

THE ASSOCIATION OF LONDON WELSH LAWYERS.

LAW REFORM IN A DEVOLVED WALES.

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I. Introduction.

In the 15 years since Wales was first whisked into devolution on the hem of a kilt – as Sir David Williams so memorably put it – the speed of constitutional change has been particularly rapid and Wales has come a very long way in a very short time. Those changes have brought many opportunities in their wake – and with them many new challenges for legal practitioners, for the courts and tribunals system and for the substantive law in force in Wales. Not the least of the challenges has been in the area of law reform and this evening I propose to say something about how that challenge is being met.

The Law Commission is, of course, the Law Commission of England and Wales – yng Nghymraeg Comiswn y Gyfraith Cymru a Lloegr. It is one of three Law Commissions in the United Kingdom. It was created by Parliament by the Law Commissions Act of 1965 which also created a separate Scottish Law Commission. More recently, in 2007, the Northern Ireland Law Commission was created by an amendment to the Justice (Northern Ireland) Act 2002.² Each Law Commission corresponds to a distinct legal system and each undertakes projects specific to its own jurisdiction. However, we also undertake joint law reform projects, for example the current joint projects of all three Law Commissions on Regulation of Health Care

¹ I am extremely grateful to Mr. Richard Percival of the Law Commission for his assistance in the preparation of this lecture.

² Sections 50-52, Justice (Northern Ireland) Act 2002 (c. 26).

Professionals and on Electoral Law which are, as a result, United Kingdom-wide projects.

The primary duty of the Law Commission of England and Wales 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 ...”³

We are best known for publishing reports recommending law reform – usually accompanied by a draft Bill – but we also perform the important functions of preparing consolidated legislation and recommending repeals of statute law which is no longer of any practical use.

The Law Commission consists of a Chairman – who has to be a judge – and four full-time Commissioners who are all senior lawyers. Each Commissioner leads a team devoted to a subject area: criminal law, public law, common and commercial law and family, property and trusts. We currently have a staff of 21 lawyers and 15 research assistants. We have three Parliamentary counsel and an in-house economist. In addition, we have a chief executive and a support staff of 10. We occupy premises in Queen Anne’s Gate so we are conveniently placed for Parliament and for the Government departments in Whitehall with which we work, in particular 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 the Government and that independence - and the public perception of that independence - are vital to our work. In particular, we are not an in-house legal department for the Ministry of Justice or any other Government department. Sometimes we are critical of Government policies; sometimes the Government will disagree with us on our proposals for law reform. Equally we are not a mere pressure group. We are a public body, uniquely placed because we are both independent of government and close enough to government to be able to influence decisions on law reform.

³ Law Commissions Act, 1965, section 3.

II. The Law Commission and the changing devolution settlements.

The devolution of legislative and executive powers to Wales has changed fundamentally the role of the Law Commission in relation to Wales. Perhaps most significantly, from the point of view of law reform, 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, in 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.⁴ 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 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. However, it is right to note that within that shared system there are many modifications which recognise the distinct character of Wales.⁵ This is acknowledged by the latest report of the Silk Commission⁶. 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.

⁴ Professor Thomas Glyn Watkin, *The Legal History of Wales*, (2nd Ed.), 2012.

⁵ 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.

⁶ Commission on Devolution in Wales, Second Report, 3 March 2014, para.10.3.25.

One of the matters recently considered by the Silk Commission has been, of course, whether Wales should become a separate jurisdiction and precisely what that might mean. In the event, in its second report published earlier this month, while calling for most aspects of policing and for the rehabilitation of young offenders to be devolved, and while recommending further administrative devolution of the courts system, it has proposed that there should be a review within ten years of the case for devolving to the Assembly legislative responsibility for the courts service, sentencing, legal aid, the CPS and the judiciary⁷. As a judge, it would not be appropriate for me to express any view on the desirability or otherwise of such constitutional developments. It is not for the judges to make the running on such issues of constitutional policy or to obstruct them. For similar reasons, it would not be appropriate for the Law Commission to express a view on that question. It is not for the Law Commission to promote or to impede devolution. The Law Commission did give evidence to the Silk Commission, but that evidence was 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 ensure that the legal system and the substantive law continue to meet the needs of the people of Wales under changing constitutional conditions. The demands of law reform will undoubtedly be different in a devolved Wales as Welsh law 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.

On occasions, the Law Commission has had to work very hard to keep up with constitutional changes in Wales. Two of our projects, in particular, provide an insight into the complexities of working within rapidly changing devolution settlements.

⁷ Commission on Devolution in Wales, Second Report, 3 March 2014, Chapter 10.

