

**WALES GOVERNANCE CENTRE ANNUAL LECTURE 2013.**  
**THE LAW COMMISSION AND LAW REFORM IN A DEVOLVED WALES.<sup>1</sup>**  
**SIR DAVID LLOYD JONES.**

**Introduction.**

Wales, it has to be said, has come a very long way in a short time. Having been whisked into devolution on the hem of a kilt, in the words of Professor Sir David Williams, we have now entered upon our third constitutional settlement in a little more than a decade. The second of those, which it was widely thought would last a generation, has rapidly been superseded after only four years. Wales now has its own legislature and its own government, although the competence of both is limited and subject to the overriding sovereignty of the United Kingdom Parliament. These developments and the speed with which they have come about have brought with them many new opportunities; but they have also brought many new challenges.

The recent implementation of Part 4, Government of Wales Act 2006 means that, for the first time in over 450 years, it is meaningful to speak of Welsh law as a living system of law. The law of Wales is now made in Brussels, Westminster and in Cardiff Bay – but the fact that a democratically elected National Assembly now possesses direct legislative powers on certain specified subjects means that Wales has some laws which are peculiarly its own, as Professor Thomas Glyn Watkin puts it.<sup>2</sup> Welsh law in this sense extends to England and Wales – it is a part of the law of England and Wales – but it applies only in relation to Wales. So, we now have Welsh law in force in Wales and, inevitably, in the years to come we are going to see an increasing divergence between English law and Welsh law in relation to the devolved subjects.

The context in which it operates is unusual, if not unique. Wales and England form one legal jurisdiction. They are one legal district, one unit for the purposes of private international law, whereas Scotland and Northern Ireland are distinct units with their own legal systems. England and Wales has two legislatures: a sovereign legislature in Westminster with the power to make law for the entire unit and a devolved legislature

---

<sup>1</sup> I am very grateful to Mr. Richard Percival of the Law Commission of England and Wales for his assistance in the preparation of this lecture.

<sup>2</sup> Professor Thomas Glyn Watkin, The Legal History of Wales, (2<sup>nd</sup> Ed.), 2012.

in Cardiff with the power to make law for Wales. Wales and England continue to share one courts system – as they have done since 1830 – and to share the legal professions of barristers and solicitors, although it is right to note that within that shared system there are many modifications which recognise the distinct character of Wales.<sup>3</sup> On the other hand Wales now has its own tribunals system operating in relation to devolved subjects, such as special educational needs and mental health, running in parallel to a system of cross-border tribunals operating in relation to reserved matters.

One of the matters currently under consideration by the Silk Commission is, of course, whether Wales should become a separate jurisdiction and precisely what that might mean. I note that the position of the Welsh Government on this issue in its evidence to the Silk Commission is that while it would not be appropriate to establish a separate legal jurisdiction for Wales now, such a development is very likely in the longer term.<sup>4</sup> My purpose today is not to consider the possible advantages or disadvantages of a separate jurisdiction. Indeed, I should make clear before I go any further that, as a judge, it would not be appropriate for me to express any view on the desirability or otherwise of such constitutional issues. As the Lord Chief Justice has made clear on a number of occasions – in particular in his speech to the Legal Wales Conference in Cardiff in 2009 - it is not for the judges to make the running on such issues of constitutional policy or to obstruct them.<sup>5</sup> Moreover, and for similar reasons, it would not be appropriate for the Law Commission to express a view on that question. The Law Commission has given evidence to the Silk Commission, but that evidence is limited to a consideration of what is necessary to facilitate the operation of the Law Commission in relation to Wales. However, what the judges and the Law Commission can legitimately do in the context of Wales is to respond to the fact of devolution and the changes which have taken place and to play their part in seeking to

---

<sup>3</sup> David Lloyd Jones, *The Machinery of Justice in a Changing Wales*, (2010) 16 Transactions of the Cymmrodorion 123. Here I have in mind, for example, the fact that the Civil and Criminal Divisions of the Court of Appeal both sit regularly and frequently in Cardiff (the only place where they now sit outside London), the particular role of the Administrative Court in Wales deciding Welsh public law cases throughout Wales, the Welsh Committee of the Judges' Council advising the Lord Chief Justice on Welsh matters, and the status of the Welsh language in courts in Wales.

<sup>4</sup> Evidence submitted by the Welsh Government to the Commission on Devolution in Wales, 18 February 2013, p. 2.

<sup>5</sup> Lord Judge, Lord Chief Justice, Lecture to Legal Wales Conference, Cardiff, 9<sup>th</sup> October, 2009. <http://www.judiciary.gov.uk/docs/speeches/lcj-legal-wales-conf.pdf>

ensure that the legal system and the substantive law continue to meet the needs of the people of Wales under changing constitutional conditions.

Not the least of the challenges which the latest settlement has brought in its wake is in the area of law reform. The demands of law reform will undoubtedly be different in a devolved Wales as Welsh and English law diverge. The Law Commission of England and Wales needs to ensure that, in these fundamentally changed circumstances, it remains an effective law reform body both for Wales and for England. My theme this evening is, therefore, how the law reform needs of a devolved Wales can best be met and what contribution the Law Commission might be able to make to that process. But before turning to the Welsh dimension, it is necessary to say something about the bigger picture and, in particular, the role of the Law Commission in relation to England and Wales.

