessary changes will be resource intensive, and will for obvious reasons be a priority over the short term. Similarly it is clear also that the Welsh Government's programme of legislative reform will take precedence over efforts to consolidate Welsh law. The task of maintaining a long term focus on programmes to improve access will, therefore, be difficult. However, it is clear also that investment now in the Welsh statute book will lead to substantial social benefits and efficiency gains over time. Making the law accessible is not only the right thing to do, it also has clear economic and financial rationale. It is something that is necessary to do to prepare for the challenges we face.

### ***Interpretation and operation of Welsh legislation***

44. The policy objective is to provide a modern, bilingual interpretation Act for Wales. Such an interpretation Act would shorten and simplify future legislation, and promote consistency in the language, form and operation of future legislation.
  
45. The aims of the provisions on interpretation in the Bill are that:
  - a. they are as simple as possible to navigate, understand and apply;
  - b. they exist in the 'background' (in the same way as other interpretation Acts), as a part of the machinery of law that the average reader will not regularly need to have recourse to;
  - c. they provide bilingual interpretation rules which apply to the wide range of bilingual legislation made by the National Assembly, the Welsh Ministers and Welsh devolved authorities, and accommodates the continuing growth in this body of legislation;
  - d. any operational tensions between the Bill and the 1978 Act are minimised, and ideally avoided;
  - e. the reader should be able to easily determine which interpretation Act applies to the legislation they are reading (because the existing 1978 Act will, inevitably, continue to operate in relation to some of the law applying in Wales; most notably, all law found in Acts of the UK Parliament).
  
46. Part 2 of the Bill therefore makes provision about the interpretation and operation of the following kinds of legislation –
  - a. Assembly Acts receiving Royal Assent on or after the day on which Part 2 of the Bill comes into force;
  - b. subordinate legislation<sup>12</sup> which is –
    - i. made on or after the day on which Part 2 of the Bill comes into force,
    - ii. made under Assembly Acts and Measures (whenever the Act or Measure received Royal Assent or approval), and
    - iii. made by the Welsh Ministers or any other person;

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<sup>12</sup> 'Subordinate legislation' is defined in Schedule 1 to the Bill.

- c. subordinate legislation which –
  - i. is made on or after the day on which Part 2 of the Bill comes into force,
  - ii. is made under an Act of the UK Parliament (whenever that Act received Royal Assent) or under retained direct EU legislation<sup>13</sup>, and
  - iii. is made only by the Welsh Ministers or another devolved Welsh authority (not acting with other types of authority), and
  - iv. applies only in relation to Wales.

In Part 2 of the Bill, both of these kinds of subordinate legislation are referred to as ‘Welsh subordinate instruments’<sup>14</sup>.

47. This means that the Bill will *not* apply, and the 1978 Act will continue to apply, to–

- a. Assembly Acts which received Royal Assent before the day on which Part 2 of the Bill comes into force;
- b. all Assembly Measures;
- c. all subordinate legislation (regardless of who made it or what kind of Act or Measure it was made under) made before Part 2 of the Bill comes into force;
- d. subordinate legislation made under an Act of the UK Parliament or retained direct EU legislation after Part 2 of the Bill comes into force, and made by the Welsh Ministers or a devolved Welsh authority acting with another authority (for example, a Minister of the Crown)<sup>15</sup>;
- e. subordinate legislation made under an Act of the UK Parliament or retained direct EU legislation after Part 2 of the Bill comes into force, and made by the Welsh Ministers, if any of the subordinate legislation applies otherwise than in relation to Wales.

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<sup>13</sup> This is defined in Schedule 1 to the Bill by reference to the definition in the European Union (Withdrawal) Act 2018. It consists of the EU legislation that is converted into domestic law by the 2018 Act at the point of the UK’s withdrawal, and includes EU regulations and decisions relevant to the UK.

<sup>14</sup> See section 3.

<sup>15</sup> This may include both “joint” and “composite” instruments. Subordinate legislation is made “jointly” if it is made under a power or duty which expressly provides that the power or duty may or must be exercised by the Welsh Ministers jointly with others. Where an instrument contains subordinate legislation made by the Welsh Ministers and subordinate legislation made by a Minister of the Crown, but not made in the exercise of a power held jointly, this is often referred to as “composite” legislation.

48. This approach will require the reader of any Assembly Act or subordinate legislation to be aware of the significance of *when* the legislation they are reading received Royal Assent or was made. However, it is intended that Part 2 will be brought into force on 1 January 2020. This will mean that the titles of legislation (which always include the year in which the legislation was made) will suffice to indicate whether the 1978 Act or the Bill applies to that legislation.
49. Although this approach means that there will be two interpretation Acts operating in relation to legislation in Wales, that was always inevitable to some extent (as is the case in Scotland, the 1978 Act will continue to have at least some effect in relation to the law in Wales).
50. The Bill will not apply to subordinate legislation made under a UK Parliament Act or retained direct EU legislation, other than where such legislation is made by the Welsh Ministers or a devolved Welsh authority. However, it will apply to all subordinate legislation made under an Assembly Act, regardless of who makes it. This will mean that all of the subordinate legislation to which Part 2 applies is ‘devolved,’ in that it is made either by a devolved authority or under powers conferred by the Assembly.
51. This approach also means that the Bill will apply to subordinate legislation made by the Welsh Ministers and devolved Welsh authorities, whether it is made under Assembly Acts and Measures or under Acts of the UK Parliament and retained direct EU legislation. It will therefore apply equally to an order made by a county council in Wales under the Local Government (Democracy) (Wales) Act 2013 and to an order made by a county council in Wales under the Local Government Act 1972.
52. For this purpose, “devolved Welsh authority” has the same meaning as in section 157A of GoWA 2006, and includes the authorities listed in Schedule 9A to that Act. The listed authorities include county and county borough councils which have powers to make orders, schemes and byelaws under a wide range of Acts; and national bodies such as Natural Resources Wales, Qualifications Wales and Social Care Wales, which have various powers to make rules, schemes and byelaws.
53. The definition of a “devolved Welsh authority” does not include bodies exercising cross-border functions. Furthermore, Part 2 of the Bill will not apply to any instrument made under an Act of the UK Parliament or retained direct EU legislation if it contains any subordinate legislation that is made by a body that is not a devolved Welsh or authority, or any subordinate legislation that applies otherwise than in relation to Wales.

54. Perhaps the most significant drawback of the approach taken is the continued application of the monolingual 1978 Act to existing bilingual legislation. The existence of the Bill, which contains a number of provisions which are equivalent to (though not always the same in substance as) the provisions in the 1978 Act, might help to reduce the impact of this issue in practice, though as a matter of law the Bill will not apply retrospectively to this legislation.
55. Annex A provides a table of comparisons between provisions in Part 2 of the Bill and in the rules of interpretation in the 1978 Act. The Explanatory Notes to the Bill (at Annex B) also provide information on the detailed provisions of Part 2 of the Bill.

### ***Words and expressions used in certain Welsh subordinate instruments***

56. The Bill contains no equivalent to section 11 of the 1978 Act. That section provides that words and expressions used in subordinate legislation have the same meaning as in the Act under which the subordinate legislation was made. The Bill does not contain equivalent provision for two reasons –
- a. it is intended help to improve the accessibility of Welsh subordinate instruments to which Part 2 of the Bill applies (and to which section 11 of the 1978 Act does not);
  - b. it helps to facilitate the application of the Bill to subordinate legislation made by the Welsh Ministers made under Acts of the UK Parliament.
57. On the first reason: the main effect of the connection provided for in section 11 of the 1978 Act is that in many cases subordinate legislation will contain terms which are not defined within it, but which have a precise meaning given to them by the Act under which the subordinate legislation is made. We agree with the comment in *Craies on Legislation* that as a result of this, section 11 is a ‘significant trap for the unwary reader’<sup>16</sup>.
58. On the second reason: Welsh subordinate instruments to which Part 2 of the Bill applies will be subject to Schedule 1 to the Bill (which does not reproduce all of Schedule 1 to the 1978 Act and differs from it in some other respects). In order to mitigate potential problems arising from the application of Schedule 1 to the Bill to subordinate legislation made by the Welsh Ministers under Acts of the UK Parliament, alongside the continuing application of Schedule 1 to the 1978 Act to those Acts of the UK Parliament, the Bill proposes breaking the connection between the subordinate legislation and the Acts it is made under.

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<sup>16</sup> 11<sup>th</sup> Ed. 2017, paragraph 22.1.16.

59. We have considered what the effect of removing the ‘trap’ created by section 11 will be and have found that although it requires drafters of legislation to make provision on a case-by-case basis, any interpretative provision made will result in subordinate legislation which is more readily understandable and accessible without recourse to the Act or Measure under which it was made.
60. Drafters of subordinate legislation to which Part 2 of the Bill will apply will need to actively consider how best to alert the reader to the meaning of key words in the legislation. If a large amount of defined words and expressions appear in both the instrument and the Act or Measure, or if it is in any event necessary for a reader of the instrument to have regular recourse to the Act or Measure, it may be appropriate to add words to the instrument reproducing the effect of section 11 to the 1978 Act. This may also be appropriate if something outside the Act or Measure affects the meaning of the words or expressions used in it; the common law or another Act, for example. On the other hand, it should often be possible for the definition of words or expressions to be set out in full in a Welsh subordinate instrument, meaning that the reader does not have to refer to the Act or Measure under which it was made in order to understand the instrument. This will also mean, in the case of subordinate legislation made under Acts of the UK Parliament, that the definition will be available in English and in Welsh.

## **Legislative competence**

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61. Part 1 of the Bill makes provision to promote the accessibility of the law that is (or could be) made by the National Assembly for Wales and the Welsh Ministers. Part 2 is about the interpretation and operation of legislation made by the National Assembly, the Welsh Ministers and other authorities exercising devolved powers in Wales. Part 3 makes miscellaneous provision relating to the form of legislation made by the Assembly or the Welsh Ministers. Accordingly, none of the provisions in Parts 1 to 3 relate to any of the reserved matters listed in Schedule 7A to GoWA 2006.
62. The provisions of the Bill will not apply otherwise than in relation to Wales, do not breach any of the restrictions in Schedule 7B to the 2006 Act, and do not give rise to any questions of compatibility with the Convention rights or EU law.
63. The Counsel General, as the Member in Charge of this Bill, has made a statement in accordance with Standing Order 26.6(i) – see page 3 of this Explanatory Memorandum.

## **Alternate approaches to achieving policy objectives**

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64. The Regulatory Impact Assessment in Part 4 of this Explanatory Memorandum provides further detail on the alternate approaches that were considered to deliver the policy objectives of the Bill.
65. In relation to Part 1 of the Bill consideration was given to:
- a. The Welsh Government demonstrating its commitment to improving accessibility by following the Law Commission's recommendation that programmes of work to improve the accessibility of Welsh law be undertaken but not accepting the recommendation that there be a statutory underpinning for such activities (as is provided under option 3 below). As the RIA demonstrates, this would deliver substantial long-term benefits for users of legislation in Wales, but these will only materialise if the focus on the issue of accessibility is maintained and resources are dedicated to delivering this. The Welsh Government agrees with the Law Commission's view that a statutory duty is required to bind future governments and to ensure a long term focus on the issue is sustained.
  - b. Alternatively, continuing business as usual. The Welsh Government has stated its commitment to improving accessibility and has undertaken piecemeal work to do this where resources allow; under this approach piecemeal work to improve accessibility would continue without dedicated resource or a defined formal programme of activity. However this is not an appropriate approach as the law would almost certainly continue to become more complex, access to justice would continue to be hindered and the rule of law would be progressively undermined. This fails to realise the identified long-term social and economic benefits of improving accessibility.
66. In relation to Part 2 of the Bill consideration was given to:
- a. Maintaining the application of the 1978 Act for the interpretation of Welsh laws. As the RIA demonstrates, following this approach would mean that the identified shortcomings and inadequacies of the current legislative framework, particularly in a Welsh context, would remain. No action would be taken in order to bring about the necessary improvements to the accessibility of the bilingual law applying in Wales.

- b. Alternatively, consideration was also given to maintaining the application of the 1978 Act for the interpretation of Welsh laws but also reproducing Schedule 1 to that Act (which contains definitions of commonly used words and expressions) in the Welsh language. Whilst this resolves some of the problems it would mean only partial action would be taken to bring about the necessary improvements to the accessibility of the bilingual law applying in Wales. We are continuing to consider the most appropriate way to provide for the reproduction of Schedule 1 in the Welsh language, for the purposes of existing bilingual legislation.

67. On the basis that a new, bespoke, bilingual interpretation Act for Wales is the right approach, consideration was also given to an alternative approach to the application of Part 2 of the Bill. Particularly that it should apply to –

- a. all Assembly Acts and Assembly Measures (whenever made),
- b. all subordinate legislation made under those Acts and Measures (whenever made, and regardless of who made the legislation), and
- c. all subordinate legislation made by the Welsh Ministers (not acting jointly with others) under Acts of the UK Parliament (whenever made).

68. There appeared to be two key advantages to this model of application –

- a. almost<sup>17</sup> all legislation which by its nature exists in English and in Welsh would be subject to the Bill, and
- b. the nature and extent of the application of the Bill could be expressed simply and be readily understandable – broadly speaking, if it is or was made in Wales, then the Bill would apply.

69. However, there were also a number of problems with this approach –

- a. legislation made prior to the coming into force of the Bill would have been made with the intention that the rules and definitions in the 1978 Act apply to it – this means that where the Bill would have done more than reproduce the effects of the 1978 Act, it would not always be possible to apply any changes in the law to existing legislation;

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<sup>17</sup> There are forms of bilingual subordinate legislation which would not be subject to the Bill; an Order in Council which exists in English and Welsh made by the Sovereign under an Act of the UK Parliament, for example.

- b. because it would be necessary to make provision in relation to those cases where the Bill could not make changes to existing legislation, the Bill would have been longer and more complex<sup>18</sup>;
- c. a number of specific technical problems would arise (none of which are insurmountable, but which would have had an impact on clarity and accessibility), for example –
  - i. the Bill would probably have needed specific provision dealing with the continuing operation of the 1978 Act in relation to things done in or under existing legislation during the period before the 1978 Act ceased to operate in relation to Assembly Acts and Measures etc.;
  - ii. the Bill would probably have needed to clarify the effect of the non-application of new rules to existing legislation, and whether that impacts upon the interpretation of such legislation;
  - iii. most of the rules in the 1978 Act do not apply if, in any particular piece of legislation, “the contrary intent” appears; this rule would have needed to be adapted for the purposes of the Bill, and could have been at odds with the new approach taken in the Bill<sup>19</sup>.

70. For these reasons, we concluded that this approach to the application of the Bill should not be taken.

## **Other matters which are not addressed in the Bill**

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### ***Restating provisions on interpretation in GoWA 2006***

- 71. The earlier consultation on the Draft Legislation (Wales) Bill set out that consideration of the desirability of restating certain provisions of GoWA 2006 in any future Bill was ongoing.
- 72. Section 107(4) and section 154 of GoWA 2006 contain propositions that can be understood as relating to the interpretation of legislation made in Wales. Section 107(4) provides that an Act of the Assembly is to be judicially noticed<sup>20</sup>. Section 154 provides that Welsh law to be construed as being within competence and *intra vires*.

<sup>18</sup> We anticipate that a Bill applying in this way would be as much as 50% larger than the Draft Bill.

<sup>19</sup> see section 3(3), discussed below.

<sup>20</sup> which means that if a person needs to rely on or otherwise cite a provision in an Assembly Act, they do not need to prove to the court that the provision is law

73. Following the consultation, it has been decided that in both cases making provision in this Bill is not, ultimately, helpful or necessary.
74. Although section 107(4) is primarily of importance within the jurisdiction of England and Wales, it also has some utility in the other jurisdictions constituting the UK. At the least, it seems unhelpful to create a suggestion that Assembly Acts need not be judicially noticed under Scottish and Northern Irish law. There are also limited gains in restating section 107(4). Although identical provision about Acts of Parliament is found in section 3 of the 1978 Act, it arguably resides there in the absence of having a more appropriate home anywhere else. In the case of Assembly Acts, section 107 of GoWA 2006 provides an appropriate home for a provision about judicial notice (which is highly technical, and probably not of interest to all but the most specialist of readers in limited circumstances) given GoWA 2006 is the constitutional Act for Wales.
75. Section 154 is not a provision purely about interpretation of legislation (at least, in the same way as the provisions in the Bill are about the interpretation of legislation). It relies on the concept of “legislative competence”, which is governed by GoWA 2006 (in other words, it relies on section 108A of, and Schedules 7A and 7B to, GoWA 2006; and of course, all the related case law). So, it is a constitutional (or quasi-constitutional) instruction to the reader, targeted primarily at the courts, which relies on matters lying outside the Bill.

### ***Interpretation of bilingual legislation***

76. The consultation document to the Draft Bill also touched upon the potential benefits and disadvantages of restating section 156 of GoWA 2006. As noted above this is concerned with the equality of the English language and Welsh language texts of bilingual legislation. It is currently a matter of the law of the UK that the Welsh and English texts of Assembly Acts and Measures, and any subordinate legislation made in Welsh and English, are of equal standing. This means that should it become necessary for any UK court to construe bilingual law, this rule will, as a matter of law, govern their construction.
77. The implications of Welsh legislation being bilingual are considered in some detail by the Law Commission in its *Form and Accessibility* consultation paper and report<sup>21</sup>. We continue to consider whether anything should be done to further clarify the relationship between the two language versions when interpreting legislation.

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<sup>21</sup> See Chapter 12 of both the Consultation Paper and Report.

### ***Arrangements for publishing Welsh law and the process of making and organising statutory instruments***

78. In addition to the concerns about the size and complexity of the statute book, there has been criticism of the arrangements for publishing the law in the UK. Given that the statute book is already difficult to access, users of legislation need to be sure that when looking at a specific Act or Statutory Instrument they are looking at its most up to date version – in other words a version incorporating any amendments made to the legislation since it came into force. Although improvements are being made to legislation.gov.uk, the website operated by The National Archives, at present the only comprehensive sources of up to date legislation are those provided by commercial publishers for a fee.
79. The Law Commission's report on *Form and Accessibility of the Law Applicable in Wales* considered the official publication of legislation (at Chapter 13) together with wider issues of publication and promulgation (see for example, Chapter 14 which deals with a legal website for Wales).
80. The report also considered the implications and possibilities for consolidating, codifying and amending secondary legislation (at Chapter 5) which in turn raises issues about the procedures for making statutory instruments.
81. The Welsh Government intends to consider the current arrangements for the publication of legislation and statutory instrument procedure in the future, with a view to establishing bespoke provision for Wales akin to the arrangements that already exist in both Northern Ireland and Scotland.