Adult Social Care

The Social Services and Wellbeing (Wales) Bill, which went to report stage on 18th March 2014, seeks to reform the structure of social services in Wales 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 the Law Commission’s report on Adult Social Care, which we published in May 2011.⁸ 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 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, in fact, 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. Given the numbers of those affected by the law of adult social care - in 2008 1.77 million adults in England and Wales were receiving support from local authorities – it was clearly necessary to consult widely. We consulted widely and many of those consultation events took place in Wales. The largest single event in the whole consultation was a 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

⁸ Law Commission Report No. 326: Adult Social Care, May 2011.

more local, the more user-focused events. Those in Wales included workshops with Conwy Connect, a local organisation for people with learning disabilities, and members of the team visiting disabled service users in their own homes in Newport, Barry and Neath.

When we started the project, there were some differences between English law and Welsh law in this area, 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 that “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 it preferred”.

I should add that, so far as England is concerned, the Department of Health has more recently accepted the report for England, and our proposals will be implemented for England in the Care Bill, currently before Parliament. However, on this occasion Wales got there first.

Renting Homes (Wales).

The contrast with England is much stronger, and to England’s detriment, when we consider what 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. The existing law on this subject provides another example of 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 2006.⁹ 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”.¹⁰ It also included a tailored system of supported housing for homeless people and others.

This project, once again, involved a substantial consultation process with a wide range of Welsh stakeholders. As a result, the Commission came to appreciate that the distinctive outlook of Welsh interested parties was 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

⁹ Law Commission Report No. 297: Renting Homes, May 2006.

¹⁰ Implementation of the proposals will entail repealing much of the existing housing legislation applicable to Wales and replacing it with a framework which is intended to be simpler comprising only two forms of occupation contract: secure contracts modelled on the local authority secure tenancy and standard contracts modelled on the current assured shorthold tenancy. Model contracts which are compliant with the requirements of the new legislation will be provided by the Welsh Government. It will be possible to convert existing tenancy agreements into one of these new contracts.

with interested parties 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. At the time we were finalising our recommendations, the bill that became the Government of Wales Act 2006 was making its way through Parliament. However, the draft bill on Renting Homes had to be written on the basis of the law in force at the time, i.e. the Government of Wales Act 1998. Nevertheless, the Law Commission had an eye to the future.

1. First, we recommended 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 subject to a Henry VIII power which would allow the Assembly to amend it in future. (I note that no equivalent power was recommended for the Secretary of State in respect of England.)
2. Secondly, in our 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 to be introduced under the 2006 Act.
3. Thirdly, 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.¹¹ In the result, the Westminster Government rejected the proposals in respect of England, whereas they were accepted in principle by Welsh Ministers. A legislative

¹¹ Law Commission Annual Report 2007-08 (Law Com 310), para. 3.44.

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.¹²

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. 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” on 9th April 2013.¹³ (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.) A new Housing Bill, which will implement these proposals, is expected before the end of the current Assembly.

The result is that the 400,000 households in Wales that rent their home – nearly a third of the population and a much higher proportion than in England – and their landlords, will benefit from a modernised, simplified legal structure, clearly setting out their respective rights and obligations and assisted by model agreements. I can only express the hope that, in the fullness of time, England will catch up with Wales.

Other projects.

I should mention some of our current projects which will have a particular impact in Wales. 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

¹² Government of Wales Act 2006, Sch. 5, Matter 11.4, in respect of social housing.

¹³ Law Commission Report No. 337: Renting Homes in Wales, Rhentu Cartrefi yng Nghymru, 9th April 2013.

major environmental project which is currently in progress, that on conservation covenants, will similarly fit into a distinct Welsh policy context.

III. Lacunae in the machinery of law reform in relation to Wales.

The founding fathers of the Law Commission, Gerald Gardiner QC (later Lord Gardiner LC) and Professor Andrew Martin, argued in their influential book, “Law Reform - Now”, published in 1963, that the problem of bringing the law up to date and keeping it up to date was largely one of machinery. That book led, two years later - by which time Gerald Gardiner had become Lord Chancellor - to the creation of the Law Commission as an essential part of the machinery of law reform. Over the years – the Law Commission will celebrate its 50th anniversary next year - the machinery of law reform in England and Wales has been refined. For example, the Law Commission Act 2009 introduced a requirement that the Lord Chancellor report annually to Parliament on what steps have been taken to implement Law Commission proposals for law reform. It also provided for a Protocol between the Law Commission and the Lord Chancellor in relation to the selection of law reform projects. At about the same time Parliament adopted a special procedure for non-contentious Law Commission Bills. That new procedure has been used repeatedly and with great success. In this way, law reform has been facilitated.

About 18 months ago it became clear to us at the Law Commission that the statutory machinery is deficient in its application to Wales. Here, it is necessary to explain that the Law Commission usually takes on a law reform project in one of two ways. First, every three or four years the Law Commission carries out a public consultation on a new programme of law reform, makes proposals as to which projects should be included and submits the programme to the Lord Chancellor for his consent.¹⁴ 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.

¹⁴ Law Commissions Act 1965, section 3(1)(a), (b), (c).