### **The Law Commission.**

At the time when the Law Commission of England and Wales was established by Parliament by the Law Commissions Act of 1965, there was widespread concern that the law had become unclear, inaccessible, outdated and, in some instances, unjust. This concern had been most notably expressed by Gerald Gardiner QC and Andrew Martin in their influential book “Law Reform – Now” in which they argued that the solution for bringing the law up to date and keeping it up to date was largely one of machinery. The creation of the Law Commission as an independent body with the purpose of promoting the reform of the law was intended to be an essential element in remedying this situation. Its primary duty is:

“... to take and keep under review all the law of [England and Wales] ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law ...”<sup>6</sup>

From the start there have been four main streams of work at the Commission.

---

<sup>6</sup> Law Commissions Act, 1965, section 3.

- The best known is that which involves projects of law reform, which after detailed study and consultation result in recommendations by the Commission to the Government for reform, usually accompanied by draft legislation. These may be included in a programme of law reform projects – we are currently in the Eleventh Programme – or may result from an ad hoc reference by a Government department. The Eleventh Programme was adopted by the Commission and approved by the Lord Chancellor after four months of consultation with judges, lawyers, academics, central and local government, other public bodies, businesses, consumer organisations and the public.<sup>7</sup> In June we will be launching the consultation on what subjects should be covered in our forthcoming Twelfth Programme of Law Reform.
- Secondly, the Commission makes proposals for consolidation of legislation. The Parliamentary Counsel seconded to the Commission, who prepare the draft bills which accompany our reports on law reform, also undertake the work of preparing consolidation bills. We currently have two Parliamentary counsel at the Commission and a third will be joining us shortly.
- Thirdly, the Commission's statute law repeals team focuses on repealing Acts of Parliament that have ceased to have any practical utility, because they are spent or obsolete.
- Fourthly, from time to time, the Commission provides advice to Government. (For example, last year we were asked by the Ministry of Justice and the Department for Business, Innovation and Skills to advise on the advantages and disadvantages of a common European Sales Law.)

The Law Commission consists of a Chairman (who has to be a High Court Judge or a Lord Justice of Appeal) and four Law Commissioners. We are particularly fortunate in that each of the four Commissioners is outstanding in his or her field and together they have a wide range of experience; two are professors of law, one is a solicitor in the City of London and one a QC. Each heads a team of expert lawyers devoted to a subject area: criminal law, public law, common and commercial law, and family, property and trusts. We currently have a staff of 18 lawyers and 18 research assistants.

---

<sup>7</sup> Law Commission, Eleventh Programme of Law Reform (Law Com No. 330), 19 July 2011.

We occupy premises in Tothill St., Westminster, about 100 yards from the West Door of Westminster Abbey. So we are conveniently placed for Parliament and for government departments, including the Ministry of Justice which is our sponsoring department.

However, we are not part of the government. We were created by Parliament to act independently of Government. So we are not an in-house legal department for the Ministry of Justice or any other Government Department. Sometimes we are critical of Government policy. Sometimes the Government will disagree with us on our proposals for law reform. Equally we are not a think tank or a pressure group. We are a public body. We are uniquely placed because we are independent of government but at the same time we are close enough to Government to be able to influence decisions on law reform.

We currently have 28 law reform projects on the go. They range from the reform of electoral law to unfair contract terms, from hate crimes to easements and rights to light. Our current projects also include:

- non-disclosure and misrepresentation in commercial insurance contracts;
- unjustified threats in intellectual property proceedings;
- the regulation of taxis and private hire vehicles;
- the regulation of health care professionals (currently 1.2 million professionals subject to 32 different professional codes);
- insanity and fitness to plead;
- matrimonial property;
- data sharing between public bodies;
- wildlife management;
- the law of level crossings.

Many of the projects are necessary because of changes in the way we live. Law reform has to reflect changes in society generally. That is an important driver in our projects, for example, in the area of family law and inheritance. But the law also has to respond to technological changes. So, for example, we currently have a project on the electronic communications code i.e. the rules governing all the masts and other installations which make our mobiles and iPads work. The law here is unsatisfactory

and way out of date and in February we published a consultation paper proposing reform in this area. These technological changes have also had an important bearing on our contempt of court project, on which we have recently been consulting. The advances in information technology mean that it is all too easy for jurors to find out information about the case on which they are sitting or about the defendant on the internet. The Law Commission is proposing that the courts should have the power to order specific postings on the internet to be taken down for the duration of the trial. However, that raises questions of freedom of speech and our proposal is being vigorously opposed in some parts of the media. The question here is: how do you draw a balance between the competing interests of freedom of expression and the right to a fair trial? It is a problem which we addressed in our consultation paper published last autumn. We plan to publish our report on the law of contempt of court in the spring of 2014.

### **The impact of devolution.**

#### **Scotland and Northern Ireland.**

The Law Commission of England and Wales is one of three law commissions within the United Kingdom. The Scottish Law Commission was created in 1965 at the same time as the Law Commission of England and Wales.<sup>8</sup> The Northern Ireland Law Commission was created in 2007 under the Justice (Northern Ireland) Act 2002, as amended.<sup>9</sup>

Each Law Commission corresponds to a distinct legal system and each undertakes projects specific to its own jurisdiction. Ministers of devolved governments in Scotland and Northern Ireland are empowered to refer law reform projects to their respective Law Commissions. In each case programmes of law reform are approved by the devolved executive and proposals for reform in the devolved fields are implemented by the devolved legislatures.