### ***Use of Welsh translation of enactments and bodies which do not have Welsh language titles or names***

82. As part of the wider initiative to improve the accessibility of legislation, we have also considered the way in which the Welsh language text of legislation currently refers to enactments and other official documents not made in Welsh, and to bodies which do not have names in the Welsh language.
83. Titles of enactments made in languages other than Welsh have to date been translated into Welsh in Assembly Acts and Welsh subordinate legislation. The Welsh language text will therefore provide a courtesy title for an Act of the UK Parliament despite the fact that technically speaking, in law there is no Act of that name. Using courtesy titles in this way is well established, but as discussed in the consultation document on the Draft Bill, it could potentially give readers the impression that the legislation has been made in Welsh or is available in the Welsh language, or that it has been made by the National Assembly or the Welsh Ministers. The consultation document to the Draft Bill noted that readers

might be assisted by the practice of citing chapter numbers for Act of the UK Parliament, and “anaw” or “dccc” numbers for Assembly Acts, but questioned whether that system was widely understood.

84. The practice of giving Welsh courtesy titles has also been followed when the Welsh language text of legislation has referred to other documents that exist in English but not Welsh, such as EU directives and regulations, UN conventions and other international agreements. In those cases, the title or description of the document will identify the nature of the document and the institution by which it was made (and for EU instruments, the official reference number will be given).
85. The consultation document mentioned an alternative approach that had been trialled in recent Bills, in which the courtesy titles of Acts of the UK Parliament had been followed by the English titles and chapter numbers in brackets. This approach gave readers more information, but it increased the length of the Welsh language text and the amount of English that it contained, and might therefore impair the readability of the Welsh text. The consultation document also listed a number of other possible alternatives.
86. Most of the options that we have identified for dealing with this issue have drawbacks, because they have the potential either to mislead the reader or to disrupt the flow of the Welsh language text. Options that might avoid those drawbacks include using footnotes to give the English language titles of Acts of Parliament, and using hyperlinks to take the reader from the courtesy title straight to the text of the Act. Both of these approaches would involve including only the Welsh language courtesy title in the operative text of an Assembly Bill, and using non-legislative means to help the reader to find the Act in question.
87. We intend to explore these approaches further. While we do so, we intend to continue the established practice of giving courtesy titles in the Welsh language texts of Bills and subordinate legislation (without the original English titles). Courtesy titles will be followed by chapter numbers for Acts of the UK Parliament and Statutory Instrument numbers for subordinate legislation. This is the approach that has been adopted in the Legislation (Wales) Bill.

## Part 2 – Consultation

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### Consultations undertaken prior to introduction of the Bill

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88. On 19 June 2017 *Interpreting Welsh legislation – considering an interpretation Act for Wales* was published on the Welsh Government website<sup>22</sup>. The consultation period ran for 12 weeks and closed on 11 September 2017.
89. The consultation considered whether the Welsh Government should develop a new interpretation Act for Wales or amend the 1978 Act by reproducing Schedule 1 to that Act in Welsh. If there were to be a new Act, the policy consultation also sought views on what should be included in it.
90. On 20 March 2018 the Welsh Government published a consultation on the Draft Legislation (Wales) Bill. That Bill and accompanying consultation papers (including a Draft Regulatory Impact Assessment and other impact assessments) were published on the Government's website<sup>23</sup>. This consultation also ran for 12 weeks, closing on 12 June 2018.
91. The second consultation set out the Welsh Government's proposals to improve the accessibility and statutory interpretation of Welsh law, and sought views on the Draft Bill.
92. During the consultation period the Counsel General held two consultation events – one in Bangor and one in Swansea – and attended an event arranged by the Law Society in Cardiff; all three meetings were aimed at explaining the consultation to stakeholders and taking their views on the proposals. The Counsel General also raised the consultation during his ongoing meetings with legal professionals, academics, law students and law firms.
93. The Counsel General provided a technical briefing on the Draft Bill to the Constitutional and Legislative Affairs Committee<sup>24</sup> on 14 May 2018.

### Summary of the outcomes of consultations

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94. The Welsh Government published the 17 consultation responses received to *Interpreting Welsh legislation – considering an interpretation Act for Wales* in December 2017, together with a consultation summary report. A copy of those

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<sup>22</sup> See: <https://beta.gov.wales/interpreting-welsh-law-interpretation-act-wales>

<sup>23</sup> See: <https://beta.gov.wales/draft-legislation-wales-bill>

<sup>24</sup> See: <http://record.assembly.wales/Committee/4765#A43497>

responses and the report is available at: <https://beta.gov.wales/interpreting-welsh-law-interpretation-act-wales>

95. Respondents were, in general, supportive of the proposal set out in the consultation to make bespoke, bilingual provision about the interpretation of Welsh legislation.
96. In September 2018 the Welsh Government published the 20 responses received from stakeholders<sup>25</sup>, together with a consultation summary report. These are available at: <https://beta.gov.wales/draft-legislation-wales-bill>
97. 19 of the 20 respondents included comments on the proposals to improve accessibility, and a significant majority saw merit in creating new obligations to address these issues. Where respondents commented on the Part of the Draft Bill dealing with statutory interpretation, they were generally supportive of the proposals. The majority of respondents to this Part of the Draft Bill chose to focus on particular questions and some also provided additional comments.

### ***Amendments in light of consultation***

98. Following consideration of the consultation responses and ongoing policy development, a number of changes to the Bill have been made. Fuller detail is provided in Table 1 below.
99. In addition, section 3 of the Draft Bill made provision about the legislation to which the rules on statutory interpretation apply. The drafting of that section has been fully reviewed in light of consultation, and further consideration by legislative counsel. The effect of section 3 now is that Part 2 of the Bill applies to:
  - a. Assembly Acts receiving Royal Assent after that Part comes into force, and to the Bill itself (as in the Draft Bill);
  - b. all subordinate legislation that is made under an Assembly Act or Measure after that Part comes into force (as in the Draft Bill);
  - c. other subordinate legislation made after that Part comes into force if the subordinate legislation:
    - i. is made under an Act of Parliament or retained direct EU legislation,

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<sup>25</sup> This included two from the same respondent which are, with the agreement of the respondent, being counted as one (although published separately).

- ii. is made by the Welsh Ministers or any other devolved Welsh authority,
- iii. is not made in a joint or composite instrument with any other person, and
- iv. applies only in relation to Wales.

The words that are underlined represent changes from the Draft Bill.

100. Additionally, the “contrary intention” provision in what was section 3(3) of the Draft Bill (now section 4(1) of the Bill) has been amended in light of further consideration by legislative counsel to ensure that it accurately reflects the ways in which the interpretation rules may be qualified or disapplied.

*Table 1 – Summary of changes made following consultation*

<b>Change made</b> (section reference is to the section in the Draft Bill)	<b>Reason for change</b>
Long title updated	To ensure Parts 1 and 2 of the Bill are fully described
Minor amendments of sections 1 and 2 to clarify their effect	Identified by legislative counsel
Sections 3 and 4 – see paragraph 98 above. In addition elements of section 4 have now been taken into Schedule 1	Responds to consultation and further consideration by legislative counsel
Section 5 (Definitions of words and expressions) amended to include power for regulations amending Schedule 1 to include consequential amendments	To ensure power (still in section 5(2)) can operate fully
Section 7 (Words denoting a gender are not limited to that gender) amended to make clear this provision refers to a person’s gender, rather than grammatical gender.	Responds to consultation
Section 9 (Periods of time) removed from the Bill.	Responds to consultation and further consideration by legislative counsel
Minor amendments to sections 10 (times of day) and	Identified by legislative

<b>Change made</b> (section reference is to the section in the Draft Bill)	<b>Reason for change</b>
12 (distances) for consistency with rest of the Bill	counsel
Section 13 (Service of documents by post or electronically) amended to simplify provision on electronic service and ensure consistency in approach within the section	Responds to consultation and further consideration by legislative counsel
Minor amendments to sections 15 to 20 to improve clarity	Identified by legislative counsel
Section 21 (References to portions of legislation) expanded to included references in legislation to any instruments or documents, not only to legislation	Identified by legislative counsel
Minor amendments to sections 22 and 23 to improve clarity	Identified by legislative counsel
Section 24 and 25 amended to simplify provisions and improve consistency	Identified by legislative counsel
Section 26 (Duplicated offences) amended to clarify the relationship between this provision and section 18 of the 1978 Act. This is to ensure the effect is clearer, in particular in the unlikely situation something is an offence under two different Assembly Acts and also an offence under a UK Act that section 18 of the 1978 Act will continue to apply	Responds to consultation and further consideration by legislative counsel
Section 27 (Application to the Crown) amended to apply only to Acts of the Assembly, and to subordinate instruments made under an enactment which binds the Crown or confers a power to make provision binding the Crown. New provision made about criminal liability and application to the Crown.	Ensures effect is clearer, and avoids subsequent legislation having to set out position on criminal liability each time
Minor drafting changes made to sections 28 to 30 (coming into force of legislation) to improve clarity	Identified by legislative counsel
Section 31 (Repeals and revocations do not revive things previously repealed or revoked) amended to exclude cases where temporary legislation expires and to include cases where repealed legislation previously abolished a common law rule (previously	Identified by legislative counsel

<b>Change made</b> (section reference is to the section in the Draft Bill)	<b>Reason for change</b>
covered in section 32)	
Section 32 (General savings) amended to reflect changes in section 31	Identified by legislative counsel
Sections 33 (Re-enactment) amended to improve clarity	Responds to drafting comments by consultees
Some of the definitions within section 35 (Interpretation of Part) have been moved to Schedule 1; other amendments are related to changes made in section 31	Identified by legislative counsel
Section 36 (Interpretation Act 1978) now reflects new title of Schedule 2	Identified by legislative counsel
Minor changes to section 37 (Power to make additional provision to give full effect to this Act) to ensure consistency within the Bill	Identified by legislative counsel
Section 38 (Regulations made under this Act) to spell out that regulations under this Bill can make different provision for different purposes	Identified by legislative counsel
Section 39 (Coming into force of this Act) amended to provide that all of the Act, except the application of the interpretation provisions to other legislation, comes into force on the day after Royal Assent; the excluded element will come into force on the day specified in an order made under (now) section 42(2). This section now also includes provision about (new) Part 3 – see paragraphs 101 to 104 below	To ensure the commencement provision reflects the policy intention for bringing the Act into force
Schedule 1 amended to: <ul style="list-style-type: none"> <li>• ensure consistency of drafting approach across the Schedule (and with the main provisions of the Bill)</li> <li>• include new terms for bodies in Wales (e.g. Natural Resources Wales)</li> <li>• improve references to Courts, including adding in</li> </ul>	Responds to consultation and further consideration by legislative counsel

<b>Change made</b> (section reference is to the section in the Draft Bill)	<b>Reason for change</b>
<p>reference to the “family court” and the “Court of Protection” and ensure consistency in drafting approach</p> <ul style="list-style-type: none"> <li>• include new terms as a result of the European Union (Withdrawal) Act 2018</li> <li>• move terms relating to legislation and Ministers of the Crown from section 4, to the Schedule, so that the terms apply to other legislation (and not just to the Bill)</li> <li>• ensure definition of “Wales” fully reflects the combined position currently achieved with the 1978 Act and GoWA 2006</li> <li>• in the Welsh language text of Schedule 1, provide a translation of enactments which do not have titles in the Welsh language (for the purposes of their reference in Schedule 1)</li> </ul>	

## **Matters in the Bill not previously consulted upon**

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101. The 2017 policy consultation sought views on possible new provisions for inclusion in an interpretation Act for Wales, including powers to amend Acts to replace descriptive references to a date on which an event occurs, with the actual date on which that event occurs. Views were also sought on powers to combine legislation subject to different procedures in the same instrument.
102. Consultees saw merit in both ideas, although perhaps as part of a wider Act dealing with legislation rather than just statutory interpretation.
103. The Deregulation Act 2015 includes, at section 104, a power to spell out dates and times described in legislation. At section 105 there is also provision allowing powers to make orders, rules and regulations to be exercised to make subordinate legislation in any other of those forms.
104. Three new sections have been included in the Bill, forming a new Part 3, on the following matters:
- a. power to replace descriptions of dates and times in Welsh legislation (see section 36);

- b. power to make subordinate legislation in different forms (see section 37);
- c. combining subordinate legislation subject to different Assembly procedure (see section 38).

105. During the consultation events questions were asked about how the interpretation provisions would apply if a piece of legislation to which those provisions apply amends a piece of legislation to which they do not apply, or *vice versa*. For example, if a future Assembly Act (to which the Bill would apply) were to insert a section into an Act of Parliament (to which the 1978 Act applied), would that inserted section be subject to the interpretation provisions of the Bill or those of the 1978 Act?

106. There is consistent case law to the effect that an amendment must generally be interpreted as part of the legislation into which it is inserted, rather than as part of the amending legislation. However as this issue has been raised, and in the interests of helping readers of the Bill understand how amendments are to be interpreted, new provision has been included (at section 30) spelling out that amendments made by or to Assembly Acts and Welsh subordinate instruments have effect as part of the legislation into which they are inserted.

107. The 2018 consultation on the Draft Bill noted that the UK Government's European Union (Withdrawal) Bill proposed, amongst other matters, a number of amendments to the 1978 Act. As that Bill was still proceeding through the UK Parliament at the time the Welsh Government's Draft Bill was published, the same amendments were not included in the Draft Bill and therefore not consulted upon. As the European Union (Withdrawal) Act 2018 has now been passed it is appropriate for the Legislation (Wales) Bill to include such matters.

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## **Part 3 – Powers to make subordinate legislation**

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### **Powers contained within the Bill**

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108. The Bill contains limited provisions to make subordinate legislation; these are summarised in Table 2 below which also provides the information required under Standing Order 26.6(x).

109. The Bill also makes provision about powers and duties in legislation (including powers and duties to make subordinate legislation) at sections 14 to 19, and a general definition of “subordinate legislation” is included in Schedule 1 to the Bill, which will apply for the purposes of future Assembly Acts and Welsh subordinate instruments unless a different meaning is intended.

110. Attention is also drawn to:

- a. section 37 of the Bill, which enables the Welsh Ministers to exercise powers to make regulations, rules or orders by making any other of those forms of subordinate legislation. For example, a power to make orders could instead be exercised to make regulations.
- b. section 38 of the Bill which deals with the combination in a single statutory instrument of subordinate legislation made by the Welsh Ministers which would attract different Assembly procedures, and ensures that the instrument is subject to the stricter of those procedures.

### **Statement of policy intent for subordinate legislation**

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111. The powers to make subordinate legislation in the Bill are discretionary, and there are no plans to use these powers immediately. Draft regulations have therefore not been prepared; instead the information below is intended to explain how the powers are to be used (at the relevant time).

#### ***Section 5(2) – amending the Schedule of defined words and expressions***

112. This power provides that the Welsh Ministers may add, remove or amend definitions within Schedule 1 to the Bill, as necessary. It is intended that this power will be used to ensure the Schedule reflects current requirements; for example, if further definitions are required relating to the UK’s exit from the European Union, amendments to Schedule 1 may be made.

113. There is a similar power in section 25(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. That power has not yet been used, although some other Acts of the Scottish Parliament have made consequential amendments to the Schedule of definitions in that Act. There is not a similar power in the 1978 Act. Instead, the UK Government have relied on other powers to make consequential amendments to the equivalent Schedule.

114. Although there is no immediate intention to use the power in section 5(2), there needs to be an appropriate mechanism available to enable the Schedule to be updated when it is considered necessary to do so.

### ***Section 36(1) – replacing descriptions of dates and times in legislation***

115. This power enables the Welsh Ministers to amend legislation which describes a date or time so that it states the actual date or time. For example, if an Act refers to “the day on which section 10 comes into force” and section 10 comes into force on 1 January 2018, the regulations could substitute a reference to that date.

116. This power could be used independently in order to clarify the meaning of existing legislation, but there are no plans for a programme of “tidying up” the statute book. Instead, this power is more likely to be used in conjunction with other powers. For example, a commencement order which appoints the day on which a section comes into force could at the same time amend any other legislation that refers to the day on which that section comes into force<sup>26</sup>.

### ***Section 40(1) – giving full effect to the Act***

117. This power enables the Welsh Ministers to make further provision in consequence of, or to give full effect to, the Bill. This power could be used, for example, to make consequential amendments to other legislation should this be found to be necessary at a future point in time.

118. There are no immediate plans for its use, and Schedule 2 to the Bill includes amendments to other legislation in consequence of the Bill.

### ***Section 42(2) – coming into force of Part 3 of the Act***

119. Section 42 of the Bill provides that with the exception of the statutory interpretation provisions (insofar as they apply to Welsh subordinate

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<sup>26</sup> Although section 36 confers a power to make regulations, provision under this section could be included in an order by virtue of the power to make subordinate legislation in different forms provided by section 37.

instruments and to Assembly Acts other than the Bill itself), the rest of the Bill will come into force on the day after Royal Assent.

120. The power at section 42(2), therefore, provides for a commencement order to be made by the Welsh Ministers to bring the statutory interpretation provisions, insofar as they apply to Welsh subordinate instruments and to Assembly Acts other than the Bill itself, into force on a particular date.
121. The current intention is that these provisions will come into force on 1 January 2020.
122. Consideration has been given to stating the date of 1 January 2020 on the face of the Bill, but on balance commencing this provision by order provides flexibility in case there is any delay in obtaining Royal Assent or any change of circumstances that makes the date of 1 January 2020 inconvenient.
123. In order to provide clarity, it is also intended that the powers provided at section 36(1) will also be used so that the commencement order would amend Part 2 of the Bill to insert “1 January 2020” (or any later commencement date fixed by the order) in place of reference to the day on which Part 2 comes into force.
124. It is also intended that the commencement order will amend section 23B of the 1978 Act<sup>27</sup> to replace references to the day on which Part 3 comes fully into force with references to the date appointed by the order – this is expressly provided for at section 42(3)(c) of the Bill.

### ***Consultation on subordinate legislation***

125. The Welsh Government consults on the content of subordinate legislation when it considers it appropriate to do so. The precise nature of any consultation in relation to exercising the powers to make subordinate legislation in this Bill will be decided at the appropriate time.

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<sup>27</sup> Which will be substituted by Schedule 2 of the Bill

Table 2 – Summary of powers and duties to make subordinate legislation

Section	Power conferred on	Form in which power is to be exercised	Appropriateness of delegated power	Assembly procedure	Appropriateness of procedure
5(2)	The Welsh Ministers	Regulations	<p>It would often be the case that where amendments to Schedule 1 (to the Bill) are required in consequence of future legislation, that legislation would make the necessary changes.</p> <p>There may be cases where Schedule 1 needs to be amended, either as a result of legislation which did not make consequential provision or other (non-legislative) events, and it is considered more appropriate to do this by way of subordinate legislation than seeking to bring forward primary legislation each time such a change is considered desirable.</p>	Affirmative procedure	Any provision made will substantially affect primary legislation (namely the Act itself) the effect of which will apply to future Acts of the Assembly and Welsh subordinate legislation. Whilst some changes may, by their nature, be purely consequential amendments as a result of other legislation, this may not always be the case.
36(1)	The Welsh Ministers	Regulations	This power is intended to make clear what legislation means without changing its legal effect, and it is considered more appropriate to do this by way of subordinate legislation than seeking to bring forward primary legislation each time such a change is considered desirable.	No procedure	<p>The regulations will not be making any change to the effect of the legislation they amend.</p> <p>Section 37 will mean that this power may also be used as part of any commencement order. It is usual for such orders to be made subject to no procedure. (But if an Assembly procedure did apply to the</p>

Section	Power conferred on	Form in which power is to be exercised	Appropriateness of delegated power	Assembly procedure	Appropriateness of procedure
					commencement order, section 38(1) would mean that the same procedure would also apply to the use of the power in section 36(1) in the same instrument.)
40(1)	The Welsh Ministers	Regulations	Appropriate for regulations to ensure that where amendments to other legislation are found to be necessary, to give full effect to this Bill, further primary legislation is not required.	Affirmative procedure	Where regulations amend, repeal or otherwise modify primary legislation, and the changes may substantially affect that legislation, affirmative procedure is appropriate
				Negative procedure	Where regulations are not amending primary legislation, negative procedure is appropriate
42(2)	The Welsh Ministers	Order	Although it is intended to bring Part 2 into force in relation to other legislation on 1 January 2020, it is considered appropriate for the Welsh Ministers to have the power to appoint the day on which Part 2 comes into force by order, in case there is any delay in the Bill obtaining Royal Assent or any other change in circumstances.	No procedure	This is a commencement order which may only specify a date on which Part 2 (insofar as it applies to legislation other than the Bill itself) may come into force

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## Part 4 – Regulatory impact assessment

126. A Regulatory Impact Assessment (RIA) has been completed for the Bill. Only Part 1 of the Bill would give rise to costs of any significance and these will not arise until the beginning of the next Assembly following Royal Assent. In addition there is a small transitional cost associated with Parts 2 and 3 of the Bill. The costs associated with the Bill have been estimated for the appraisal period 2019-2020 to 2025-2026. In this RIA all costs have been rounded to the nearest £100.

127. There are no provisions in the Bill which charge expenditure on the Welsh Consolidated Fund.

128. Table 3 below summarises the costs and benefits of the preferred options for accessibility of the law and statutory interpretation.

*Table 3 – Summary of costs and benefits of preferred option*

<b>Legislation (Wales) Bill</b>				
<b>Preferred option:</b>				
Legislate to improve accessibility of the law applicable in Wales and ]the interpretation and operation of the law in Wales. Under Part 1 statutory duties to maintain oversight of the accessibility of the law and to prepare and deliver a programme of activities aimed at improving accessibility over each Assembly term are imposed on the Counsel General and Welsh Ministers.				
<b>Stage:</b>	Introduction	<b>Appraisal period:</b>	2019/20-2025/26	<b>Price base year:</b> 2017/18
<b>Total cost</b>		<b>Total benefits</b>		<b>Net present value (NPV)</b>
Total:	£2,962,000 - £2,984,000	Total:	£0	£-2,498,200 - £-2,516,700
Present value:	£2,498,200 - £2,516,700	Present value:	£0	

### **Administrative cost**

#### **Costs:**

There will be administrative costs for the Welsh Government. Under Part 1 a programme must be prepared and implemented in each Assembly term (outlined in

table 6) and there is a small transitional cost associated with Parts 2 and 3 of the Bill (outlined in paragraph 205(a)).

<b>Transitional:</b>	<b>Recurrent:</b>	<b>Total:</b>	<b>Present value:</b>
<b>£20,000 - £42,000</b>	<b>£2,942,000</b>	<b>£2,962,000 - £2,984,000</b>	<b>£2,498,200 - £2,516,700</b>
<b>Cost savings:</b>			
More accessible legislation will reduce the time and resource required for research by Welsh Government lawyers advising on operational matters however it is not possible to quantify this benefit in monetary terms with any degree of certainty.			
<b>Transitional:</b>	<b>Recurrent:</b>	<b>Total:</b>	<b>Present value:</b>
<b>£0</b>	<b>£0</b>	<b>£0</b>	<b>£0</b>
<b>Net administrative cost:</b>		<b>£2,962,000 - £2,984,000</b>	

### **Compliance cost**

#### **Costs:**

No compliance costs have been identified as arising in relation to the options proposed in this RIA.

<b>Transitional:</b>	<b>Recurrent:</b>	<b>Total:</b>	<b>Present value:</b>
<b>£0</b>	<b>£0</b>	<b>£0</b>	<b>£0</b>

### **Other costs**

#### **Costs:**

No further quantifiable economic, social or environmental costs have been identified as arising in relation to the options proposed in this RIA.

<b>Transitional:</b>	<b>Recurrent:</b>	<b>Total:</b>	<b>Present value:</b>
<b>£0</b>	<b>£0</b>	<b>£0</b>	<b>£0</b>

### **Unquantifiable costs and disbenefits**

No further unquantifiable costs or disbenefits have been identified as arising in relation to the options proposed in this RIA.

### **Benefits**

By ensuring the long term accessibility of Welsh Law the Bill would give rise to significant benefits for the public and private sectors in Wales and for private citizens by progressively removing the barriers to efficient and effective use of the law. It will promote greater confidence in the law for business, Government and citizens, leading to more confident and more efficient decision-making across all parts of civic society and the private sector.

**Total**

£

**Present value:**

£

**Key evidence, assumptions and uncertainties**

Legislation is preferred because it gives effect to the recommendations of the Law Commission as set out in *Form and Accessibility of the Law Applicable in Wales 2016*. The findings of the Law Commission that underpin the recommendation to create a statutory duty are relied upon as evidence in support of this option. This is the option most likely to achieve the goal of making Welsh law more accessible.

**Part 1: Accessibility of Welsh law**

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129. Background on the current and proposed arrangements for making Welsh law more accessible is set out more fully in Part 1 of the Explanatory Memorandum – see particularly paragraphs 2 to 15 and 24 to 43.

130. Three options have been assessed when considering how to address the need to improve accessibility of the law applicable in Wales:

Option 1: Aspiration to improve accessibility but no formal programme

Option 2: Formal accessibility programme without statutory duty

Option 3: Formal accessibility programme underpinned by statutory duty

131. A more detailed description of each option considered is set out below together with an analysis of the associated costs and benefits.

***Option 1: Aspiration to improve accessibility but no formal programme***

132. Option 1 would be to continue our current arrangements. The Welsh Government has stated its commitment to improving accessibility and has undertaken piecemeal work to do this where resources allow; under this option

sporadic work to improve accessibility would continue without dedicated resource or a defined formal programme of activity.

133. Pursuing this option would almost certainly mean that despite its aspirations the Welsh Government would fail to consolidate and codify Welsh law. Although there might be gradual improvements made over time, without allocation of sufficient resource to the task, any gains would be persistently undermined by the proliferation of amended legislation created in the ordinary course of Government and National Assembly business.

#### *Costs of option 1*

134. Under this option no dedicated resource would be allocated to the task of improving accessibility and so there would be no additional costs generated under this option.

#### *Benefits of option 1*

135. Any improvements to the accessibility of legislation achieved under this option would carry a small economic and social benefit. But this would be temporary and would be outweighed by the disbenefits of a disordered statute book as the proliferation of unconsolidated and uncodified law created under the legislative programme will perpetually undermine any progress made.

#### *Conclusion*

136. Under option 1 the law would almost certainly continue to become more complex, access to justice would continue to be hindered and the rule of law would be undermined. This would cause significant reputational damage to the Welsh Government and fail to realise the identified long-term social and economic benefits of improving accessibility. In consequence this is not the preferred option.

#### ***Option 2 – Formal accessibility programme without statutory duty***

137. Option 2 involves the Welsh Government demonstrating its commitment to improving accessibility by following the Law Commission's recommendation that programmes of work to improve the accessibility of Welsh law be undertaken. However, the recommendation that there be a statutory underpinning for such activities (as is provided under option 3 below) would not be pursued.
138. As noted by the Law Commission, due to the scale and complexity of the task of consolidating and codifying the law, it will be necessary to undertake structured programmes of work to fully achieve this aim; a piecemeal approach such as

that set out in option 1 is unlikely to produce benefits; economic or social. Under option 2 the Government would develop periodic programmes of activities aimed at improving accessibility but without any statutory underpinning determining the scope of such programmes or the frequency with which they are created and delivered.

### *Costs of option 2*

139. The costs of option 2 fall into 2 categories: firstly those costs associated with developing a programme and secondly; the costs associated with implementing such a programme. Details of each are set out below, all of which fall on the Welsh Government.

140. Without any statutory underpinning it cannot be said at this point how frequent these programmes would be, how many years they would run over or what activities might be undertaken. In order to facilitate comparison with option 3 however, it has been assumed for the purposes of this assessment that the programmes devised under this option would contain the same activities and would be agreed and delivered in the same way as formal programmes developed under option 3.

141. Each programme created under this option would need to be prepared, consulted on, finalised and published. It is estimated that this would be carried out mainly by administrative staff at Executive Band 2 and would take the equivalent of 8 weeks of full time working. On this basis the estimated cost of preparing a single programme would be £12,000. The basis on which this cost is calculated is set out in Table 4 below.

*Table 4 – Costs of developing a programme of accessibility*

<b>Cost of developing a programme of accessibility</b>	
Identification and selection of activities for inclusion in the draft programme	£4,500
Drafting of the draft programme (including ministerial clearance)	£3,000
Publishing the programme for consultation and analysis of consultation responses	£1,500
Preparation and publication of final programme (including clearance)	£3,000
<b>TOTAL ESTIMATED COSTS</b>	<b>£12,000</b>

142. Once the programme has been laid before the Assembly and is underway the Counsel General might wish to report to the Assembly on progress made under the programme. Reporting might take place through the OAQ system and or in statements or papers from the Counsel General. The costs of such reporting would be opportunity costs. However, if the Counsel General wanted to prepare a full report on such a programme it is estimated that the cost of this would be approximately £3,000.
143. Depending on the findings of a report into an accessibility programme, it might also be that the programme needed to be revised. The costs of revision would depend on the extent of the revision undertaken but for the purposes of this assessment it is estimated that such costs are likely to be two-thirds of the cost of preparing the initial programme; approximately £8,000.
144. The other costs of option 2 are those arising from delivery of each accessibility programme. The actual cost of each individual programme would be dependent upon the scale of the activity included in it the resource allocated to that activity. It is therefore difficult to predict, although best estimates have been made below.
145. Option 3 (below) requires that a programme be created once in each Assembly term. It is thought that in order to effect real change for users of legislation in Wales it will be necessary for each programme to provide for 4-5 consolidation bills to be completed during each Assembly term. Alongside this would be a rolling programme of projects aimed at improving law through codification and through better publication and promulgation of Welsh law more generally.
146. Activities within a programme relating to consolidation and codification of Welsh law would primarily involve drafting and translating legislation and would be done by Welsh Government Legislative Counsel and legislative translators. Work on this scale could not be absorbed into normal business and would require dedicated resourcing. In order to deliver a consolidation bill approximately once a year for five years it is estimated that a team of Legislative Counsel would be needed who between them would be carrying out the work of four full-time drafters working at the Assistant Legislative Counsel grade. The estimated cost of providing such a team is £376,900 per year. The team would also need substantial input from translation equivalent to two translators. The estimated cost of this is a further £93,000 per year. The team would naturally receive some input and support from policy colleagues and advisory lawyers, but no additional costs have been identified in relation to this. The total annual cost of preparing a consolidation bill in a programme under which a bill is produced roughly every year for a five year period is therefore estimated to be £469,900 per year.

147. Activities within a programme which do not involve consolidation or codification are likely to include those undertaken to improve the publication and explanation of Welsh law. For example, the further development of the Cyfraith Cymru/Law Wales website, further involvement in the publication of the law and the investigation and utilisation of emerging technologies relevant to these tasks. Part of the focus would be on issues relating to the Welsh language where, as noted by the Law Commission, there are significant failings in the current systems. These activities would be undertaken in the main by a team of Welsh Government 3 administrative staff at management band 2 and 3 working full time. The estimated cost of this is £118,500 per year. The combined additional costs (to Welsh Government) of delivering an example programme are set out in Table 5 below.

*Table 5 – Estimated annual cost of delivering a programme of accessibility*

<b>Estimated additional annual cost of delivering a programme of accessibility including 4 to 5 consolidation bills over 5 years</b>	
Cost of drafting resource equivalent to four Legislative Counsel	£376,900
Cost of translation resource equivalent to two Legislative Translators	£93,000
Cost of one Management Band 2 and two Management Band 3 staff delivering rolling programme of accessibility projects	£118,500
<b>TOTAL ESTIMATED COSTS</b>	<b>£588,400</b>

*Benefits of option 2*

148. As noted by the Law Commission in its report, although the exact monetary costs associated with inaccessible law are unknown, it is more or less self-evident from descriptive examples of the issues caused by inaccessible law that there are costs to the economy as a whole.

149. Inaccessible law pushes up the costs of accessing the law by increasing the time and resource needed to research and apply law; not only for lawyers in the public and private sectors but also for businesses and private citizens who may find it impossible to - or at least disproportionately expensive to - access the law directly. Furthermore, because of the time and resource constraints within which lawyers and other people accessing the law must operate; inaccessible law can lead to limited or inaccurate legal analysis and advice. This in turn can adversely impact not only the businesses relying on their own analysis or

receiving legal advice but also, ultimately, the court system; to which it inevitably falls to resolve disputes arising from these errors. Improving the accessibility of the law would reduce the costs associated with these issues and benefit the people of Wales.

150. Options 2 and 3 will lead to improvements in the accessibility of Welsh law. These will benefit the public and private sectors in Wales as well as citizens by progressively removing the barriers to efficient and effective use of the law and thereby reducing the costs associated with inaccessible law. It will promote greater confidence in the law for business, Government and citizens, leading to more confident and more efficient decision-making not just in law reform and investment but across all parts of civic society. The Law Commission estimated that the benefits arising from implementation of their recommendations could amount to approximately £24 million per year. The Welsh Government has not sought to substantiate this analysis, and is not applying this figure as part of its own benefit analysis in this RIA. But this figure is, at least, a monetised quantification of the time that could be saved and is an expression, at least, of the extent to which resources could be deployed to do other things.

### *Conclusion*

151. Whilst a programme delivered under option 2 would, if it were the same as a programme required to be delivered under option 3, give rise to substantial long-term benefits for users of legislation in Wales, these will only materialise if the focus on the issue of accessibility is maintained and resources are dedicated to delivering this. The Welsh Government agrees with the Law Commission's view that a statutory duty is required to bind future governments and to ensure a long term focus on the issue is sustained. Option 2 is not therefore, the Government's preferred option.

### ***Option 3 – Formal accessibility programme underpinned by statutory duty***

152. Under option 3 the Welsh Government would, in accordance with the recommendations of the Law Commission, commit to improving the accessibility of Welsh law by creating statutory obligations placing:
- a. the Counsel General, as the Law Officer of Wales, under a duty to keep the accessibility of Welsh law under review; and
  - b. the Welsh Ministers and the Counsel General under a duty to develop and implement a programme of activity for each Assembly term, setting out what they intend to do to improve accessibility of Welsh law, which must include proposed activities intended to contribute to an ongoing

process of consolidating and codifying Welsh law and facilitating the use of the Welsh language.

153. The overall aim of these duties is to ensure that a constant and enduring focus on the accessibility of the law is embedded in the function of law making in Wales so that the accessibility of this law is improved over the long term. Under the first duty the Counsel General will be obliged to consider not only each new law proposed, but the state of Welsh law as a whole. This oversight is intended to inform the activities of the Counsel General and the Welsh Ministers under the second duty. Together they encourage a systematic approach to making Welsh law accessible. Programmes will not only include activities relating to the consolidation and codification of Welsh law and the use of the Welsh language; they may also contain other initiatives to improve accessibility, such as further developing explanatory material on the Cyfraith Cymru/Law Wales website or improving the way in which Welsh law is promulgated.
154. Due to the scale and complexity of the task, it will take many years of sustained work to fully achieve the aim of making Welsh law accessible. The time taken to achieve a system of law making under which accessible legislation is both created and maintained will be determined not only by the extent of the resource available (in particular the Welsh Government Legislative Counsel who will be needed to draft consolidated legislation) but also the need to take a gradual and systematic approach and to coordinate this with the reform of the law pursued as part of the Government's Legislative Programme.
155. On the other hand, if insufficient dedicated resource is allocated, the rate of progress is likely to be such that the task is unlikely to ever be achieved. This is because the improvements to accessibility achieved through the act of consolidation and codification would be undermined by the rate of change to the statute book that will take place in any event under the normal course of National Assembly business.
156. It is the view of the Welsh Government that a statutory obligation is essential in order to maintain the profile of inaccessibility as an issue and ensure that the work required to address this issue remains a government priority over the long term. Without a statutory obligation underpinning the efforts of the Welsh Government to address this issue there is a risk that successive governments may not commit the resources needed to undertake this work. The Law Commission recommended the relatively unusual step of a government imposing a duty on itself as it was conscious that previous attempts in the UK at regular and systematic consolidation of legislation had failed.
157. While the Welsh Government is committed to the task of making Welsh law more accessible, it is clear also, however, that the work required to deliver its

legislative reform programme and to make the changes required to Welsh law in consequence of the United Kingdom leaving the European Union must take priority. Although the intention is to assign dedicated resource to the task of consolidating and codifying the law (in particular) there is a risk that this could – in exceptional circumstances – have to be diverted to these priorities. On the other hand there are many synergies which mean that there will be opportunities to improve accessibility while developing the legislative programme and dealing with the legislative impact of withdrawal.