However, the existing law often operates on a United Kingdom-wide basis and in these circumstances it is often appropriate for the Law Commissions to carry out joint projects. The Law Commission of England and Wales and the Scottish Law

---

<sup>8</sup> Law Commissions Act, 1965.

<sup>9</sup> Sections 50-52, Justice (Northern Ireland) Act 2002 (c. 26).

Commission have carried out a number of joint projects – a current example is our project on the law of level crossings - and the three Law Commissions in the United Kingdom are currently working jointly on the projects on the regulation of healthcare professionals and on electoral law which I mentioned earlier. More UK-wide projects are likely in the future.

### **The Welsh Dimension.**

What about Wales? At the moment Wales shares a Law Commission with England just as it shares a legal system with England. It is clearly incumbent on the Law Commission to ensure that, in this post-devolution age, it is properly meeting the law reform needs of Wales, as well as those of England. What, then, has the Law Commission of England and Wales done for law reform in Wales?

I should like to take a little time to tell you something about our recent projects falling within the devolved areas – both because of their intrinsic interest and because of what they reveal about the complexities of working within the rapidly changing devolution settlements.

### **Adult Social Care.**

Last week, the Stage 1 Committee of the Assembly held its first public session on the Social Services and Wellbeing (Wales) Bill. The bill seeks to reform the structure of social services for both children and adults, and represents a significant departure from the law in force in England. The proposals in relation to adults draw heavily on the proposals in our report on Adult Social Care, which we published in May 2011.<sup>10</sup> For us in the Law Commission, this bill is an important milestone. It is the first time that the Assembly has sought to implement a Law Commission report, using its powers under Part 4 of the Government of Wales Act 2006.

The origins of this bill go back to the consultation on our last programme of law reform. The project was proposed to us by The Law Society, MIND and the parents of disabled adults. As we considered the project, we consulted the Welsh Assembly Government, as we did the Department of Health in England, and as the project progressed, we ensured that our arrangements for on-going liaison with the

---

<sup>10</sup> Law Commission Report No. 326: Adult Social Care, May 2011.

Department for Health were mirrored in Wales. At the outset, Welsh Ministers decided not to make it a joint project (that is, loosely, one jointly sponsored by the Welsh Government and the Department of Health), but that made little if any difference to the running of the project.

In our report we described the law relating to adult social care as “inadequate, often incomprehensible and outdated”. It is a confusing patchwork of conflicting statutes enacted over a period of 60 years – much of the fundamentals still being based on the National Assistance Act 1948. Moreover, much of the real substance of the applicable rules was to be found in ministerial directions and statutory guidance.

However, this is an area of the law which affects an enormous number of people. At some time in our lives, most of us will come into contact with adult social services, for ourselves or for members of our family or friends. In 2008, 1.77 million adults in England and Wales were receiving support from local authorities, and the Westminster Government estimates that that will double in the next twenty years.

Given the numbers of those affected by the law of adult social care, we thought it essential to engage as widely and as deeply as we could with the full range of stakeholders. Members of the team at the Law Commission, including my predecessor as Chairman, Sir James Munby, and Frances Patterson QC, the Commissioner leading on the project, therefore attended a large number of conferences, workshops, seminars and other events during the consultation period. The largest single event in the whole consultation was a major conference organised on our behalf in Cardiff by the Older People’s Commissioner for Wales and Age Cymru. But just as important as these large scale events were the more local, the more user-focussed events: workshops with Conwy Connect, a local organisation for people with learning disabilities, or members of the team visiting disabled service users in their own homes in Newport, Barry and Neath. Overall, 15% of all consultation events on this project took place in Wales.

When we started the project, there were some legal differences between England and Wales, but they were few and minor. There was, however, a distinct and growing difference in the general direction of policy at the governmental level. This was in due



course reflected in two Measures adopted by the National Assembly during the currency of the project, on charging for adult social care services and on consultation with carers. As it turned out, it is possible to track these distinctive policy outlooks and the changes in the devolution settlement in our treatment of implementation in England and Wales through the progress of the project.

In our consultation paper, published in February 2010, we provisionally proposed “that the vehicle for our reform should be a unified adult social care statute covering both England and Wales”. Such differences of law as there were, we thought, did not justify separate statutes for each country. But at that point, the choice was between a single, combined England and Wales Act and the model provided by the National Health Service Acts 2006 – i.e. two Acts, one for England and one for Wales, both enacted by the UK Parliament. It seemed to us at that time that there would be very little difference, if any, between an English adult social care statute and a Welsh one. We did, however, note the importance of keeping the issue under review in the light of the then expected referendum on introducing Part 4 of the Government of Wales Act 2006.

Our final report was published immediately after the last Assembly elections and the introduction of the Part 4 system. The adult social care project was an unusual project for us, in that it was not accompanied by draft legislation. By this time, our view had changed. We said that “it would be constitutionally infelicitous to propose that the UK Parliament legislate for Welsh adult social care, whether in one UK bill covering both England and Wales, or in separate Westminster bills for each country.” We went on to recommend that our proposals should be implemented in Wales by an Act of the National Assembly. We said “this would allow for the legislation itself to be made in Wales and would give the Welsh Assembly the freedom to implement our recommendations in the way they preferred”.