### *Costs of option 3*

158. As with option 2, the costs of option 3 fall into two categories: those associated with developing each programme and those associated with implementing each programme. Part 1 of the Bill will come into force at Royal Assent but the requirements of the Part will only bear upon the next Assembly.
159. Under option 3 the Welsh Ministers and Counsel General would be under a duty to prepare a programme at least once in each Assembly term. Each such programme would need to be prepared, translated and laid before the Assembly. The Counsel General has indicated that a draft programme would be consulted upon before being finalised. It is estimated that the cost of preparing each programme would be £12,000. This would be an upfront cost arising at the start of the appraisal period and then subsequently at the start of each Assembly term. Table 4 (above) sets out the activities that would be undertaken in the process of preparing a programme together with the estimated costs of doing this (and part of the publication cost would include the cost of laying the programme before the National Assembly).
160. The Bill also provides that the programme may be revised during the Assembly term. Under this option, any revised programme would also need to be laid before the Assembly. As noted above the cost of this would depend on the extent of the revision required. But since many of the activities would be essentially the same as those required to prepare the programme initially it is estimated that the costs of such a revision are likely to be around two-thirds of the cost of doing that (£8,000). It is thought to be highly unlikely that a programme be revised more than twice in the appraisal period if at all so the estimated cost of this is at its highest £16,000 and much more likely £0-8,000 for the period.
161. Once the programme has been laid before the Assembly, the provisions of the Bill under option 3 require the Counsel General to periodically report to the Assembly on the progress that has been made under the programme. It will be for the Counsel General to determine what is reasonably required under this duty but on an indicative basis of providing a bespoke report approximately

three times in each Assembly term (once every 18 months), the cost of preparing each report is estimated to be £3,000 recurring three times throughout the term resulting in a total cost of £9,000.

162. The total estimated costs (falling to the Welsh Government) of developing, revising and amending the programmes of accessibility are set out in Table 6 below.

*Table 6 – Estimated cost of developing and reporting on a programme of accessibility (per Assembly term of five years)*

<b>Estimated cost of developing and reporting on a programme of accessibility (per Assembly Term of five years)</b>		
	Low	High
Preparation and laying of programme for Assembly term	£12,000	£12,000
Preparation of report on progress under the programme (low: once during each assembly term, high: three times during each assembly term)	£3,000	£9,000
Preparation of revised programme (low: no revision during assembly term, high: twice during each assembly term)	NIL	£16,000
<b>TOTAL ESTIMATED COSTS</b>	<b>£15,000</b>	<b>£37,000</b>

163. The other costs of option 3 are those arising from delivery of each accessibility programme. As noted under option 2, the actual cost of each individual programme would be dependent upon the scale of the activity included in it and the resource allocated to that activity. These factors are not determined by the Bill but are matters to be considered by the Counsel General and the Welsh Ministers when preparing each accessibility programme.

164. The aim of the Welsh Government in pursuing this option is to ensure that the benefits of consolidation and the work carried out under the proposed programmes is not undermined by the effect of the legislative programmes on the statute book. In order to ensure this does not occur and the benefits of consolidation are achieved it is estimated that it would be necessary to deliver four to five consolidation bill projects (around one per year) as well as some consolidation of statutory instruments, projects to improve the publication and

explanation of Welsh law, and other projects aimed at improving law making processes.

165. As is set out in more detail under option 2, it is estimated that the consolidation elements of such a programme would cost £469,900 per year: A total of £2,349,500 over an Assembly term. The other elements of the programme would cost £118,500 per year; a total of £592,500 an Assembly term. Table 7 below sets of the full costs (falling to the Welsh Government) of delivering a programme of accessibility over the course of an Assembly term of five years.

*Table 7 – Estimated cost of delivering a programme of accessibility (per Assembly term of five years)*

<b>Estimated cost of delivering a programme of accessibility (per Assembly term of five years)</b>		
	per year	over appraisal period
Drafting of 4-5 consolidation bills over 5 year period	£376,900	£1,884,500
translation of 4-5 consolidation bills over 5 year period	£93,000	£465,000
Non-consolidation activities aimed at improving accessibility	£118,500	£592,500
<b>TOTAL ESTIMATED COSTS</b>	<b>£588,400</b>	<b>£2,942,000</b>

166. The total estimated additional costs of this option over an Assembly term are therefore £2,957,000 - £2,979,000. This is comprised of the combined costs of developing, revising and amending the programme once during an Assembly term (£15,000 - 37,000) and the costs of delivering the programme throughout the term (£2,942,000).

### *Benefits of option 3*

167. This section considers what benefits would arise over and above those identified in relation to Option 2. There is a certain paradox – some may say – in using legislation to address a problem caused partly by a proliferation of legislation. Governments, generally, should not legislate unless doing so is necessary. On that basis it could be said that a statutory obligation, and the administrative implications of responding to the scrutiny of that obligation, involves use of resource that is not essential. However, the Welsh Government's view is that the benefits of raising the profile of the issue in order

to ensure long term focus on the problem (partly by binding future governments) outweighs such concerns and the negligible costs. This view was supported by respondents to the consultation on the Draft Bill.

### *Conclusion*

168. There is substantial support amongst stakeholders for a programme of consolidation and codification of the law applicable in Wales. It is recognised also that in the medium to long term there would be significant social and economic benefits associated with this. Working with a rationalised statute book would save time, increase efficiency and enable officials to do more, leading potentially also to real financial savings.

169. The Welsh Government recognises that it has a responsibility for the law within the emerging Welsh legal jurisdiction. The Welsh Government has already undertaken activities to address the problem and intends to do over the long term.

170. This option fully reflects the agreed recommendations made by the Law Commission and is the Welsh Government's preferred option.

## **Parts 2 and 3: Interpretation and operation of Welsh law**

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171. Background on the purpose of interpretation Acts and the current and proposed arrangements for interpreting Welsh laws is set out in Part 1 of the Explanatory Memorandum – see particularly paragraphs 16 to 23 and 44 to 60.

172. Three options have been assessed when considering whether to address the absence of a bespoke, modern and bilingual Act on interpreting Welsh laws:

Option 1: Maintain the application of the Interpretation Act 1978 Act (the 1978 Act) for the interpretation of Welsh laws (i.e. “the current arrangements”).

Option 2: Maintain the application of the 1978 Act for the interpretation of Welsh laws but reproduce Schedule 1 to that Act (which contains definitions of commonly used words and expressions) in the Welsh language.

Option 3: Develop new (separate) interpretation provisions for Wales to govern the interpretation of Welsh laws.

173. A more detailed description of each option is outlined below along with an analysis of the associated costs and benefits.

**Option 1 – Maintain the application of the Interpretation Act 1978 Act**

174. At present the Interpretation Act 1978 applies to all legislation made in Wales despite the fact that this Act is in the English language only. Under the first option this would remain the case.

175. The Welsh Government is committed to improving the accessibility of the law applying in Wales. The Welsh Government has made clear it wants the laws of Wales to be clear, certain, and navigable. Acts on the interpretation of legislation have an important role to play in achieving accessibility of the law – whilst they are technical in nature, they shorten legislation and promote consistency in the language and form of legislation. Maintaining the current legislative framework for statutory interpretation would mean that an opportunity to make bespoke, modern provision in Wales that remedies some of the problems associated with the 1978 Act would be lost. Users of legislation wanting to use the Welsh language text of the law would continue to have to rely on an English-language only interpretation Act to determine its meaning and effect. The inequality in treatment of the English and Welsh languages would, therefore, remain. This is clearly contrary to the spirit of the Government of Wales Act 2006.

176. The Welsh language was recorded as having been used in 790 court cases during 2017<sup>28</sup>; an increase from the over 570 cases in which Welsh was used during the 2015-16<sup>29</sup> period. This is a significant number. It is not clear how many of these cases have turned on a point of statutory interpretation, however, it is evident that relying on an interpretation Act which is in English only (and does not reflect Wales' distinct approach to law-making) is not appropriate.

177. This is important also because the use of the Welsh language in the law is likely to increase for a combination of reasons:

- a. the body of bilingual law in Wales is growing;
- b. more students are studying law through the medium of Welsh;
- c. the growth in the use of Welsh in the courts is likely to continue in line with the increase in the quantity of bilingual law applicable in Wales; and
- d. action is being taken more generally by the Welsh Government to promote the use of the language<sup>30</sup>.

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<sup>28</sup> Judiciary of England and Wales (2017 Figures provided by office of The Lord Chief Justice) *The Lord Chief Justice's Report 2017*

<sup>29</sup> Judiciary of England and Wales (2016) *The Lord Chief Justice's Report 2016*

<sup>30</sup> For example: [Welsh Government \(2017\) \*Cymraeg 2050: Welsh language strategy\*](#)

In addition there are a growing number of members of the judiciary who are able to conduct cases in Welsh – this includes a third of all Circuit Judges, a third of District Judges and just under half of District Judges (Magistrates' Courts)<sup>31</sup>.

#### *Costs of option 1*

178. Since option 1 involves maintaining the current legislative framework for the statutory interpretation of the law applicable in Wales, there are no additional costs associated with this option.

#### *Benefits of option 1*

179. If new legislation was brought forward for the interpretation of Welsh law, the 1978 Act would still continue to apply to all Acts of the UK Parliament and subordinate legislation made under them (other than by the Welsh Ministers) which apply in Wales. There would, therefore, continue to be only one Act.

180. Our policy consultation noted that a separate Act making interpretation provisions for the interpretation of Welsh law would not apply to legislation that applies in Wales but is made by the UK Government. Rather, the new interpretation provisions would only apply to Welsh law. The 1978 Act would, therefore, continue to apply to all Acts of the UK Parliament and subordinate legislation made under them (other than by the Welsh Ministers) which apply in Wales. This creates the possibility that a person might mistakenly apply the wrong interpretation provisions when reading legislation that applies in Wales.

181. Under option 1 the only benefit is that the 1978 Act will continue to be the Act by which laws in Wales are interpreted, and any confusion arising from having two Acts would be avoided. Similarly as with any other proposal to amend the law, not doing so would mean not incurring the costs associated with implementation.

#### *Conclusion*

182. Under this option the identified shortcomings and inadequacies of the current legislative framework, particularly in a Welsh language context would remain. No action would be taken in order to bring about the necessary improvements to the accessibility of the bilingual law applying in Wales. In consequence, this is not the preferred option.

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<sup>31</sup> Judiciary of England and Wales (2017) *The Lord Chief Justice's Report 2017*

## ***Option 2 – Reproduce Schedule 1 to the Interpretation Act 1978 in the Welsh language***

183. Option 2 is to produce a Welsh language version of Schedule 1 to the 1978 Act. This would apply to bilingual legislation and would define Welsh language words and expressions equivalent to those English language words and expressions listed in Schedule 1.
184. Maintaining the application of the 1978 Act to Welsh law, whilst also reproducing the existing Schedule 1 to the 1978 Act in the Welsh language, would remedy the problem caused by the definitions in the 1978 Act applying to the English language only and would not give rise to any confusion caused by having two Acts.
185. However, there are also rules set out elsewhere in the 1978 Act which relate to the meaning of words in bilingual Welsh law (for example section 7 (references to service by post)). Neither these rules, nor the rules in the 1978 Act that relate to the effect of legislation, would exist in law in the Welsh language if we adopted the approach in option 2. Therefore, option 2 would not, fully address the accessibility issues raised by having an English language only interpretation Act.
186. Furthermore, many stakeholders have also suggested that the present accessibility issues raised by the application of the 1978 Act to Welsh law could only be fully addressed if the legislation was modernised. This involves making new, tailored provision for Wales expressed in a modern and accessible drafting style and reflecting current practices in law (including advances in technology). Merely reproducing Schedule 1 of the 1978 Act would not address these issues.

### *Costs of option 2*

187. The costs associated with option 2 relate to preparing a Welsh language version of Schedule 1. Drafting and translating this would be carried out by Welsh Government legislative counsel and jurilinguists and as such would involve only opportunity costs absorbed in the normal course of business and would not result in additional financial outlay.
188. A suitable legislative vehicle would need to be found for the translated Schedule and if this were to be inserted into the 1978 Act this would very probably need to be agreed with and facilitated by the UK Government under section 150 of the Government of Wales Act 2006. This would require some legal and policy resource within the Welsh Government to be exercised (for example, preparing relevant supporting documentation). Again these would be opportunity costs

absorbed in the normal course of business and would not result in additional financial outlay.

189. If the 1978 Act was amended, there would be costs associated with making interested parties aware of the translated legislation, and where and when it would apply. This would probably take the form of information being placed on the Cyfraith Cymru/Law Wales website, the Welsh Government website, and an email to key stakeholders.

### *Benefits of option 2*

190. Option 2 would address the absence of a Welsh language equivalent of Schedule 1 to the 1978 Act.
191. Stakeholders to the Welsh Government's policy consultation<sup>32</sup> indicated support for a Welsh language version of Schedule 1 to the 1978 Act. Creating such a translation would resolve a key shortcoming in relation to interpreting any Welsh language legislation to which the 1978 Act applies and would – to some degree – contribute to improving accessibility of the law applying in Wales. However it is recognised that this argument has its limitations as some of the definitions in the 1978 Act cross-refer to other Acts which are only in the English language, and it would not provide for the rules in the body of the 1978 Act (which are also important) to be available bilingually.

### *Conclusion*

192. Under this option some of the identified shortcomings and inadequacies of the current legislative framework, particularly in a Welsh context would remain. Only partial action would be taken in order to bring about the necessary improvements to the accessibility of the bilingual law applying in Wales. In consequence, this is not the preferred option.

### ***Option 3 – Develop bespoke interpretation provisions for Wales***

193. Option 3 is to develop new bilingual and modern interpretation provisions to apply to Welsh law. This is the option delivered by Parts 2 and 3 of the Bill. In this context “Welsh law” means:

- a. all Assembly Acts;
- b. all subordinate legislation made by the Welsh Ministers under an Assembly Act or Measure, or (where the Welsh Ministers are not acting jointly with others) under a UK Parliament Act; and

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<sup>32</sup> Welsh Government (2017) *Interpreting Welsh legislation: Considering an interpretation Act for Wales*

- c. all subordinate legislation made by any other person under an Assembly Act or Measure

where that legislation receives Royal Assent (or is made) on or after the day on which Part 2 of the Bill would come into force.

194. The Bill if enacted would not only address the absence in the Welsh language of the definitions of commonly used words and expressions that are set out in Schedule 1 to the 1978 Act, but would also comprise wider rules on the interpretation and operation of the law similar to those in the 1978 Act. These rules would be tailored to Welsh legislation and contribute to improving the accessibility of Welsh laws.
195. Stakeholders are keen for the Welsh Government to do something about the absence of Welsh language provision in the 1978 Act and for many this extends to developing bespoke, modern rules on interpretation for Wales.
196. The Constitutional and Legislative Affairs Committee saw “*merit in developing a separate Welsh interpretation Act as a means of improving the understanding of Welsh law*”<sup>33</sup>, while the Law Commission<sup>34</sup> noted the absence of provision about the interpretation of legislation in the Welsh language. Option 3 would address some recommendations made by and issues raised by, the Committee and the Commission.
197. The Counsel General’s programme of consolidation, codification and better publication of legislation is seeking to improve the accessibility of the law applying in Wales. As a part of that wider programme, this option would make improvements to the interpretation of Welsh law and is necessary to resolve the identified shortcomings of the 1978 Act, in particular as it applies to bilingual Welsh law.
198. Some stakeholders are of the view that a separate Act making interpretation provisions for the interpretation of Welsh law – should remain broadly similar to the 1978 Act and reproduce the effect of many of the provisions in that Act. The Welsh Government recognised this point in the policy consultation<sup>35</sup>: it is important not least because the 1978 Act adequately addresses many of the matters that need to be addressed in any interpretation Act. Also, due to the potential for confusion arising from the existence of the Acts any departure from,

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<sup>33</sup> Constitutional and Legislative Affairs Committee (of the Fourth Assembly) (2015) *Making Laws in Wales*

<sup>34</sup> Law Commission (2016) *Form and Accessibility of the Law Applicable in Wales*

<sup>35</sup> Welsh Government (2017) *Interpreting Welsh legislation: Considering an interpretation Act for Wales*

or addition to the effect of the 1978 Act should be done only where it is necessary.

199. That said, new, bespoke interpretation provision for Wales allows the Welsh Government to reform the interpretation of legislation applying in Wales, tailoring the legislation to the specific needs of an emerging bilingual jurisdiction.

#### *Two Acts*

200. Having two Acts does not in our view negate the benefits of having a separate Act for Wales, particularly in a context where there is a recognised need for a bilingual interpretation Act to apply to the bilingual law that is made in Wales. It could be said that having two Acts is an inevitable consequence, in each of the current UK devolution models, of having a ‘devolved’ interpretation Act operating alongside the 1978 Act. A similar issue arises in Scotland and Northern Ireland, both of which have their own interpretation Acts, and there is no evidence that this has caused any particular problems in either of those jurisdictions. (The fact that there is currently no separate Welsh legal jurisdiction is of limited relevance to this issue as the interpretation provisions apply to the body of law created by the legislature and executive – something which exists in Wales regardless of the shared jurisdiction).

#### *Costs of option 3*

##### *Two Acts*

201. It will be important to mitigate the potential for confusion arising from have two Acts relating to the interpretation of the law applicable to Wales. In particular, where such ambiguity arises, consideration needs to be given to the impact on two key categories of persons:
- a. individuals interpreting the law (or those representing them); and
  - b. drafters of Assembly Acts and subordinate legislation made under Acts and Measures of the Assembly (to ensure they take account of the correct interpretative rules and terms).
202. It is intended that drafters of legislation would be provided with clear guidance setting out the way the two Acts apply, and other relevant information for the purposes of preparing subordinate legislation in order to mitigate any negative impact of the existence of the two Acts. The costs of becoming generally familiar with any new Act are hard to quantify, but in this particular case it is probably reasonable to consider it part of the day to day work.

203. Explanatory Notes to the final Act would also assist the citizen and those representing them to understand which interpretation Act actually applies to the legislation they are reading and help promote the accessibility of the law. Information would also be made available on the Cyfraith Cymru/Law Wales website, the Welsh Government website, and to practitioners, law schools, legal advice centres and any other interested parties.
204. Further, it is considered that while some confusion may arise initially this would be resolved once users of the new legislation become more familiar with its operation, in particular its relationship with the 1978 Act. The existence of the new Act specifically for Wales would also raise the profile and understanding of interpretation Acts and their purpose generally, which would further mitigate risk of confusion.

#### *Transitional costs*

205. We have identified the following actions for implementation, resulting in some costs:

- a. *Preparation and delivery of guidance* – To support effective implementation of the Bill, the Welsh Government intends to develop and publish non-statutory guidance for drafters of subordinate legislation. This cost would be incurred by the Welsh Government.

The guidance would be prepared to coincide with the coming into force of the interpretation provisions (intended to be on 1 January 2020) by the Welsh Government (predominantly by the Office of the Legislative Counsel with input from lawyers who draft subordinate legislation). The activity and resultant cost would be absorbed within the normal course of business but has been estimated at £5,000 (a one-off cost arising in 2019/2020). The guidance would be published online only and therefore there would be no costs arising from print publication.

- b. *Informing those administering the law of the changes* – It is recognised that Welsh Government drafters, legal professionals, the judiciary and Welsh law schools will need to be made aware of the changes (in relation to statutory interpretation) brought about by the Bill if enacted.

We intend to alert the Law Society, the Bar Council, and CILEX of the new legislation, and invite them to notify their members. We would provide them with links to further information about the new Act held on the Cyfraith Cymru/Law Wales website.

We will provide similar information to the Welsh Committee of the Judicial College (for the judiciary and tribunal members), the Heads of the Law Schools in Wales, and other interested parties.

It is possible that bodies such as the Law Society or the Bar Council may chose to provide training or other information on the new legislation to their members. To date we have not been advised by respondents to our previous consultations that this would be the approach taken. For this reason it is difficult to quantify such costs, but we would estimate any cost to be cost-neutral (in the sense that we would expect such training to be undertaken periodically in any event).

Information sessions would be provided internally within the Welsh Government. This would be an opportunity cost – for example, the cost of a one-hour training sessions organised by and for officials working on legislation.

### *Ongoing costs*

206. We do not anticipate that there will be ongoing costs under option 3, as the need for familiarisation of the new arrangements would arise in the first year following the Bill receiving Royal Assent, if passed by the Assembly.

207. Making the law more accessible through the implementation of option 3 in ongoing years would at worst be cost neutral, but should result in a cost saving once familiarity with the new, clearer, legislation increases. Such savings are not quantifiable in monetary terms and are therefore unknown.

### *Benefits of option 3*

208. This option would result in modern, bilingual interpretation legislation bespoke to Wales. It would be an improvement on the 1978 Act – not only because it would be modern and bilingual but also because the Bill, unlike the 1978 Act, would only contain provision which is relevant to the law applying in Wales (and not the law applying elsewhere in the UK).

209. The Bill, whilst being technical in nature, would help to keep legislation shorter and more consistent; it would reduce complexity in drafting and interpreting legislation setting out certain principles, rules and definitions once and bilingually so that they do not have to be repeated in each new law that is made. The Bill, as is the case with other interpretation Acts, defines commonly used expressions in legislation which can assist in resolving uncertainties about the meaning of particular legislative provisions. It also contains rules of statutory construction, such as provisions about when the laws come into force, the

calculation of time periods, and the effects of repeal, all of which provide legal certainty. Whilst these changes are minor and technical and are only a small component of the Welsh Government's wider programme of accessibility of Welsh law they are nevertheless beneficial and supported by the majority of stakeholders.

210. Those using the growing body of Welsh law would derive benefit from statutory interpretation legislation created specifically for Wales which is bilingual. The constitutional benefit of a separate Act making interpretation provisions for the interpretation of Welsh law would be of significance and is more consistent with the principle set out in section 156 of the Government of Wales Act 2006 (equality of languages) than the existing legislative framework.

211. We recognise that two interpretation Acts would necessarily be in operation, under this option. However, our view is that the benefits of creating a separate Act making interpretation provisions specifically for the interpretation of Welsh law would outweigh any potential drawbacks arising from having two Acts.

### ***Conclusion (and preferred option)***

212. Wales has developed a body of bilingual legislation which will continue to expand in future. It is important that the statutory interpretation tool used to interpret the bilingual legislation applying in Wales is fit for purpose, bilingual and reflects the practices of the National Assembly as a modern legislature. Stakeholders have made it clear that the 1978 Act is not fit for purpose.

213. We are now of the view that the best means of delivering any reform of the law governing the interpretation of legislation applying in Wales would be through a new separate Act for Wales.

214. The potential benefits of developing a separate Act making interpretation provisions for the interpretation of Welsh law outweigh the costs and in particular the concerns raised by stakeholders in relation to the potential drawbacks of having two interpretation Acts operating in Wales.

215. For these reasons, option 3 is the preferred option.

### **Post-implementation review**

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216. Under Part 1 of the Bill there will be ongoing evaluation of the efficacy of the programmes developed and delivered under that Part. The Counsel General is also required under the Part to keep the accessibility of Welsh law under review and this will include reviewing the efficacy of Parts 2 and 3 of the Bill also.

217. To the extent that it is appropriate or necessary in view of the ongoing evaluation described above, we anticipate that the legislation will be reviewed in 2026 at the end of the first Assembly term in which a formal accessibility programme has been delivered. It will not be feasible before this time to assess the effectiveness of the statutory underpinning for the programme or indeed predict the ongoing need for the legislation.

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## **Part 5 – Specific impact assessments**

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218. Alongside the RIA a number of other impact assessments have been carried out, which are summarised below. Copies of each of these assessments are available, on request, please contact: [LegislativeCounsel@gov.wales](mailto:LegislativeCounsel@gov.wales)

### ***Equality impact assessment***

219. There are no, or negligible, impacts on people under the protected characteristics of: age, disability, gender, transgender, marriage or civil partnership, pregnancy or maternity, religion and belief or non-belief, or sexual orientation.

220. In terms of race, no or negligible impacts are expected in respect of ethnic minority people, asylum seekers and refugees, gypsies and travellers, migrants and others. There could be a positive impact on ‘national origin’ as the provisions of the Bill are considered likely to benefit those whose first language is Welsh, or those who otherwise wish to access and rely upon the Welsh language texts of Welsh law.

221. The assessment of the Bill in respect of human rights is that the impact is neutral.

### ***Rights of the child***

222. Having reviewed the UNCRC articles, the benefits and impacts of the Bill do not directly support or promote children’s rights. Nor is there considered to be an adverse affect to children’s rights.

223. Activities pursued under the programme of improving accessibility of Welsh law are expected to have a positive impact for children, young people and their families. The benefits identified in relation to the Welsh language (see below) are also expected to benefit those children, young people and their families which have been educated through the medium of Welsh and may be more comfortable reading in Welsh.

### ***Impact on Welsh language***

224. The assessment has identified a positive impact on those wishing to use the Welsh language as a language of law, for example legal professionals, the judiciary, academics and court users wishing to conduct court proceedings in the medium of Welsh. The Bill will help to improve accessibility, including

publication, of the law applying in Wales in both the English and Welsh languages. An element of this includes a bilingual statutory interpretation tool for the interpretation of the legislation applying in Wales that is tailored to a Welsh context and reflects the current drafting practices of the National Assembly.

225. As identified earlier in the Explanatory Memorandum, the existence of a new separate Act for Wales will not mean that the 1978 Act ceases to apply. Therefore the interpretation of the law applying in Wales will be governed by two Acts; the Act which is relevant being governed by whether the law is devolved and when the legislation is made. This means that the rules of interpreting bilingual laws made before the new provisions come into force will not be bilingual (as is the case now). It is recognised that the existence of two Acts may cause some confusion but this is an inevitable consequence of tackling the issue for the future.

### ***Justice impact assessment***

226. The potential impacts on the justice system of the proposals have been considered, including on:

- a. courts (criminal and civil);
- b. non-devolved tribunals;
- c. devolved tribunals;
- d. legal aid;
- e. the judiciary;
- f. prosecuting bodies; and
- g. prisons, youth justice and probation services.

This consideration has informed an assessment that the Bill is likely to have no impact on the justice system.

### ***Competition assessment***

227. There are no anticipated effects on competition arising out of this legislation.

Table 8 below sets out the conclusions of the competition filter test.

*Table 8 – Competition filter test*

The competition filter test	
Question	Answer yes or no
<b>Q1:</b> In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
<b>Q2:</b> In the market(s) affected by the new regulation,	No

The competition filter test	
Question	Answer yes or no
does any firm have more than 20% market share?	
<b>Q3:</b> In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
<b>Q4:</b> Would the costs of the regulation affect some firms substantially more than others?	No
<b>Q5:</b> Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
<b>Q6:</b> Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
<b>Q7:</b> Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
<b>Q8:</b> Is the sector characterised by rapid technological change?	No
<b>Q9:</b> Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

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## Annex A – Comparison with the Interpretation Act 1978

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The provisions in Part 2 of, and Schedule 1, to the Bill reflect the rules of statutory interpretation which the Government considers relevant and applicable for Welsh legislation. In many cases they take account of similar provisions in the Interpretation Act 1978, but as this Bill is neither a consolidation nor restatement of that Act, it is not correct to describe the provisions as ‘derived from’ the 1978 Act.

Instead the table below provides a short comparison, for information, between rules and provisions in the 1978 Act with those in Part 2 of the Bill.

Rule or provision	Legislation (Wales) Bill	Interpretation Act 1978	Comments
Legislation to which Part 2 of the Bill applies	Section 3	Sections 22, 23 and 23B	See paragraphs 46 to 54 of Part 1 of the Explanatory Memorandum for further information on which legislation the Bill applies to
“Contrary intention”	Section 4	Various	Each of the interpretation rules in the 1978 Act make specific provision about contrary intention as relevant to the rule.  The Bill takes a similar approach to that in the Interpretation and Legislative Reform (Scotland) Act 2010 and generally deals with the issue in one place
Definitions of words and expressions used in legislation	Section 5 and Schedule 1	Section 5 and Schedule 1	
Words in the singular include the plural	Section 6	Section 6(c)	
Words denoting a gender are not limited to that gender	Section 7	Section 6(a) and (b)	
Variations of a word or expression due to grammar etc.	Section 8	-	Similar provision exists in the Canadian Interpretation Act (section 33(3), RSC 1985) and the Hong Kong Interpretation Act and General Clauses Ordinance (section 5)
References to time of day	Section 9	Section 9	

<b>Rule or provision</b>	<b>Legislation (Wales) Bill</b>	<b>Interpretation Act 1978</b>	<b>Comments</b>
References to the Sovereign	Section 10	Section 10	
Measurement of distance	Section 11	Section 8	
Service of documents by post or electronically, and day on which service is deemed to be effected	Sections 12 and 13	Section 7	Sections 12 and 13 are equivalent to section 7 of the 1978 Act, but go further by also providing for service of documents using electronic communication
Continuity of powers and duties	Section 14	Section 12	
Exercise of a power or discharge of a duty that is not in force	Section 15	Section 13	Section 13 of the 1978 Act does not deal with all the matters which the section 15 of the Bill covers.
Inclusion of sunset provisions and review provisions in subordinate legislation	Section 16	Section 14A	
Revoking, amending and re-enacting subordinate legislation	Section 17	Section 14	Section 17 of the Bill differs from section 14 in some respects
Amendment of subordinate legislation by an Assembly Act	Section 18	-	Clause 41 of the Legislation Bill before the New Zealand Parliament makes similar provision
Varying and withdrawing directions	Section 19	-	
References to portions of enactments, instruments and documents	Section 20	Section 20(1)	Section 20 of the Bill covers references to a wider range of documents than the 1978 Act
Editions of Assembly Acts or Measures or UK Parliament Acts referred to	Sections 21 and 22	Section 19(1)	
References to enactments are to enactments as amended	Section 23	Section 20(2)	Section 23 of the Bill makes clear that references to other legislation are “ambulatory”  Note also section 14 of the Interpretation and Legislative Reform (Scotland) Act 2010

<b>Rule or provision</b>	<b>Legislation (Wales) Bill</b>	<b>Interpretation Act 1978</b>	<b>Comments</b>
References to EU instruments	Section 24	Section 20A	
Duplicated offences	Section 25	Section 18	Although note that section 18 of the 1978 Act remains relevant where an act is also an offence under legislation other than, or additional to, Assembly Acts
Application of Welsh legislation to the Crown	Section 26	-	Provision on application to the Crown is also made in section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010
Time when Welsh legislation comes into force	Section 27	Section 4(a)	
Day on which an Assembly Act comes into force	Section 28	Section 4(b)	
Orders and regulations bringing Assembly Acts into force	Section 29	-	
Amendments made to or by Welsh legislation	Section 30	-	Clause 29 of the Legislation Bill before the New Zealand Parliament makes similar provision
Repeals and revocations do not revive law previously repealed, revoked or abolished	Section 31	Section 15	Amongst other matters section 31 of the Bill applies to the repeal of a provision which abolished a common law rule
General savings in connection with repeals and revocations	Section 32	Section 16	
Effect of re-enactment	Section 33	Section 17(2)	
Referring to an Assembly Act by its short title after repeal	Section 34	Section 19(2)	
Meaning of repeal and revocation in this Part	Section 35	-	Section 35(2)(b) of the Bill is equivalent to section 16(2) of the 1978 Act

Some of the rules in the 1978 Act do not feature in the Bill, specifically:

- sections 1 and 2 as these are not considered necessary;
- section 3 as this is provided for in section 107(4) of GoWA 2006;
- section 11 – see paragraphs 56 to 60 in Part 1 of the Explanatory Memorandum;
- section 17(1) as this is not considered necessary.

# **Annex B – Explanatory Notes to the Legislation (Wales) Bill**

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## **LEGISLATION (WALES) BILL**

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### **EXPLANATORY NOTES**

#### **INTRODUCTION**

1. These Explanatory Notes are for the Legislation (Wales) Bill which was introduced into the National Assembly for Wales on 3 December 2018. They have been prepared by the Office of the Legislative Counsel of the Welsh Government to assist the reader of the Bill. The Explanatory Notes should be read in conjunction with the Bill but are not part of it.
2. The Explanatory Notes are not meant to be a comprehensive description of the contents of the Bill. Where an individual provision of the Bill does not seem to require any explanation or comment, none is given.

#### **SUMMARY AND BACKGROUND**

3. The Bill makes provision about the interpretation and operation of Welsh legislation, and requires the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law:
  - a. Part 1 imposes duties on the Counsel General to the Welsh Government and the Welsh Ministers relating to the accessibility of Welsh law.
  - b. Part 2 makes general provision about the interpretation and operation of the Bill itself and of Welsh legislation enacted after Part 2 comes into force.
  - c. Part 3 gives the Welsh Ministers powers to replace descriptions of dates in Welsh legislation and to make subordinate legislation in different forms, and provides for the combination of subordinate legislation that is subject to different procedures in the National Assembly for Wales.
  - d. Part 4 contains general provisions, including consequential amendments to other legislation and provision about when and how the Bill comes into force.
4. The Bill forms part of the Welsh Government's wider programme of improving the accessibility of Welsh law and clarifying and simplifying the operation of Welsh legislation.
5. The background to the Bill has involved a number of inquiries and consultations.

6. In its report *Making Laws in Wales* (October 2015), the Constitutional and Legislative Affairs Committee of the National Assembly for Wales made a number of recommendations relating to the quality, preparation and scrutiny of legislation. In particular, it recommended that the Welsh Government develop a long-term plan for consolidating the law in Wales, and that the Counsel General work towards producing a separate Welsh interpretation Act.
7. In its report *Form and Accessibility of the Law Applicable in Wales* (Law Com No 336, June 2016), the Law Commission recommended that the Welsh Government should pursue a policy of consolidating and codifying the law in Wales. It made a number of recommendations relating to the process of consolidation and codification, including that the Counsel General should be required to present a codification programme and report on progress to the National Assembly for Wales.
8. The Law Commission also recommended that the Welsh Government and the National Assembly consider, and keep under review, the practical benefits of introducing an Interpretation Act for Wales, and made further recommendations relating to the quality, publication and availability of legislation.
9. The Welsh Government subsequently published a consultation document *Interpreting Welsh Legislation: Considering an interpretation Act for Wales* (WG 32209, June 2017), seeking views on the benefits of having a separate Welsh Interpretation Act and on the approach that such an Act should take. This was followed by a second consultation, *Draft Legislation (Wales) Bill* (WG 34368, March 2018) which included a draft Bill and sought views on the approach taken in the draft. The responses to both consultations were taken into account in developing the Bill for introduction.

## COMMENTARY ON SECTIONS

### *Part 1: Accessibility of Welsh law*

#### **Section 1 - Duty to keep accessibility of Welsh law under review**

10. In order to inform the process of making Welsh law more accessible section 1(1) requires the Law Officer for Wales, the Counsel General, to keep the accessibility of Welsh law under review. The Counsel General is a member of the Welsh Government, appointed by Her Majesty upon the recommendation of the First Minister under section 49 of the Government of Wales Act 2006.
11. The duty in section 1(1) is similar to, and intended to supplement (not replace), the obligation on the Law Commission to keep the law under review under section 3(1) of the Law Commissions Act 1965. It requires a focus on the law as a collective, be that the law on a particular subject and the statute book as a whole. It also means that the Counsel General's obligation to keep the accessibility of Welsh law under review will be relevant when the Welsh Ministers are considering whether to propose new legislation. In such situations regard should be had to how the approach taken to legislating could impact upon the accessibility of the law. This does not, however, mean that the Welsh Ministers would have to legislate in a particular way in any individual case.

12. “Welsh law” is defined in section 1(2) to mean:
- a. Assembly Acts and Measures and subordinate legislation made under them (in other words, all legislation made by the National Assembly for Wales or under its authority),
  - b. other subordinate legislation made by the Welsh Ministers or the old National Assembly for Wales so far as it applies in relation to Wales (in other words, any other legislation made by the devolved government in Wales), and
  - c. any other enactment or rule of law so far as it applies in relation to Wales and relates to subject matter for which an Assembly Act could make provision (in other words, other legislation or common law rules which could potentially be reformed or re-enacted by the National Assembly).
13. Schedule 1 to the Bill contains definitions of various terms used in section 1(2), including “enactment”, “subordinate legislation” and “Wales”.

## **Section 2 – Programme to improve accessibility of Welsh law**

14. This section requires the Welsh Ministers and the Counsel General to develop a programme of action designed to improve the accessibility of Welsh law for each Assembly term that begins after the section comes into force. An Assembly term means the period from an Assembly being formed after a Welsh general election to dissolution prior to the following general election.
15. Although the specific content of a programme will be a matter for the Welsh Ministers and the Counsel General, section 2(3) requires each programme to make provision for measures that are intended to consolidate and codify Welsh law, maintain codified law and to facilitate use of the Welsh language.
16. Consolidating the law generally involves bringing all legislation on a particular topic together, better incorporating amendments made to legislation after it has been enacted and modernising the language, drafting style and structure. This involves no or only minor amendments to the substance of the law consolidated. In Wales consolidation of the law will involve for the most part re-enacting laws previously made by the UK Parliament, and doing so bilingually.
17. Codifying the law is intended to bring order to the statute book. This involves organising and publishing the law by reference to its content (and not merely when it was made), and maintaining a system under which that law retains its structure rather than proliferating. A “Code” of Welsh law would generally be published once some or all of the primary legislation on a particular subject (taking account of the legislative competence of the National Assembly) has been consolidated, or has been created afresh following wholesale reform. This should usually be accompanied by a process of rationalisation of subordinate legislation made under the primary legislation. The existing hierarchy within, and delineation between, legislative instruments (primary and secondary legislation, and guidance or other similar documents made under the Acts or subordinate legislation) would remain. All the legislation within a Code will be made in both English and in Welsh.