I should add that the Department of Health has also accepted the report for England, and a bill has been published in draft for pre-legislative scrutiny. So on this occasion Wales has got there first.

### **Renting Homes (Wales).**

The contrast with England is much stronger, and to England's detriment, when we consider what I hope will be the Law Commission's next project to be implemented by the Assembly. That is the project on Renting Homes, which relates to the law of housing tenure. This is another example of an area of law beset by legislative intervention after intervention, adding layer after layer of complexity to an area of the law that affects the lives of millions of people. This project pre-dates that relating to adult social care, the Law Commission having reported as long ago as May 2006.<sup>11</sup> The report proposed a radical restructuring of the law, sweeping away dozens of different types of statutory and common law tenancies and licences, and replacing them with two new "occupation contracts". It also included a tailored system for supported housing provided for homeless people and others.

This project, once again, involved a substantial consultation process with the full range of Welsh stakeholders. As a result, we came to appreciate the importance of understanding the distinctive positions and outlook of Welsh interested parties and policy makers, which were often substantially different from those of similar organisations in England.

In the result, our proposals were widely supported by consultees in both countries, but there was a higher level of support in Wales than in England. In relation to supported housing in particular, we had worked with stakeholders in both countries to improve and refine proposals, but again the final recommendations were more positively received in Wales than in England.

We published our final recommendations, with a draft Parliamentary bill, in the summer of 2006. The draft bill therefore reflected the position under the Government of Wales Act 1998. The draft bill provided that the single most important rule in our proposed system – the rule that gave council and housing association tenants the same right to the high security "secure occupation contract" – should be in primary legislation. However, we also recommended that it should be subject to a Henry VIII

---

<sup>11</sup> Law Commission Report No. 297: Renting Homes, May 2006.

power for the National Assembly to amend it in future, but with no equivalent power for the Secretary of State in respect of England.

The Law Commission was, in fact, finalising its report at the same time that the bill that became the Government of Wales Act 2006 was making its way through Parliament. The draft bill on Renting Homes had to be written on the basis of the law in force at the time, that is, the 1998 Act. However, in the report, we recommended that, while there should be a single England and Wales bill to implement our new system, it should add “housing tenure” as a matter in the relevant field, to allow policy makers in Wales to legislate in the future, under the Part 3 system.

Our recommendations in the Renting Homes report went further. We recommended that, if Whitehall was not interested in implementing our proposals, then the Welsh Assembly Government should seek a legislative competence order to do so on a Wales-only basis. By the time the report was published, it was clear to the Commission that the appetite for reform was already significantly sharper in Wales than in England.

Indeed, in our 2007-2008 annual report, we contrasted the response in England with what we described as the “imaginative and positive policy reaction” from Welsh Ministers and officials.<sup>12</sup> In the result, the Westminster Government rejected the proposals in respect of England, whereas they were accepted in principle by Welsh Ministers. A legislative competence order, which would have allowed for legislation on much, but not all, of Renting Homes was passed by the last Assembly, but only right at the end of its life.<sup>13</sup>

With the move to the Part 4 system, and the announcement of a Housing Bill in the legislative programme in July 2011, the Welsh Government embarked on a major policy initiative to consider an ambitiously wide range of policy options in relation to housing. Eventually, in a White Paper published in May 2012, the Welsh Government announced that it would seek to legislate on the basis of the Law Commission Report on Renting Homes during the life of the current Assembly in a second Housing Bill.

---

<sup>12</sup> Law Commission Annual Report 2007-08 (Law Com 310), para. 3.44.

<sup>13</sup> Government of Wales Act 2006, Sch. 5, Matter 11.4, in respect of social housing.

We were asked to assist implementation by up-dating our report on Renting Homes, by considering whether implementation raised any devolution issues, and by considering the implications of our proposals for other housing policy developments. We published our report of that work, entitled “Renting Homes in Wales” “Rhentu Cartrefi yng Nghymru” a fortnight ago on 9<sup>th</sup> April.<sup>14</sup> And I am pleased to tell you that, although the Commission has published bilingually before, this is our first formal report in a single bilingual volume.

The result is that the 400,000 households in Wales that rent their home – nearly a third of the population – and their landlords will benefit from a modernised, simplified legal structure, clearly setting out their respective rights and obligations and assisted by model agreements prescribed by Welsh Ministers. Envious eyes are already being cast towards Wales by English-based bloggers and the specialist housing press. I can only express the hope that, in the fullness of time, England will catch up with Wales.

### **Other projects.**

We have current projects, too, in other devolved areas. These include a major project reviewing the law relating to wildlife regulation. In Wales, the project fits into a quite different policy context from that which obtains in England. It is highly likely that what we propose by way of reforms will be substantially the same in both countries, but in Wales they will stand, we hope, as part of the broader work being done on the National Environmental Framework. Another major environmental project which is currently in progress, that on conservation covenants, will similarly fit into the Welsh policy context. The Commissioner responsible for that project, Professor Elizabeth Cooke, held a seminar on the subject at Cardiff University Law School last week.