18. Therefore a Code would not (generally) be one legislative instrument but rather a collection of enactments under a unifying overarching title. Those enactments which make up the Code on any particular subject would be made available together. Similarly these enactments will remain the means by which the law is formally articulated. The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively.
19. References in section 2(3) to “codifying” the law mean, generally speaking, the codification of statute law (legislation). Although a Bill that codifies statute law might incorporate the effect of case law on the meaning of the legislation being consolidated and codified, or rules of common law that are closely related to that legislation, the Welsh Government does not intend to undertake wholesale codification of the common law.
20. Section 2(3) also requires each programme to include activities intended to facilitate use of the Welsh language. This is intended to include facilitation of the language in the law, in public administration and more generally. A key aspect of this will be consolidating the law bilingually so that much more of the law for which the National Assembly and Welsh Government are responsible is made in Welsh. Similarly, improving publication arrangements and providing more commentary on the law in both languages will make it easier for the Welsh language to be used in the law and in public administration more generally in Wales. Other projects in a future programme could include making more glossaries for legislation available and further initiatives to develop agreed terminology where this is helpful.
21. Section 2(4) provides that each programme may also include proposals to promote Welsh law for example by raising awareness of significant changes in the law or the existence of Welsh law more generally.
22. Section 2(5) requires a programme to be laid before the National Assembly within six months of the appointment of the First Minister following a general election. This is intended to ensure that each government can be held accountable for what its programme achieves over an Assembly term.
23. Although a new government is not required to inherit the programme of the previous government at the beginning of an Assembly term, in practice, projects from one programme will almost certainly continue until the next programme is prepared and laid, and there is nothing to prevent projects from an earlier programme appearing in a subsequent programme where the timeframe for completing such a project requires that. Some of the individual projects to consolidate and codify the law on a subject will be long term in nature, and could take more than one Assembly term to complete.
24. Section 2(7) requires the Counsel General to make periodic reports to the National Assembly on progress against the programme. Such reporting could be made through a statement to the Assembly, which would enable Assembly Members to ask questions of the Counsel General on the report.
25. A programme set out at the beginning of the Assembly term may need to be varied during that term. New projects could be added, or perhaps existing projects removed

if they were found not to be suitable for consolidation in light of related legislative reform. Section 2(6) provides that the Welsh Ministers and Counsel General may revise a programme during the Assembly term, but that revised programme must be laid before the National Assembly and again reported against.

### ***Part 2: Interpretation and operation of Welsh legislation***

26. Part 2 of the Bill makes provision about the interpretation and operation of legislation made by the National Assembly for Wales or under powers it has conferred, and other subordinate legislation made by the Welsh Ministers and other devolved Welsh authorities.
27. The position before Part 2 comes into force is that the Interpretation Act 1978 (“the 1978 Act”) governs the interpretation and operation of legislation of these types. The 1978 Act will continue to apply to legislation that has been made before Part 2 comes into force. Part 2 will apply only to legislation made after Part 2 comes into force (and to the Bill itself).
28. The 1978 Act will also continue to apply to some very limited categories of instrument that are made by the Welsh Ministers and other devolved Welsh authorities under certain powers after Part 2 of the Bill comes into force, if those instruments also contain provisions that are made by bodies that are not devolved Welsh authorities or provisions that apply otherwise than in relation to Wales.
29. Part 2 of the Bill begins by identifying the legislation to which it applies. Part 4 of the Bill amends the 1978 Act to ensure that it does not apply to legislation to which Part 2 applies, and to deal with some of the interactions between legislation to which the 1978 Act applies and legislation to which Part 2 applies.
30. Most of the provisions in Part 2 of the Bill are intended to have the same effect as provisions in the 1978 Act, even if they are expressed in different terms. However, there are a number of differences which are identified and described in these Explanatory Notes.

### **Section 3 – Legislation to which this Part applies**

31. Section 3(1) sets out the legislation to which Part 2 of the Bill applies. Part 2 applies to the Bill itself, to Assembly Acts that receive Royal Assent after Part 2 comes fully into force, and to Welsh subordinate instruments made after Part 2 comes fully into force. Part 2 will be brought fully into force by an order made by the Welsh Ministers under section 42(2).
32. A “Welsh subordinate instrument” is defined in section 3(2) as an instrument containing only one or both of the types of subordinate legislation described in paragraphs (a) and (b). An instrument which contains any subordinate legislation not falling within either of those paragraphs will not be a “Welsh subordinate instrument” (and will instead be subject to the 1978 Act).
33. The subordinate legislation within paragraph (a) is any subordinate legislation made under an Assembly Act or Assembly Measure, regardless of who makes it. This paragraph covers any subordinate legislation made under powers conferred by

primary legislation passed by the National Assembly for Wales. It does not matter when the primary legislation was enacted.

34. Where subordinate legislation is made under an Assembly Act enacted after Part 2 of the Bill comes into force, Part 2 will apply to both the parent Act and the subordinate legislation. But where subordinate legislation is made under an Assembly Measure or an Assembly Act enacted before Part 2 of the Bill comes into force, the 1978 Act will continue to apply to that Measure or Act, while Part 2 of the Bill will apply to the subordinate legislation. Nothing in Part 2 will change the meaning or effect of the Measure or Act under which the subordinate legislation is made.
35. The subordinate legislation within paragraph (b) of the definition of “Welsh subordinate instrument” is subordinate legislation that:
  - a. is made under an Act of the UK Parliament or retained direct EU legislation,
  - b. is made only by the Welsh Ministers or any other devolved Welsh authority, and
  - c. applies only in relation to Wales.
36. Where the subordinate legislation is made under an Act of the UK Parliament, the 1978 Act will continue to apply to the parent Act, but Part 2 of the Bill will apply to the subordinate legislation. Nothing in Part 2 will change the meaning or effect of the Act under which the subordinate legislation is made.
37. Similarly, Part 2 will apply to certain subordinate legislation that is made under “retained direct EU legislation” but not to the “retained direct EU legislation” itself. Schedule 1 to the Bill defines “retained direct EU legislation” by reference to the European Union (Withdrawal) Act 2018, which provides for certain EU legislation (including regulations and decisions) to be retained in domestic law on “exit day”. It also confers powers to amend that legislation so that it contains powers to make subordinate legislation.
38. The “devolved Welsh authorities” to which paragraph (b) refers are defined in section 157A of the Government of Wales Act 2006, and include all of the bodies listed in Schedule 9A to that Act. They include county and county borough councils, National Park authorities, Natural Resources Wales, and other devolved bodies that have powers to make orders, rules, schemes or byelaws.
39. An instrument will not be a “Welsh subordinate instrument” if it contains subordinate legislation made under an Act of the UK Parliament or retained direct EU legislation by a person or body that is not a devolved Welsh authority. Therefore “Welsh subordinate instruments” do not include instruments made jointly by the Welsh Ministers and a Secretary of State, or “composite” instruments in which the Welsh Ministers legislate for Wales and a Secretary of State legislates for England.
40. An instrument will not be a “Welsh subordinate instrument” if it contains subordinate legislation that is made under an Act of the UK Parliament or retained direct EU legislation and applies otherwise than in relation to Wales. It is possible that an Act of Parliament may confer functions on the Welsh Ministers in relation to

an area that extends beyond the boundaries of Wales, such as the part of the Welsh zone that lies beyond the territorial sea. In addition, Part 1 of Schedule 3 to the Government of Wales Act 2006 provides that functions may be transferred to the Welsh Ministers in relation to English border areas and waters beyond the seaward boundary of the territorial sea.

#### **Section 4 – Effect of provisions in this Part**

41. The provisions in Part 2 of the Bill provide a set of presumptions about the meanings and effects that Assembly Acts and Welsh subordinate instruments are intended to have. Section 4 of the Bill makes provision about the operation of the rules in Part 2 of the Bill in relation to a particular Assembly Act or Welsh subordinate instrument.
42. Even where Part 2 applies to an Assembly Act or Welsh subordinate instrument (i.e. it is enacted after Part 2 of the Bill comes into force), some or even all of the rules in Part 2 may be modified or excluded in relation to the Act or instrument. Section 4(1) provides that most of the rules in Part 2 have effect in relation to an Act or instrument except so far as “(a) express provision is made to the contrary or (b) the context requires otherwise”. This corresponds to the various provisions in the 1978 Act which state that rules in that Act apply unless “the contrary intention appears”.
43. Paragraph (a) relates to the situation where an Act or instrument expressly states that any of rules in Part 2 of the Bill do not apply to it, or contains express provisions that are inconsistent with any of the rules in Part 2. For example, an Act or instrument might use a term that is defined in Schedule 1 to the Bill, but give the term a different definition. In that case, paragraph (a) makes clear that the definition in Schedule 1 to the Bill would not apply.
44. Paragraph (b) relates to the situation where the context requires an Act or instrument to be interpreted or given effect in a different way from that set out in Part 2 of the Bill. For example, there may be cases where an Act or instrument uses a term defined in Schedule 1 to the Bill without providing an alternative definition, but the way in which the term is used, or some other aspect of the context of the Act or instrument, indicates that the term must be intended to have a different meaning.
45. Section 4(2) provides that the exceptions in section 4(1) do not apply in relation to sections 9 (time of day), 26 (application of Welsh legislation to the Crown) and 31 (revival of law previously repealed or abolished). This reflects the fact that each of those sections provides that the rule in question can only be disapplied with express words (and not by implication).

#### **Section 5 and Schedule 1 – Definitions of words and expressions**

46. Section 5 provides that the words and expressions set out in Schedule 1 (which it introduces) have the meaning given in that Schedule where they are used in Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill applies. The terms listed in Schedule 1 are ones that are expected to be used in Welsh legislation and to have a consistent meaning.
47. Schedule 1 contains definitions of:

- a. terms relating to legislation (e.g. “Assembly Act”, “enactment” and “subordinate legislation”);
  - b. terms relating to central government and public bodies (e.g. “Welsh Ministers”, “Natural Resources Wales” and “Minister of the Crown”);
  - c. terms relating to criminal offences and courts (e.g. “summary offence”, “county court” and “High Court”);
  - d. terms relating to the European Union and Brexit (e.g. “EU instrument”, “retained direct EU legislation” and “member State”);
  - e. other basic legal terms (e.g. “land”, “person”, “Wales”, “writing” and “working day”).
48. Schedule 1 to the Bill is similar to Schedule 1 to the 1978 Act, but it does not include terms listed in Schedule 1 to the 1978 Act that are irrelevant to Welsh legislation, such as “Bank of Ireland”. On the other hand, it includes some terms that do not appear in Schedule 1 to the 1978 Act but which are likely to be relevant to Welsh legislation, such as “Welsh Ministers”.
49. Where Schedule 1 to the Bill defines a word or expression that is also defined in Schedule 1 to the 1978 Act, the definition given in the Bill is usually intended to have the same effect as that in the 1978 Act even if it appears different from the equivalent definition in the 1978 Act.
50. However, there are some definitions that appear in both Schedule 1 to the Bill and Schedule 1 to the 1978 Act which are different in the Bill:
- a. The definitions of various courts in the Bill include only the courts that operate within the jurisdiction of England and Wales, whereas the definitions in the 1978 Act also include the equivalent courts in Northern Ireland.
  - b. Whereas the definition of “financial year” in the 1978 Act is limited to certain references relating to public money, the definition in the Bill will apply for all purposes. However, in practice references to financial years in Welsh legislation nearly always relate to the financial years of public bodies.
  - c. The definition of “Wales” in the Bill is intended to reproduce the effect of the definition in the Government of Wales Act 2006 (set out in section 158(1) of that Act). The definition of “Wales” in the 1978 Act is limited to the local authority areas in Wales, but the 2006 Act expands that definition to include “the sea adjacent to Wales out as far as the seaward boundary of the territorial sea”. As the Government of Wales Act 2006 deals with the powers of the National Assembly for Wales to make legislation, the Bill provides for the default definition of “Wales” to be in line with the definition in that Act.
51. Some definitions in Schedule 1 refer to provisions in Acts of the UK Parliament, which are enacted only in English. The Welsh language text of Schedule 1 refers to those Acts using Welsh translations of their titles (or “courtesy titles”) rather than the

original titles in English. The Welsh language version of these Explanatory Notes lists the courtesy titles that have been used for Acts mentioned in Schedule 1.

52. By virtue of section 4(1) of the Bill, section 5(1) and Schedule 1 have effect except to the extent that express provision is made to the contrary or the context requires otherwise. An Assembly Act or Welsh subordinate instrument may therefore give a term listed in Schedule 1 to the Bill a different meaning from that in Schedule 1.
53. Section 5(2) provides for a power to amend the Schedule. This would allow definitions to be added to the Schedule where it would be helpful to do so, or to reflect legislative changes that affect the meaning of terms listed in the Schedule. Under section 41 of the Bill, this power would be subject to the affirmative procedure.

### **Section 6 – Words in the singular include the plural and vice versa**

54. Section 6 means that, where an Assembly Act or Welsh subordinate instrument refers to a noun in either the singular or the plural, the reference will usually cover both forms of the noun. It therefore removes the need for legislation to use phrases like “a person or persons” in most contexts. This provision is relied on in most, if not all, legislation, and helps to facilitate shorter, more accessible drafting.
55. This section has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 6(c) of the 1978 Act.

### **Section 7 – Words denoting a gender are not limited to that gender**

56. Section 7 means that words in Assembly Acts and Welsh subordinate instruments which could be read as being limited to persons of a specific gender are not to be read as being limited in that way. The purpose of the section is to ensure that legislation is not too narrow in its application, and that even wording and phrasing which might traditionally have been considered gender-neutral (such as “he or she”) does not exclude anyone, regardless of their gender identity.
57. Section 7 has effect except to the extent that express provision is made to the contrary or the context requires otherwise, so it will not be relevant where an Act or instrument clearly intends to refer to persons of a particular gender.
58. This section is equivalent to section 6(a) and (b) of the 1978 Act, but it does not refer expressly to the male and female genders and therefore has a wider scope.

### **Section 8 – Variations of a word or expression due to grammar etc.**

59. Section 8 makes clear that, where an Assembly Act or Welsh subordinate instrument defines a word or expression, parts of speech relating to the word or expression also carry the definition. For example, if the word “walk” is defined, then the parts of speech relating to “walk”, such as “walking” and “walker”, are to be interpreted in the light of that definition.
60. It often goes without saying that a definition applies in these circumstances. In some cases though this needs to be put beyond doubt. See for example the definition of “education” in section 99(1) of the Additional Learning Needs and Education Tribunal

(Wales) Act 2018, which makes provision about the application of that definition in relation to “*educate*” and “*educational*”. Section 8 of the Bill makes general provision about the application of definitions, to avoid ambiguity and remove the need to make separate provision in individual Acts and instruments.

61. Section 8 will also put beyond doubt that a definition of a word or expression applies despite any variation of that word or expression arising due to the operation of rules of grammar. In relation to the Welsh language text of legislation, this section will make it clear that a definition or meaning applies regardless of any mutations of a word, or variations of an expression arising due to rules about word order and sentence structure.
62. Section 8 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It has no equivalent in the 1978 Act.

### **Section 9 – References to time of day**

63. Section 9 provides that a reference to a particular time of day (such as 2pm or 2am) is a reference to Greenwich mean time, except during the period when British summer time applies, when the reference is to British summer time (that is, the time fixed for general purposes during the period of summer time by section 1 of the Summer Time Act 1972).
64. The effect of this section is not subject to the exception in section 4(1) of the Bill. Instead, section 9 will apply to a reference to the time of day unless legislation expressly provides that the reference is not to Greenwich mean time or (in summer) British summer time. This might arise in a provision which needs to refer to the time outside the United Kingdom. This section is equivalent to section 9 of the 1978 Act.

### **Section 10 – References to the Sovereign**

65. Section 10 is intended to ensure that references to the Sovereign in Assembly Acts and Welsh subordinate instruments remain up to date. Where legislation refers to the monarch, it usually does so by reference to the individual reigning at the time when the legislation is enacted. It may therefore refer to “the Queen” or “the King” or to “His Majesty” or “Her Majesty”. In the event of a change of Sovereign, this section will operate in relation to such references so that they continue to apply to the current monarch.
66. Section 10 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It corresponds to section 10 of the 1978 Act.

### **Section 11 – Measurement of distance**

67. This section provides that distances referred to in Assembly Acts and Welsh subordinate instruments are to be measured horizontally and in a straight line. It has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 8 of the 1978 Act.

### **Section 12 – Service of documents by post or electronically**

68. Section 12 contains basic provisions about the service of documents by post and electronically. It does not itself authorise or require any type of document to be

served using postal services or electronic communications. It applies only where an Assembly Act or a Welsh subordinate instrument provides for service by either or both of those methods. It is for individual Acts and instruments to determine whether those methods of service, or any others, are permitted in particular contexts.

69. Section 12(1) will apply wherever an Assembly Act or Welsh subordinate instrument provides that a document may or must be served (or given or sent etc.) by post. It means that, if the person who is to serve the document takes certain steps, the person will be regarded as having served the document.
70. Subsection (1) requires the sender to “properly address” the letter containing the document. This is intended to mean that the postal address of the intended recipient appears correctly on the letter. If it is necessary to specify which of a recipient’s addresses can be used, for example in relation to a company with multiple offices, it will be for the relevant Act or instrument to make provision about that issue.
71. Subsection (2) takes a similar approach to subsection (1), but in relation to service of documents using methods of electronic communication. It will only apply where an Assembly Act or Welsh subordinate instrument provides that a document may or must be sent electronically. This will include sending documents by email, fax or any other method of electronic communication.
72. The concept of “properly addressing” an electronic communication in subsection (2)(a) is intended to require the sender to make sure that the email, fax or other communication is sent to an email address, fax number or other electronic address which is valid and which the recipient can be reasonably expected to access, and that the address has been entered accurately. If additional requirements are wanted in particular cases, such as prior consent for service by electronic communications, they will need to be set out in the relevant Act or instrument.
73. Subsection (2)(a) allows for the attachment of documents to an electronic communication, as well as for the electronic communication itself to be the document which is being served. It is not intended to allow service to be effected electronically by sending someone a link to a document hosted on the internet, which the recipient must then take further steps to access.
74. Section 12 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It (together with section 13) corresponds to section 7 of the 1978 Act.