### **The machinery of law reform in relation to Wales.**

The recent changes in the constitutional settlement in Wales have caused us in the Law Commission to consider whether the appropriate procedures and institutions are in place to ensure that law reform can be delivered effectively in Wales. I have already referred to the fact that Gerald Gardiner and Andrew Martin felt very strongly

---

<sup>14</sup> Law Commission Report No. 337: Renting Homes in Wales, Rhentu Cartrefi yng Nghymru, 9<sup>th</sup> April 2013.

that effective law reform is dependent on there being appropriate machinery to facilitate the identification of areas in need of reform, the consideration of possible remedies and the implementation of reforming measures. So the Law Commission has recently turned its attention to the question whether there is in place the appropriate machinery to achieve effective law reform in the changed circumstances now applying in Wales. In this exercise we have been greatly assisted by our discussions with the Welsh Government.

#### The making of references on law reform matters.

First, we have identified a deficiency in relation to the machinery which would enable the Commission to undertake Wales-only projects at the request of the Welsh Government. The Law Commission usually comes to take on a particular law reform project in one of two ways. First, as I mentioned earlier, every three or four years the Law Commission consults on a new programme of law reform, decides on which projects should be included and submits the programme to the Lord Chancellor for his consent.<sup>15</sup> Secondly, under section 3(1)(e) of the Law Commission Act, 1965, departments of the United Kingdom Government have the power to request advice from the Law Commission, and a significant proportion of our law reform projects are referred to us in this way. In practice references are made by Ministers.

It is for the Law Commission to decide whether it will undertake a project of law reform, whether it is proposed as part of a programme or is referred as an individual project. In deciding whether or not to take on a project we will need to consider

- First, how important is the project? To what extent is the law unsatisfactory e.g. unfair, unduly complex, inaccessible or out of date? What are the potential benefits of reform?
- Secondly, is it the sort of project which is suited to the Commission, bearing in mind that it is an independent, non-political body? So you won't find us carrying on a project on abortion or the death penalty – or any such politically controversial issues.
- Thirdly, would the Commission have sufficient resources to complete the project effectively? Here we are concerned not only with financial

---

<sup>15</sup> Law Commissions Act 1965, section 3(1)(a), (b), (c).

funding, but also with human resources. Would we have or could we acquire lawyers with the required expertise and experience?

- Fourthly, we would consider whether the project would require the involvement of the Welsh Government or the Scottish or Northern Ireland Law Commissions.
- Fifthly, we would need to be confident that we would receive the co-operation we need from Government to enable us to complete the project. In 2009, pursuant to the Law Commission Act 2009, the Law Commission and the Lord Chancellor concluded a protocol governing relations between the United Kingdom Government and the Commission. One particular effect of the protocol is that the Commission will not undertake a project unless the relevant department has indicated a serious intention to legislate in the area concerned.

So far as Wales is concerned, we have identified a specific deficiency in the present statutory scheme. As matters stand there is no procedure under the Law Commissions Act 1965 by which the Welsh Government can make a reference in respect of a law reform matter directly to the Law Commission. In the case of Scotland, the 1965 Act was amended to enable both the United Kingdom Government and the Scottish Government to make such references to the Scottish Law Commission.<sup>16</sup> Similarly, the statute creating the Northern Ireland Law Commission made provision for references from Northern Ireland departments to the Northern Ireland Law Commission.<sup>17</sup>

In November 2012 the Law Commission considered this matter and concluded that the Welsh Government needs to be able to refer law reform projects to the Law Commission. While in practice a reference could be made by the Wales Office on behalf of the Welsh Government, the Law Commission does not consider that a satisfactory route. One way of empowering the Welsh Government to make a reference to the Law Commission would be by an amendment to the Law

---

<sup>16</sup> Section 2, Law Commissions Act 1965, as amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

<sup>17</sup> Section 51, Justice (Northern Ireland) Act 2002, as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976).

Commissions Act 1965. However, amendment of primary legislation is not straightforward, not least because of a lack of Parliamentary time. Accordingly, the Law Commission has proposed to the Secretary of State for Wales that the same result should be achieved by a transfer of functions order under section 58, Government of Wales Act 2006. That proposal was supported by the Welsh Government although it has made clear that in the longer term it will be looking for an amendment of the statute to this effect. The proposal for a transfer of functions order is now being considered further by the Welsh Government, the Wales Office and the Ministry of Justice.

#### Programmes of law reform.

As matters presently stand, under the statutory scheme there is no role for the Welsh Government in relation to the adoption of a programme of law reform. The programme is proposed by the Law Commission and requires the consent of the Lord Chancellor. In its evidence to the Silk Commission the Welsh Government has urged that consideration be given to ensuring that, in future, a programme of law reform proposed by the Law Commission should require the approval of the Welsh Ministers insofar as Welsh devolved matters are concerned.<sup>18</sup> Whatever the outcome here, it is clearly necessary for the Law Commission to consult fully with the Welsh Government on the proposed programme in its entirety. It is expected that the final decisions on which projects are to be included in the Commission's Twelfth Programme of Law Reform will be taken in the summer of 2014 and we very much hope that these will include Wales-only projects.

#### Concordat with the Welsh Government.

We have been working for some time with the Welsh Government on revising the concordat between us so that it reflects the major constitutional changes which have taken place and provides a workable framework for our relationship. However, I think it likely that this will have to await the outcome of proposals for a transfer of functions order.