### **Section 13 – Day on which service is deemed to be effected**

75. This section provides for the day on which a document served electronically or by post is deemed to be served. It creates a presumption that the document was served on that day, but this can be rebutted by evidence to the contrary.
76. Section 13 relies on the concept of “the ordinary course of post” for the purposes of deeming when service by post is effected. This concept is intended to operate with any postal service that may be used, including service using first class or second class post, or some other means of expedited postal delivery. In each case, when post is

used, the sender can determine the day on which service is deemed to take place by reference to normal delivery times for the service chosen.

77. This section also deals with the deemed date of service of documents served using electronic communications. In order to reflect the near instantaneous nature of most electronic communication, the document is deemed to be served on the day it is sent.
78. Section 13 provides for the “day” on which service is deemed to take place, because periods of time specified in Welsh legislation are normally periods of whole days. If there were a case where it was necessary to identify the precise time of day at which a document was served, the relevant Assembly Act or Welsh subordinate instrument would need to make provision about that question.

#### **Section 14 – Continuity of powers and duties**

79. Section 14 puts beyond doubt that powers conferred and duties imposed on a person are continuous, and may be exercised from time to time and as necessary. It applies to all powers and duties conferred or imposed by Assembly Acts and Welsh subordinate instruments to which Part 2 applies, including powers and duties to make subordinate legislation.
80. Section 14 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 12 of the 1978 Act, which will continue to apply to powers and duties conferred or imposed by Assembly Acts that receive Royal Assent before Part 2 of the Bill comes into force, or by subordinate legislation made before then.

#### **Section 15 – Exercise of a power or duty that is not in force**

81. Subsections (1) and (2) of section 15 provide that powers and duties under provisions of Assembly Acts and Welsh subordinate instruments may be exercised before those provisions come into force. By virtue of subsection (1)(a), the section applies to provisions of Assembly Acts if they come into force at a time which is specified in the Act and is more than one day after the day of Royal Assent (but not to provisions which come into force sooner or are brought into force by order or regulations).
82. Section 15(3) sets out the purposes for which the power or duty can be exercised before the relevant provision comes into force.
83. Section 15(4) allows for reliance on other provisions in the Act or Welsh subordinate instrument which are not in force but which are incidental or supplementary to the provision granting the power or imposing the duty.
84. Section 15(5) makes it clear that any limitations or conditions which would apply to the exercise of the power or discharge of the duty if the Act or instrument were fully in force also apply when the power or duty is exercised in reliance on section 15.
85. Section 15 has effect except to the extent that express provision is made to the contrary or the context requires otherwise.
86. This section is equivalent to section 13 of the 1978 Act, but it contains a number of differences intended to clarify its scope. In particular, section 15 does not apply

where a power or duty is to be brought into force by order or regulations; it makes clear exactly when it enables the power or duty to be exercised; and it provides that the power or duty is to be exercised in the same way as if the provisions conferring or imposing it were in force.

87. Section 13 of the 1978 Act will continue to apply to powers and duties conferred or imposed by Assembly Acts that receive Royal Assent before Part 2 of the Bill comes into force, and by subordinate legislation made before then.

### **Section 16 – Inclusion of sunset provisions and review provisions in subordinate legislation**

88. Section 16 puts beyond doubt that the Welsh Ministers, or any other person making subordinate legislation under an Assembly Act, may provide in the subordinate legislation:

- a. for the legislation to cease to have effect at a specified time or at the end of specified period (a “sunset provision”);
- b. for the person who made the legislation to be required to review the effectiveness of the legislation (a “review provision”).

89. Section 16 applies to powers and duties to make subordinate legislation under Assembly Acts that receive Royal Assent after Part 2 of the Bill comes into force. It has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

90. This section is equivalent to section 14A of the 1978 Act, which will continue to apply to powers and duties to make subordinate legislation conferred or imposed by Assembly Measures, by Assembly Acts that receive Royal Assent before Part 2 comes into force, and by Acts of the UK Parliament.

### **Section 17 – Revoking, amending and re-enacting subordinate legislation**

91. Section 17 applies where an Assembly Act confers a power or imposes a duty to make subordinate legislation. It provides general powers to amend, revoke and re-enact subordinate legislation.

92. Section 17 applies to powers and duties to make subordinate legislation under Assembly Acts that receive Royal Assent after Part 2 of the Bill comes into force. It has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

93. Section 17 is equivalent to section 14 of the 1978 Act, but there are a number of differences. Section 14 applies to subordinate legislation other than rules, regulations and byelaws only if that subordinate legislation is made by statutory instrument, but that limitation has not been included in section 17 of the Bill. Section 17(2) also refers expressly to subordinate legislation made in the discharge of a duty, and limits the power to revoke and amend to the extent necessary to ensure that the duty to make the subordinate legislation cannot be undermined.

94. Like section 16, section 17 will not apply where the Welsh Ministers or other devolved Welsh authorities make subordinate legislation under Assembly Measures, under Assembly Acts that receive Royal Assent before Part 2 of the Bill comes into force, or under Acts of the UK Parliament. In those cases, section 14 of the 1978 Act will continue to apply in relation to the power or duty to make the subordinate legislation.

### **Section 18 – Amendment of subordinate legislation by an Assembly Act**

95. Section 18 applies where an Assembly Act amends or revokes subordinate legislation. Where this happens, it can give rise to questions about whether the amendment or revocation is in some way intended to limit the future exercise of the power under which the subordinate legislation is made. Sometimes express provision is made in the Act to remove any doubt about this, but the general rule in section 18 will make this unnecessary.
96. Section 18 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It has no equivalent in the 1978 Act.

### **Section 19 – Varying and withdrawing directions**

97. Most legislation which confers a power or imposes a duty to give directions contains provision about varying and withdrawing those directions. Even in instances where no express provision about variation or withdrawal of directions has been made, it may be possible to interpret the legislation as permitting the variation or withdrawal of directions given under it.
98. Section 19 removes any doubt about whether directions can be varied or withdrawn, and avoids the need to state this expressly every time a power or duty to give directions is created. This is intended to improve consistency across the legislation to which Part 2 of the Bill applies.
99. This section has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It has no equivalent in the 1978 Act.

### **Section 20 – References to portions of enactments, instruments and documents**

100. Section 20 applies where an Assembly Act or Welsh subordinate instrument refers to a portion of text in any enactment, instrument or document. For this purpose, an “enactment” has an extended meaning and includes any of the types of legislation that may apply in the United Kingdom. An “instrument” will include any kind of legal instrument, legislative or otherwise, such as an EU instrument, Royal Charter or deed.
101. Section 20 is intended to remove any doubt about the precise portion of text in the enactment, instrument or document that is being referred to. This is particularly useful in relation to provisions in legislation which make amendments. For example, in the case of a provision which states *“In section 1, for the words from “the local authority” to “officer” substitute “the county council may appoint two or more officers”*”; section 20 puts beyond doubt that the substituted text starts with, and includes, *“the local authority”*, and ends with, and includes, *“officer”*.

102. Section 20 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 20(1) of the 1978 Act, but applies to references to a wider range of instruments and documents.

### **Section 21 – Edition of Assembly Act or Assembly Measure referred to**

103. Section 21 applies to any reference to an Assembly Act or Measure in an Assembly Act or Welsh subordinate instrument to which Part 2 of the Bill applies. It enables readers of the Assembly Act or Welsh subordinate instrument to know which “edition” of the Act or Measure is being referred to.
104. Section 21 is equivalent to section 19(1) of the 1978 Act (when read with section 23B of that Act). Unlike the provisions in the 1978 Act, section 21 refers to the Act or Measure “published”, rather than “printed”. This is intended to reflect changes in arrangements. In the past, the Queen’s Printer (or a person acting under the superintendence or authority of Her Majesty’s Stationery Office) would have printed a version of an Act as it stood on receiving Royal Assent. This would have been, for all intents and purposes, the definitive version of the Act, and could be obtained from The Stationery Office. While that is still the case today, Acts are also made available on the [legislation.gov.uk](http://legislation.gov.uk) website, in a form which reflects exactly the version of the Act which is printed. This is now how the vast majority of people access and read an Act.
105. In practice, however, the [legislation.gov.uk](http://legislation.gov.uk) website updates Acts in order to incorporate amendments made to those Acts (while generally keeping the original, “*as enacted*” version of the Act available). These updates mean that the printed version of the Act and the online version of the Act will diverge. In order to avoid confusion, and to avoid having a different effect from section 19(1) of the 1978 Act (which still refers to the printed versions of Acts), section 21 refers to:
- a. the certified copy of an Assembly Act which is made and sent to the Queen’s Printer under section 115(5D) and (5E) of the Government of Wales Act 2006 once the Bill has received Royal Assent, and
  - b. an Assembly Measure as it stood when it was approved by Her Majesty in Council (see section 102 in Part 3 of the Government of Wales Act 2006, which is now repealed, but section 106 of that Act makes saving provision in relation to the repeal of Part 3 of that Act, which is now continued by paragraph 5 of Schedule 7 to the Wales Act 2017).
106. In other words, section 21 provides that references to an Assembly Act or Measure are to the version of the Act or Measure published by the Queen’s Printer etc. which reflects the Act or Measure as it stood at the moment it ceased to be a Bill or proposed Measure and was enacted as an Act or Measure.
107. Where an Assembly Act or Measure has been amended, this section must be read with section 23, so that a reference to the Act or Measure is a reference to the version published by the Queen’s Printer etc., as subsequently amended.

### **Section 22 – Edition of Act of the Parliament of the United Kingdom referred to**

108. Section 22 makes similar provision to section 21, but for references in Assembly Acts and Welsh subordinate instruments to Acts of the UK Parliament. It enables readers of Welsh legislation to determine, where that legislation refers to an Act, what “edition” of that Act is being referred to. As in section 21, the concept of publishing rather than printing is relied on.
109. Section 22 is equivalent to section 19(1) of the 1978 Act, but the citations to which it applies are described in more general terms. Section 19(1) refers to citations of Acts of the UK Parliament “by year, statute, session or chapter”. This was of particular value in a historical context; there were sometimes different editions of Acts and statutes, and in those Acts and statutes the numbering and order of provisions sometimes differed between the editions. However section 19(1) is understood to apply generally to all references to an Act of the UK Parliament. Therefore section 22 does not say that it is limited to cases where Acts are cited in particular ways.

### **Section 23 – References to enactments are to enactments as amended**

110. Section 23 addresses the situation where an Assembly Act or Welsh subordinate instrument refers to other legislation, and that other legislation is amended, whether before or after the Act or instrument is enacted.
111. Section 23 is equivalent to section 20(2) of the 1978 Act, but it seeks to clarify the extent to which its effect is “ambulatory” (i.e. the extent to which it applies to a reference to legislation which is later amended).
112. Like section 20(2) of the 1978 Act, section 23 of the Bill deals with the following situation:
- a. Act 1 is passed
  - b. Act 2 subsequently amends Act 1;
  - c. Act 3 is passed after Act 2, and contains a reference to Act 1.

In this case, the reference in Act 3 is a reference to Act 1 as amended by Act 2.

113. Section 23 also makes clear that it applies in the following case:
- a. Act 1 is passed
  - b. Act 2 subsequently amends Act 1;
  - c. Act 3 is passed after Act 2, and contains a references to Act 1;
  - d. Act 1 is amended again, by Act 4.

Under section 23, the reference in Act 3 to Act 1 becomes a reference to Act 1 as amended by Act 4.

114. Like section 20 of the Bill, this section extends the definition of “enactment” given in Schedule 1, meaning that it will apply to references in Assembly Acts and Welsh subordinate instruments to a range of other kinds of legislation existing across the United Kingdom.

115. Section 23 has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

#### **Section 24 – References to EU instruments**

116. Section 24 provides that where an Assembly Act or Welsh subordinate instrument to which Part 2 of the Bill applies refers to an EU instrument, and that instrument was amended by another EU instrument before the Act received Royal Assent or the Welsh subordinate instrument was made, the reference to the EU instrument is to that instrument as amended. Unlike section 23, its effect is not “ambulatory”. In other words, if the EU instrument is amended after the Assembly Act receives Royal Assent or the Welsh subordinate instrument is made, the reference to the EU instrument is not then treated as a reference to the EU instrument as amended.
117. “EU instrument” is defined in Schedule 1, and means any instrument issued by any institution of the European Union, excluding any retained direct EU legislation. EU instruments that become retained direct EU legislation under the European Union (Withdrawal) Act 2018 are instead treated as “enactments” (and references to them are therefore to be interpreted in accordance with section 23 rather than section 24).
118. Section 24 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 20A of the 1978 Act.

#### **Section 25 – Duplicated offences**

119. Section 25 applies where conduct is an offence under two or more different Acts or instruments to which Part 2 applies, or is an offence under one or more Acts or instruments to which Part 2 applies as well as the common law. The effect of the section is that a person whose conduct is a criminal offence can be prosecuted and punished under any of the law in question (in other words, the various criminal offences which cover the conduct in question are without prejudice to each other). However, section 25 makes it clear that the person can only be punished once for the offence.
120. Section 25 is equivalent to section 18 of the 1978 Act. That section currently applies where a person’s act or failure to act amounts to a criminal offence under any combination of two or more of the following:
- a. Acts of Parliament,
  - b. Assembly Acts and Measures,
  - c. Acts of the Scottish Parliament,
  - d. subordinate legislation made under any of the above Acts or Measures,
- or under any one or more of the above, and at common law.
121. Section 18 of the 1978 Act will continue to apply where an act or omission is an offence under an Act or Measure of the Assembly to which Part 2 of the Bill does not apply or under any subordinate legislation made under those Acts or Measures, and also is an offence under any of the other kinds of legislation to which section 18 applies or at common law.

122. Section 25(2) of the Bill makes clear that section 18 of the 1978 Act will also apply where an act or omission is an offence under an Act or instrument to which Part 2 of the Bill will apply, and under any other legislation to which section 18 applies (including Acts and Measures of the Assembly and Welsh subordinate instruments to which Part 2 of the Bill will not apply). Schedule 2 to the Bill replaces section 23B of the 1978 Act (which governs how that Act applies in relation to Assembly Acts and Measures) with new sections 23B and 23C. In section 23C, subsection (3) is intended to achieve this result.
123. Section 25 of the Bill has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

### **Section 26 – Application of Welsh legislation to the Crown**

124. The question of whether an Act or subordinate legislation binds the Crown<sup>36</sup> (that is, whether or not the Crown is subject to any duty or burden imposed by the Act) can be problematic in practice. The common law rule<sup>37</sup> is that Acts and subordinate legislation do not bind the Crown unless:
- a. the Act expressly provides that it binds the Crown,
  - b. the Crown is bound by necessary implication (though what amounts to a “necessary implication” for the purposes of the rule is not wholly certain), or
  - c. other exceptions to the rule apply (for example where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that the Crown will be bound by all relevant statutes relating to civil proceedings).
125. This means that in the absence of an express provision binding the Crown, the question of whether an Act binds the Crown needs to be considered by looking at the rule and its limits, and then determining whether the nature, context and content of the Act in question mean that the National Assembly must have meant for the Crown to be bound.
126. Section 26(1) replaces the common law rule with a statutory rule. In relation to Assembly Acts to which Part 2 applies, it reverses the common law position so that the rule is that an Assembly Act does bind the Crown. This statutory rule is not subject to the exception in section 4(1); instead, section 26(4) provides that the rule has effect except so far as the Assembly Act expressly provides otherwise.
127. The situation is more complex in relation to subordinate legislation, and a particular issue would arise if a Welsh subordinate instrument was subject to the rule in section

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<sup>36</sup> For these purposes, the Crown generally means either: the Sovereign personally; her servants and agents; and persons who are not Crown servants or agents but who for certain purpose are considered to be in an analogous position. It can also include Crown property, such as Crown land and vehicles. But the question of what amounts to the Crown for the purposes of the application of the law is not always clear.

<sup>37</sup> See in particular *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, *Lord Advocate v Dumbarton District Council* [1990] 2 AC 50; [1989] 3 WLR 136, and most recently *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81 (which, in paragraph 36 and 37, contains a “clarification” of the test behind the rule).

26, but the Act under which it was made was not. Section 26(2) deals with issue by providing that a Welsh subordinate instrument to which Part 2 applies binds the Crown if it is made under an enactment which binds the Crown or which confers a power to bind the Crown. The rule for Welsh subordinate instruments is therefore that they bind the Crown wherever it is possible for them to do so. Section 26(4) means that this rule has effect except to the extent that the Welsh subordinate instrument expressly provides otherwise.

128. Where legislation provides that it binds the Crown, it usually also includes provision making clear that it does not make the Crown criminally liable, but that this does not prevent persons in the service of the Crown being criminally liable. Section 26(3) makes general provision to this effect in relation to Assembly Acts and Welsh subordinate instruments.

### **Section 27 – Time when Welsh legislation comes into force**

129. Section 27 provides that where the day on which an Assembly Act or Welsh subordinate instrument, or a provision in such an Act or instrument, comes into force is provided for in legislation, the Act or instrument comes into force at the beginning of that day.
130. In practice, the day on which an Assembly Act or a provision in an Act comes into force is usually provided for in the Act itself<sup>38</sup>, or the Welsh Ministers are given a power to bring it into force on a specific day by making an order (usually known as a commencement order). All of these scenarios are covered by section 27.
131. Section 27 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 4(a) of the 1978 Act.

### **Section 28 – Day on which an Assembly Act comes into force**

132. Section 28 will operate where an Assembly Act does not address the coming into force of the Act or a provision in the Act (in other words, is silent as to how or when the Act or provision comes or is brought unto force). The expectation is that this provision would not be relied on in practice; but it would operate as a useful backstop.
133. Section 28 is equivalent to section 4(b) of the 1978 Act. However under section 4(b) an Act comes into force on the day on which it receives Royal Assent, whereas under section 28 of the Bill an Assembly Act or provision in an Assembly Act comes into force at the beginning of the day *after* the day on which the Act receives Royal Assent. This change removes the element of retrospectivity in section 4(b) of the 1978 Act, which could cause problems in practice, for example if a Bill received Royal Assent in the afternoon and applied retrospectively to things done that morning.
134. Like section 4(b) of the 1978 Act, section 28 of the Bill does not apply to subordinate legislation. A general backstop is not considered appropriate for such legislation,

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<sup>38</sup> Usually by providing that the Act comes into force at the end of a certain period beginning with the grant of Royal Assent, or that it comes into force on a specific date. Occasionally, an Act will provide for the Act to come into force when a certain event or other contingency occurs.

given the wide range of different types of instrument and the variety of circumstances in which they can be made.