---

<sup>18</sup> Evidence submitted by the Welsh Government to the Commission on Devolution in Wales, 18 February 2013, para. 22.

### A Welsh Advisory Committee.

Another important recent development is the creation of a Welsh Advisory Committee. At the Legal Wales conference in Llandudno in October 2012, I floated the idea of the creation of a Welsh law reform institute of the kind which exist in a number of parts of the world, attached to University law schools, to promote law reform. On that occasion I suggested that there might be real advantage in the Welsh law schools giving thought to the establishment of such an institute to work closely with the Law Commission of England and Wales to promote Welsh-centred law reform.

This idea grew. It occurred to us that we could cast the net considerably wider and set up a committee to advise the Law Commission in relation to law reform in Wales. We therefore invited many prominent lawyers and representatives of different organisations in Wales to a one-day seminar which we held at Aberystwyth University in March. It was attended by the Law Commissioners, by the Counsel General, legal advisers to the Welsh Government, the Ombudsman, representatives of all the Welsh law schools and this Governance Centre, the Wales and Chester Circuit of the Bar, the Law Society, Legal Wales and the Wales Council for Voluntary Action, amongst others. It was a very successful day and there was unanimous support for the creation of an advisory committee.

As a result, at its meeting on 20<sup>th</sup> March the Law Commission has created a Welsh Advisory Committee the membership of which is drawn from different areas in Welsh life relevant to law reform. Its function is to advise the Law Commission on the exercise of its statutory functions in relation to Wales; this will not be limited to law reform in devolved areas but will also include the Welsh dimension of reserved matters. It will be chaired by the Chairman for the time being of the Law Commission. Its first meeting will be in Cardiff in June.

The Welsh Government has been strongly supportive of this initiative. The Commission, of course, holds frequent discussions with the Welsh Assembly and Government and their officials in relation to law reform proposals – as we do with the Government in Westminster. However, so far as this Advisory Committee is concerned, we have come to the clear view that the need to preserve the



Commission's independence of Government would make it inappropriate that the Welsh Government should be represented on the Committee. That position is understood and accepted by the Counsel General and the legal advisers to the Welsh Government.

It is likely that the initial task for the Committee will be to advise on the selection of projects for inclusion in the Commission's Twelfth Programme of Law Reform. Consultation on this programme is due to begin in June 2013. The Committee will also have a valuable role to play both in relation to the consultation process and in the assessment of proposed projects which lie in policy areas wholly or partly devolved to the Welsh Assembly or the Welsh Government or which impact significantly on devolved responsibilities. It would, of course, be for the Commission to decide in due course what projects are to be included in the draft programme to be submitted to the Lord Chancellor. The proposal is to create a Committee which would be essentially advisory. However, it is likely that the Committee will be able to play a useful part in the process by providing in each case an objective assessment of the need for reform and the context in which the law operates.

We will be asking the Committee to play an on-going role in relation to law reform projects once adopted. Here its role would be to assist the Commission in ensuring that the Welsh dimension is properly taken into account in on-going projects. This would include the Committee identifying appropriate means by which the Commission could obtain responses to its consultations. It would also involve the Commission in reporting regularly to the Committee on progress on current projects.

We hope that this will be an effective step forward which will give Wales a more effective voice in relation to law reform. It has the great advantage that it is one which has been open to us to pursue without any need for amending legislation. Moreover, it is one which should be useful whatever the outcome of the debate on a separate jurisdiction.

### Implementation – Special Procedures.

So far, I have said nothing about the implementation of Law Commission proposals for law reform. This is, of course, one important measure of the success of any law reform organisation. As we have seen, we have made an excellent start, so far as implementation by the National Assembly is concerned, with adult social care and renting homes. So far as Westminster is concerned the picture is mixed: if one considers the entire work of Law Commission since its creation in 1965 about 69% of its law reform proposals have been implemented in whole or in part.

I should like to mention briefly one innovation in relation to implementation which has undoubtedly been very successful and which may have a particular relevance to Wales. In 2010 Parliament in Westminster adopted a new streamlined procedure in respect of non-controversial Law Commission Bills. It was piloted with what became the Perpetuities and Accumulations Act 2009 and the Third Parties (Rights against Insurers) Act 2010. These have been followed by the Consumer Insurance (Disclosure and Representations) Act 2012 (which came into force on 6 April) and the Trusts (Capital and Income) Act 2013 (which received the Royal assent on 31<sup>st</sup> January). Under this procedure the Second Reading debate is held in a Second Reading Committee instead of on the floor of the House and the Committee stage is held before a Special Public Bill Committee in the House of Lords. This has the advantage that it enables valuable legislation to proceed to the statute book which otherwise might not have found a slot in the main legislative programme.

The procedure is available only in the case of uncontroversial proposals for law reform. However, it should not be imagined that these proposals go through on the nod. The Second Reading of each of the measures to follow this procedure to date has involved rigorous scrutiny and keen and informed debate.

I mention it in this context because on Thursday of last week (18 April) the Standards, Procedures and Public Appointments Committee of the Scottish Parliament adopted a special procedure for Scottish Law Commission Bills which is expected to be endorsed by the Scottish Parliament. This would give effect to the recommendations of Working Groups that certain law reform bills emanating from the Scottish Law

Commission should be referred to the Subordinate Legislation Committee for Stage 1 scrutiny. There will be a review of the procedures after two Bills or two years.