### **Section 29 – Orders and regulations bringing Assembly Acts into force**

135. Where an Assembly Act provides for any of its provisions to be brought into force on a day appointed by order, it nearly always provides that an order may appoint different days for different purposes. Section 29 sets out this proposition generally, meaning that this provision will not need to be included on an Act-by-Act basis. This will help to shorten future Assembly Acts.
136. Section 29 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It has no equivalent in the 1978 Act.

### **Section 30 – Amendments made to or by Welsh legislation**

137. Where one piece of legislation amends another by inserting or substituting material, questions may arise as to whether that material is to be interpreted and given effect as part of the legislation which made the amendment, or as part of the legislation into which the material has been inserted. This question may be more significant if different rules of interpretation apply to each piece of legislation (for example, if an Assembly Act or Welsh subordinate instrument to which Part 2 applies amends an Act of the UK Parliament or other legislation to which that Part does not apply).
138. The general position at common law is that the effect of an amendment is to be determined by interpreting the legislation that has been amended, rather than the amending legislation<sup>39</sup>. Section 30 makes express provision that is intended to reflect this common law position, for cases where an amendment is made by or to (or by and to) an Assembly Act or a Welsh subordinate instrument.
139. The common law does recognise that in some circumstances it may be necessary to refer to the amending legislation in order to interpret the legislation that it amends, in order to give effect to the intention of the legislator in enacting the amending legislation. In the Bill, this is reflected in the fact that the effect of section 30 is subject to any express provision to the contrary or to the context requiring otherwise, by virtue of section 4(1).
140. Section 30 does not have any equivalent in the 1978 Act. However, section 23ZA of the 1978 Act (which is inserted by paragraph 20 of Schedule 8 to the European Union (Withdrawal) Act 2018) provides that most of that Act applies to retained direct EU legislation (other than subordinate legislation) so far as it is amended by domestic legislation including Assembly Acts and subordinate legislation.

### **Section 31 – Repeals and revocations do not revive law previously repealed, revoked or abolished**

141. Section 31 overrides the common law rule that when an Act is repealed, it is treated as if it had never been enacted except in relation to things already done and finished under the Act.
142. This section deals with the situation where:

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<sup>39</sup> See, for example, *Inco Europe Ltd v First Choice Distribution* [1999] 1 WLR 270.

- a. Act 1 is passed.
  - b. Act 2 subsequently repeals Act 1.
  - c. Act 3 then repeals Act 2.
143. At common law, the effect of Act 3 would be to revive Act 1. As this is rarely the desired outcome in practice, section 31 provides that in the above circumstances Act 3 does not revive Act 1.
144. Section 31 also deals with the situation where Act 1 abolishes a rule of common law, and then Act 2 repeals Act 1. Again, the common law position would be that Act 2 revived the rule that had been abolished. Section 31 prevents the revival of the previously abolished rule.
145. Section 31 operates in relation to repeals and revocations made both by Assembly Acts and by Welsh subordinate instruments. And given the definition of “enactment” in Schedule 1, it operates where an Assembly Act or Welsh subordinate instrument repeals or revokes any Assembly Act or Measure, Act of the UK Parliament, retained direct EU legislation, or any subordinate legislation made under any of those kinds of legislation.
146. Section 31 is not subject to section 4(1) of the Bill; so if the intention is that the rule in section 31 should not apply in relation to a particular repeal or revocation, express words will be needed in the Act or instrument making the repeal in order to revive the earlier enactment or rule.
147. Section 31 is equivalent to section 15 of the 1978 Act. However, section 15 applies only to the repeal of legislation which previously repealed another enactment, and not to the repeal of legislation which abolished a common law rule. In the 1978 Act, the latter situation is instead treated as falling within section 16(1)(a), which has a similar effect but is subject to the general “contrary intention” rule in the 1978 Act.

### **Section 32 – General savings in connection with repeals and revocations**

148. Section 32 operates in relation to the same common law rule as section 31. Its purpose is to ensure that the repeal of a law does not mean that things which happened or matters which arose prior to the repeal are to be treated as if they were never subject to that law.
149. Where an Assembly Act or Welsh subordinate instrument repeals or revokes another enactment, section 32(2):
- a. in paragraph (a), provides for a rule which is a kind of expansion of the rule in section 31, so that a repeal or revocation does not revive anything that was not previously in force (such as a contract which the repealed legislation made illegal or invalid);
  - b. in paragraph (b), provides more generally that the repeal or revocation operates only in relation to the future and does not affect anything done under the repealed legislation while it was in force.

150. Section 32(3) preserves rights and liabilities that arose while the legislation was in force, and enables steps to be taken to enforce those rights and liabilities after the legislation has been repealed. For example, if a person committed an offence under a law which was repealed after the offence was committed but prior to the matter being brought to trial, section 32(3) means that the person can still be tried and punished under that law.
151. Like section 31, section 32 will operate where an Assembly Act or Welsh subordinate instrument repeals or revokes any Assembly Act or Measure, Act of the UK Parliament, retained direct EU legislation, or any subordinate legislation made under any of those kinds of legislation. Unlike section 31, it will also apply where a temporary Assembly Act or Welsh subordinate instrument expires, by virtue of section 35(2).
152. Section 32 is intended to have the same effect as section 16 of the 1978 Act. The only change is that the repeal of an enactment which previously abolished a rule of common law is dealt with in section 31 rather than in this section.
153. Section 32 has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

### **Section 33 – Effect of re-enactment**

154. Section 33 operates where:
  - a. an Assembly Act or Welsh subordinate instrument repeals or revokes a provision in any Assembly Act or Measure, Act of the UK Parliament, retained direct EU legislation, or any subordinate legislation made under any of those types of legislation; and
  - b. an Assembly Act or Welsh subordinate instrument re-enacts the provision that is repealed or revoked.
155. By virtue of section 35(2), this section will also apply where a temporary Assembly Act or Welsh subordinate instrument expires and is re-enacted by another Assembly Act or Welsh subordinate instrument.
156. In those cases, section 33(2) means that a reference to the provision which has been repealed or revoked (or has expired) is to be read as a reference to the provision as re-enacted. Section 33(2) applies to references in any of the kinds of legislation mentioned above, and also to references in any other legal instrument (such as a deed, will, contract or lease) or any other document.
157. In practice, wherever possible the repealing or revoking enactment (or another enactment) would make the necessary amendments to all references to the repealed provisions. But in case that does not happen, section 33(2) will provide a useful backstop, and ensure that enactments which refer to those provisions continue to operate.
158. Section 33(3) and (4) provide that any subordinate legislation that has been made, and any other things that have been done, under a repealed provision which has

been re-enacted are to be treated as having been made or done under the re-enactment.

159. Section 33 is equivalent to section 17(2) of the 1978 Act, but there are some differences between them. Section 17(2) only operates where the repeal and re-enactment are provided for in the same Act. Section 33 will operate where the repeal is provided for in one Assembly Act or Welsh subordinate instrument, and the re-enactment is provided for in a different Assembly Act or Welsh subordinate instrument. This will make it easier to rely on section 33 where necessary. For example, in a consolidation exercise it may be desirable to have one Act setting out the consolidated law, and another Act which deals with all of the repeals and consequential amendments.
160. In addition, whereas section 17(2)(a) provides that a reference to the repealed enactment “shall be construed as” a reference to the re-enacted provision, section 33(2) provides that the reference is to be read as “(or as including)” a reference to the re-enactment. This is intended to clarify that the reference may need to continue to operate as a reference to *both* the repealed enactment *and* the re-enactment. For example, if an Assembly Act amends an Act of the UK Parliament so that it no longer applies to Wales, and restates the provisions of that Act that applied to Wales, there may be references to the Act of the UK Parliament that need to be treated as references to both that Act and the new Assembly Act.
161. The reference in section 33(2) to any “instrument or document” corresponds to the provision made by section 23(3) of the 1978 Act for section 17(2)(a) to apply to “any deed or other instrument or document”. Section 33(2) does not make express reference to deeds because there is no doubt that deeds are “instruments”. Provisions modifying references as a consequence of legislative changes do not normally single out deeds for separate mention.
162. Section 33 has effect except to the extent that express provision is made to the contrary or the context requires otherwise.

#### **Section 34 – Referring to an Assembly Act by its short title after repeal**

163. The short title of an Assembly Act is generally provided for in a provision in the Act itself, and as its name suggests it provides a short and convenient title which can be used in other legislation to refer to the Act. Section 34 has the effect of preserving the validity of references to an Act by its short title even after the Act, and the provision which concerns its short title, have been repealed. By virtue of section 35(2), section 34 also applies to the short title of a temporary Assembly Act which expires.
164. Section 34 has effect except to the extent that express provision is made to the contrary or the context requires otherwise. It is equivalent to section 19(2) of the 1978 Act.

#### **Section 35 – Meaning of repeal and revocation in this Part**

165. Section 35 makes provision about the meaning of references to the repeal and revocation of legislation in Part 2.

166. At common law, “repeal” and “revoke” include not just express repeals and revocations, but any limitation of the effect of an enactment. This includes an Act which provides that another enactment “*ceases to have effect*” or that it no longer applies in relation to a place, person or thing; and cases where an amendment to an enactment (or the substitution of anything for the enactment) in any way limits the operation or effect of the enactment<sup>40</sup>.
167. Section 35(1) is intended to reflect the meaning that repeal and revocation would already have at common law. It also applies to the reference to the abolition of a rule of law in section 31.
168. The effects of section 35(2) in relation to temporary legislation are discussed above in relation to sections 32 to 34. Temporary legislation is legislation that has effect only for a limited duration and which does not require additional legislative action to be taken for it to be repealed or revoked (i.e. it will repeal or revoke itself after the duration specified comes to an end).
169. The definitions in this section do not apply outside Part 2 (unlike the definitions in Schedule 1, which will apply to all Assembly Acts and Welsh subordinate instruments to which Part 2 will apply).

### ***Part 3: Miscellaneous***

#### **Section 36 – Power to replace descriptions of dates and times in Welsh legislation**

170. Section 36(1) gives the Welsh Ministers a power to amend Welsh legislation which contains a description of a date or time, by inserting a reference to the actual date or time once it is known. The power is available where a date or time is described by reference to the coming into force of an enactment or the occurrence of any other event. For example, if an Assembly Act refers to things done on or after “the day on which section 10 comes into force”, and section 10 is brought into force on 1 January 2018, the Act could be amended to refer to things done on or after “1 January 2018”.
171. The power in section 36(1) cannot be used to change the effect of the legislation in question, but only to change the way in which that effect is expressed. The purpose of the power is to make legislation simpler and more accessible. Regulations under section 36(1) will mean that people reading the up-to-date text of the legislation will be able to understand references to dates or times without needing to refer to other legislation or documents (such as commencement orders).
172. Where a date is inserted, readers may find it helpful to know the significance of that date. Section 36(2) therefore enables regulations under section 36(1) to add an explanation of the date they insert. For example, it might sometimes be helpful to replace “the day on which section 10 comes into force” with “1 January 2018 (the day on which section 10 came into force)”.
173. Subsection (2) also confers a power to make consequential amendments, repeals and revocations. For example, if Welsh legislation contained references to an “appointed

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<sup>40</sup> In *Moakes v Blackwell Colliery Co* [1926] 2 KB 64, 70, the substitution in an Act of a reference to an amount of money with a reference to a higher amount of money was held to be a repeal.

day,” which were replaced with references to the actual day that was appointed, an amendment might be made to remove the definition of the “appointed day”.

174. Subsection (3) identifies the Welsh legislation that may be amended under this section, to include primary and secondary legislation made by the National Assembly for Wales and the Welsh Ministers. The power may be used to amend both existing legislation and legislation enacted after this section comes into force.

### **Section 37 – Power to make subordinate legislation in different forms**

175. Since 2014, Assembly Acts and Acts of the UK Parliament have usually given the Welsh Ministers powers to make subordinate legislation in the form of regulations rather than orders or rules. However, the Welsh Ministers still have many powers to make orders and rules under earlier legislation. This section enables the Welsh Ministers to exercise powers to make regulations, rules or orders by making any other of those forms of subordinate legislation. For example, a power to make orders could instead be exercised to make regulations.

176. Section 37 is intended to remedy the situation where it is necessary to make a number of different regulations, rules or orders to give effect to a single policy. It applies to subordinate legislation that is made by statutory instrument, and its purpose is to enable different forms of subordinate legislation to be combined in the same instrument. Making a single statutory instrument may not only be administratively convenient but may also enable the legislation to tell its story more coherently.

177. Subsection (2) makes clear that making subordinate legislation in a different form under this section does not affect the procedure for making an instrument. For example, if an order-making power in an Act is used to make regulations in reliance on this section, the procedure that would apply to orders under the Act still applies.

178. Where other legislation, legal instruments or documents contain references to regulations, rules or orders made under particular powers, subsection (3) adapts those references to take account of the possibility that subordinate legislation under those powers may be made in a different form as a result of this section.

179. Section 37 applies regardless of the source of the Welsh Ministers’ power or duty to make subordinate legislation, and regardless of when the power was conferred or the duty was imposed. However, subsection (4) provides that the power in this section cannot be used where the Welsh Ministers make subordinate legislation that applies otherwise than in relation to Wales under an Act of the UK Parliament or retained direct EU legislation. In other words, the power can be used where the Welsh Ministers make subordinate legislation under an Assembly Act or Measure, and where they make provision that applies only in relation to Wales under an Act of the UK Parliament or retained direct EU legislation.

### **Section 38 – Combining subordinate legislation subject to different Assembly procedures**

180. Section 38 makes provision about the combination in a single statutory instrument of subordinate legislation made by the Welsh Ministers using different powers to which different Assembly procedures apply. It ensures that the instrument is subject to the

most stringent of the procedures that would otherwise apply. For example, if a statutory instrument contains some provisions that would attract the affirmative procedure and some provisions that would attract the negative procedure, this section means that the affirmative procedure applies to the whole instrument (and that the negative procedure does not apply).

181. Many Acts already contemplate the combination in a single instrument of subordinate legislation made under different powers within the same Act, even where those powers would normally attract different procedures. For example, an Act may provide that any instrument containing regulations under certain powers in the Act is subject to the affirmative procedure (whether or not it also contains regulations under other powers), and that the negative procedure applies to “any other” instrument containing regulations under the Act (i.e. any instrument that does not contain regulations under the powers that attract affirmative procedure).
182. However, provisions about Assembly procedure for statutory instruments do not always deal with this issue, and they do not usually cater for the combination in the same instrument of provisions subject to different procedures that are made under different Acts. The purpose of section 38 is to facilitate the combination in a single statutory instrument of provisions that are subject to different procedures, whether they are made under powers in the same Act or different Acts, and to avoid any procedural difficulties that would be caused by combining provisions in this way.
183. Subsection (1) achieves this by providing that, where more than one Assembly procedure would apply, it is only whichever of those procedures mentioned first in subsection (2) that applies. Subsection (2) then lists the different types of Assembly procedure from the most stringent to the least stringent, starting with the draft affirmative procedure in paragraph (a) and ending with no procedure in paragraph (e).
184. Subsection (3) makes clear that making subordinate legislation in a combined statutory instrument to which this section applies does not prevent the Welsh Ministers making subordinate legislation in separate instruments in the future, or affect the procedure that applies to any separate instruments they make. For example, if regulations under a power that would normally attract the negative procedure have been included in a statutory instrument that is subject to the affirmative procedure, the Welsh Ministers may make further regulations under that power in a separate statutory instrument that is subject to the negative procedure.

#### *Part 4: General*

##### **Section 39 and Schedule 2 – Amendments and repeals in consequence of this Act**

185. This section and Schedule 2 provide for the amendment of the 1978 Act, the Government of Wales Act 2006 and the Waste (Wales) Measure 2010.
186. The amendments to the 1978 Act are consequential on Part 2 of the Bill. The new section 23B of the 1978 Act ensures that the 1978 Act no longer applies to Assembly Acts and Welsh subordinate instruments to which Part 2 applies, but that the 1978 Act continues to apply to other Assembly Acts, Assembly Measures and Welsh subordinate instruments.

187. Section 23B(4) makes clear that sections 12 to 14A of the 1978 Act continue to apply to existing powers and duties (and powers and duties under future Acts of the UK Parliament) that are exercised to make Welsh subordinate instruments after Part 2 of the Bill comes into force. However, section 11 of the 1978 Act, which provides that words have the same meaning in subordinate legislation as they have in the parent Act, will not apply to instruments that are subject to Part 2.
188. The 1978 Act will continue to apply to Acts, Measures and instruments enacted before Part 2 of the Bill comes into force. Under section 23B(3)(b) and (c), the 1978 Act will also continue to apply to two categories of Welsh subordinate instrument made under Acts of the UK Parliament or retained direct EU legislation after Part 2 comes into force. It will apply to those instruments if they are made with any person who is not a devolved Welsh authority (e.g. joint or composite instruments containing subordinate legislation made by the Welsh Ministers and a Secretary of State) or if they contain any provisions that apply otherwise than in relation to Wales.
189. New section 23C makes provision about how references in the 1978 Act to enactments and other types of legislation will operate in relation to Welsh legislation, including Assembly Acts and Welsh subordinate instruments to which Part 2 of the Bill applies. These provisions are intended to ensure that the 1978 Act continues to operate correctly in relation to interactions between legislation to which that Act applies and legislation to which Part 2 of the Bill applies.
190. Section 23B of the 1978 Act was originally inserted by paragraph 11 of Schedule 10 to Government of Wales Act 2006. Because Schedule 2 to the Bill is replacing all of section 23B, it also repeals the paragraph that inserted the section.
191. The repeals in the Waste (Wales) Measure 2010 remove provisions which have the same effect as section 37 of the Bill in relation to subordinate legislation under the Measure, and which will no longer be necessary once that section comes into force.

#### **Section 42 - Coming into force of this Act**

192. This section makes provision about when and how the Bill comes into force.
193. Part 1 of the Bill will come into force the day after the Bill receives Royal Assent. However, section 2 will not have any immediate effect in practice, because it requires a programme to be prepared only for each Assembly term that begins after the section comes into force, and requires the programme to be laid before the Assembly within 6 months after the appointment of a First Minister following an Assembly general election.
194. Part 2 will come into force the day after Royal Assent so far as it applies to the interpretation and operation of the Bill itself. The power in section 5(2) and (3) to amend Schedule 1 will also come into force the day after Royal Assent, in case the Schedule needs to be amended before it comes fully into force.
195. An order made by the Welsh Ministers will bring Part 2 into force in relation to other Assembly Acts and in relation to Welsh subordinate instruments. It is expected that the order will bring Part 2 fully into force at the start of a calendar year, so that it is

possible to tell from the year included in the title of an Act or instrument whether Part 2 applies to it.

196. Parts 3 and 4 will come into force the day after the Bill receives Royal Assent.