There is no comparable procedure in the Standing Orders of the Northern Ireland Assembly or the National Assembly for Wales. At the Law Commission seminar in Aberystwyth last month Keith Bush gave a paper on these special procedures and suggested that, in the case of Wales, the opportunity may exist for engagement with the Assembly with a view to ensuring that it has available suitable procedures for those Commission reports which could be implemented through Acts of the Assembly. I simply do not know whether the pressure on legislative time in the Assembly is such as to justify a special procedure of this sort. However, I expect that the Commission will be keen to follow up this proposal.

### **Where next?**

So that is an update on where we stand at present. However, I should like to finish by looking at how the machinery of law reform could work in future if, as seems inevitable, there were to be a greater divergence of English and Welsh law than exists at present or, indeed, if Wales were to become a separate jurisdiction.

### **A Law Commission for Wales?**

Let me ask the question which I am sure many of you are asking yourselves: Should there be a separate Law Commission for Wales?

The evidence submitted by the Welsh Government to the Silk Commission addresses this question directly. It points to the associated start-up and running costs of such a separate body and records that “the Welsh Government works closely with the existing Law Commission, which serves England and Wales, and continues to benefit from that Commission’s work.” It states its conclusions as follows:

“Given the costs involved in setting up a separate Law Commission for Wales, but bearing in mind the Parliamentary legislation, together with Assembly legislation, and the benefits that reconsideration of particular issues by an expert body such as the Law Commission can provide, the Welsh Government

does not seek the creation of an independent Welsh Law Commission at this point in time...”<sup>19</sup>

However, it qualifies this conclusion by emphasising its view that the 1965 Act should be amended

- to enable Welsh Ministers to refer law reform projects to the existing Commission on the same basis as is open to UK Government Ministers
- to provide that Welsh Ministers are to be statutorily consulted about the Commission’s law reform programmes; and
- to provide for the Welsh Ministers’ consent where projects or programmes engage the law on matters within the Assembly’s legislative competence or their own executive competence.

How might law reform work if Wales were to have its own Law Commission? Taking the work of the current Law Commission of England and Wales, we have four law reform teams. One covers crime. A second covers commercial and common law. A third covers property, family and trust law. In none of these areas is the main thrust of the law devolved. That is not to say there will not often be a significantly different Welsh perspective on reforming these areas of law. But essentially the areas of law covered are un-devolved and not significantly divergent. Our fourth team at the Law Commission is the public law team and the large bulk of this team’s work *is* significantly devolved. It is this team that has done the work on housing, adult social care and wildlife that I referred to earlier. So one might say that, in very general terms, up to about a quarter of our work is in devolved areas of law, and about three quarters in un-devolved.

So if a new Welsh Law Commission were to assume all of the responsibilities of the current Law Commission in respect of Wales, it would doing about a quarter of its work in areas in which the Welsh Government would have the policy lead, and three quarters in areas where the lead would be a Whitehall department. If that is the starting point, what would happen in practice?

---

<sup>19</sup> Evidence submitted by the Welsh Government to the Commission on Devolution in Wales, 18 February 2013, para. 22.

These are, of course, familiar issues for our existing sister Commissions in Scotland and Northern Ireland. Both Commissions cover both reserved (and in Northern Ireland excepted) as well as devolved law. The Scottish Commission has, since the advent of devolution, had to think carefully about how much of its resources should be devoted to reserved law and how much to devolved law. A Government which is paying for a Commission may have a natural inclination to favour projects in areas for which it is responsible. However, the Commission's duty is to review "all of the law" of Scotland, and so a balance must be struck.

The Commission in Northern Ireland is younger, and was set up after the current devolution settlement was put in place. Here once again, I think it would be fair to say that there is a strong preference on the part of the Belfast Department of Justice – the paymaster – for the Commission to devote itself primarily to devolved law.

If a Welsh Law Commission found itself in the same situation, it is likely that it, too, would be inclined to concentrate on devolved law. Indeed, if the Welsh Government were to be the Commission's paymaster, I would expect that the Commission would, quite properly, be under *pressure* to do so. At one level, one might say that there is nothing wrong with that. The proponents of a Welsh Law Commission certainly argue that there is much work to be done on our devolved law.

But what about the reform of the law in the reserved areas in its application to Wales? If what would become the Law Commission for England proposed reform of insurance law, or easements, or criminal offences, how would we deal with that in Wales? While it would be for Westminster to legislate for these areas, the *vires* of the English Commission would not extend to the Welsh jurisdiction. One, unpalatable, answer would be that undeveloped law in so far as it applies in Wales would remain unreformed. Alternatively, Westminster might decide to keep the law of Wales in step with the law of England by replicating in Wales the English Commission's recommendations for England, in a single Westminster Act dealing with both jurisdictions. But it would hardly be satisfactory just to add on Wales at the end as an after-thought. The law reform recommendations would not have been developed with Wales in mind, they would not have involved consultation with interested parties in Wales, and they might well not suit Wales.

### Joint projects.

The standard answer from the practice of the existing Law Commissions in the United Kingdom would be to undertake these reforms as joint projects between the English Law Commission and the Welsh Law Commission. This seems to work reasonably well for Great Britain, and now United Kingdom, projects at the moment, so perhaps it could work for the two jurisdictions of England and Wales.

But this too may be impractical. Both of the other Law Commissions expect to run a programme of predominantly devolved law. In Scotland, currently, joint projects on undeveloped law make up something over 1/3 of the Law Commission's law reform work. In Northern Ireland it is only 20%. In each case the great majority of their work relates to devolved law. But, in the case of Wales, projecting the division of the workload between devolved and undeveloped work from our current practice, 75% of the work of a Welsh Law Commission could be expected to be joint projects on undeveloped law.

In practice, there might be a danger that the Welsh Commission would be the junior partner in these projects and would be merely going through the motions, or playing catch-up with English reforms.

So it may be that the replication of what has become the standard United Kingdom pattern, i.e. a general law commission for each jurisdiction, would not necessarily be entirely appropriate to meet the needs of Wales.

### The Australian model.

But that is not the only way it could be done. Another option would be to have a Welsh Law Commission limited only to devolved matters, whilst retaining an England and Wales Commission to cover that part of the law of Wales which was not devolved. This is what Professor John Williams of Aberystwyth University was

suggesting in his article on the new law of adult social care in the recent issue of the Statute Law Review devoted to Wales.<sup>20</sup>

This model would resemble that which exists in some federal jurisdictions. In Australia, the Commonwealth Law Reform Commission deals with federal law, while each of the state law reform commissions deals with its own state law. A similar system used to be in place in Canada.

One possible difficulty with this model may be that in a federal jurisdiction, the distinction between the jurisdictions is, largely, both stable and clear. The distinction between the powers of the National Assembly and the United Kingdom Parliament are not likely to be *stable*. No doubt, some would consider that it is undesirable that they be so, for it would imply that we have now reached the limits of devolution in Wales. And whether the distinction between the two will be *clear*, as the Assembly develops its legislative programme under Part 4 of the 2006 Act, remains to be seen.

There may, therefore, be some difficulty in clearly ascertaining where the border between a Wales-only and an England-and-Wales Law Commission lies. But that is not a very fundamental objection. With good will on both sides, and some flexibility in the drafting of the powers of the two Commissions, it should be possible to resolve any such difficulties on a case by case basis.

Perhaps more concerning would be the impact on the England-and-Wales Commission of losing responsibility for devolved law in Wales. Even where the law is not devolved, there is often a specifically Welsh perspective on reform which would make it important to engage with Welsh policy makers and interested parties. There might be a danger that if we did not have a firm understanding of devolved law, this Welsh perspective in undeveloped areas would begin to slip off the radar of the Commission. We have made great efforts over recent years to meet the law reform needs of Wales. It would be a great shame if the result of a separate jurisdiction were that an England-and-Wales Commission fell victim to that very Anglo-centricity that

---

<sup>20</sup> Professor John Williams, A New Law on Adult Social Care: A Challenge for Law Reform in Wales, (2012) 33 Statute Law Review 304.

it has tried so hard, thus far, to avoid. If such a model were adopted we would have to be vigilant to avoid such a result.

But the two-tier law reform model remains a viable and interesting one. It would require close and co-operative arrangements between the two Commissions with responsibility for the jurisdiction of Wales but, no doubt, that could be achieved

#### A further model.

Another way of accomplishing such working methods would be not to split the existing Law Commission, but to reconstitute it so as to ensure that it could internally create the necessary structures to provide law reform of both devolved and un-devolved law in Wales. If this model were adopted:

- Legislation would have to impose clear duties in respect of both the English and Welsh jurisdictions.
- Changes to the make-up of the Commission would be necessary – possibly a requirement for Welsh Commissioners, or the advisory committee which we have established might be put on a statutory basis. Such a committee might help to bind the judiciary in Wales, the professions and the law schools into the new structure.
- Clearly, in any such arrangement the Welsh Government would have to have a status on a par with that of the United Kingdom Government. One might expect a requirement for the development of distinct programmes of law reform for each jurisdiction, approved by the Lord Chancellor for England, and an appropriate Minister - perhaps the Counsel General - for Wales.

#### Conclusion.

These are all possible options for the future and I simply present them for your consideration. As Legal Wales in the broad sense continues to develop, we in the Law Commission hope to be part of the discussion about how law reform should be accommodated. No doubt, this Governance Centre will also have an important contribution to make in this regard.



In the immediate future, in June we will be launching our consultation on our Twelfth Programme of Law Reform and inviting individuals and public and private bodies to make proposals for suitable law reform projects. Last time there was only a single response from Wales advocating a Wales-only project. I am confident that that will not be the position this time; the Welsh Advisory Committee will see to that, I suspect. And my colleagues and I very much hope that the new programme will include specifically Welsh projects.

For the moment, I hope I have been able to persuade you that the Law Commission of England and Wales is making strenuous efforts, within the existing structures, to discharge its statutory duty to be an effective law reform body for Wales. In particular, the reforms of the law on adult social care and renting homes are likely to have a major impact on society in Wales as a whole. We believe that these projects demonstrate that the Law Commission has the expertise and the creativity to deliver proposals for law reform on this scale for the benefit of the people of Wales.

And I hope I have been able to persuade you this evening why such law reform really matters.