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.¹⁵ Similarly, the statute creating the Northern Ireland Law Commission made provision for references from Northern Ireland departments to the Northern Ireland Law Commission.¹⁶

In November 2012 the Law Commission considered this matter and concluded that the Welsh Government clearly 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, we did not consider that a satisfactory route. We were also concerned that the necessary amendment to the Law Commissions Act could take too long. Accordingly we 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 strongly supported by the Welsh Government, although it has made clear that in the longer term it would be looking for an amendment of the statute to this effect.

In the event, it seems that the problem is to be remedied by primary legislation, which is excellent news. The Wales Act, introduced into Parliament on 20th March 2014, will amend the Law Commissions Bill 1965 so as to add to the functions of the Law Commission that of providing advice and information to the Welsh Ministers.¹⁷ This will permit the Welsh Ministers to refer law reform projects to the Law Commission of England and Wales. However, the Wales Bill does not stop there in relation to the Law Commission. We have for some time been working with the Welsh Ministers on the drafting of a concordat. The Bill will make provision for a protocol between Welsh Ministers and the Commission about the Commission's work relating to Welsh devolved matters. In particular, this may include provision on

¹⁵ Section 2, Law Commissions Act 1965, as amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

¹⁶ 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).

¹⁷ Wales Bill, clause 21(2).

- the principles and methods to be applied in deciding the work relating to Welsh devolved matters to be carried out by the Commission and in carrying out that work
- the assistance and information Welsh Ministers and the Commission are to give to each other
- the way in which Welsh Ministers are to deal with Law Commission proposals so far as they relate to Welsh devolved matters.

The protocol and any revision of it require the consent of the Lord Chancellor.¹⁸

In addition the Wales Bill makes provision requiring the Welsh Ministers to lay before the Assembly an annual report concerning Law Commission proposals relating to Welsh devolved matters. In particular, they must include their plans for dealing with such proposals and, where they have decided not to implement them, to give their reasons.¹⁹ It will, therefore, mirror the obligation on the Lord Chancellor to report to Parliament on the implementation of Law Commission proposals.

These are very welcome developments. These amendments to the Law Commissions Act 1965 will ensure that, for the first time, the statutory scheme reflects the reality of devolution in Wales.

IV. The Welsh Advisory Committee.

In the meantime, the Commission has itself acted so as to improve the machinery of law reform in relation to Wales. 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 jurisdictions, 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.

¹⁸ Wales Bill, clause 21 (4), inserting section 3D into the Law Commissions Act 1965.

¹⁹ Wales Bill, clause 21 (4), inserting section 3C into the Law Commissions Act 1965.

This idea grew. It occurred to us at the Law Commission 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 2013. 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 the Wales Governance Centre, the Wales and Chester Circuit of the Bar, the Law Society, Legal Wales, Citizens Advice 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.²⁰

As a result, 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 is not limited to law reform in devolved areas but will also include the Welsh dimension of reserved matters. It is chaired by the Chairman for the time being of the Law Commission. Its third meeting will be in Cardiff on 3 April and its fourth is likely to be in Bangor in October at the same time as the Legal Wales conference.

The Welsh Government has been very 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, we came to the clear view that the need to preserve the Commission's independence of Government would make it inappropriate for the Welsh Government to be represented on the Committee. That position is understood and accepted by the Counsel General and the legal advisers to the Welsh Government.

The initial task for the Committee has been to advise on the selection of projects for inclusion in the Commission's forthcoming Twelfth Programme of Law Reform. We are currently engaged in identifying those law reform projects which will constitute

²⁰ Seminar to discuss creation of Committee, Cambrian News, 1st March 2013.

the main part of the Commission's work for the next three or four years. In this regard we have received invaluable assistance from the Advisory Committee which is able to provide us with an objective assessment of the law reform needs of Wales. Coming up to the first anniversary of the Advisory Committee's creation, we in the Commission regard it as a great success. The members of the Committee have been able to provide valuable insights into the Welsh dimension of our work. Significantly, this is not limited to devolved subjects. For example, one member of the Committee, Angela Williams from Citizens' Advice Cymru, was able to provide us with a great deal of information concerning the use of bills of sale to support log book loans – outside the protection of the Consumer Credit Act – and the severe social consequences which have followed. As a result, we hope to include a project on bills of sale in our next programme of law reform. That will, of course, be an England and Wales project.

In the longer term, we see the Advisory Committee playing an important role in relation to consultation and in ensuring that proper account is taken of the Welsh dimension in specific law reform projects. It is our intention that this should give Wales an effective voice in relation to law reform. This development has the great advantage that it has been achievable without any need for amending legislation. Moreover, it is one which should be useful whatever the outcome in the longer term of the debate on a separate jurisdiction.

V. Possible Welsh law reform projects.

A direct consequence of the acquisition by the Assembly of direct legislative powers under Part 4, Government of Wales Act 2006, has been that the Law Commission is now proposing to undertake law reform projects which will relate only to Wales. We are currently discussing with the Welsh Ministers a number of possible Wales only projects which they have suggested. In addition, further Wales-only projects have been proposed by the Welsh Advisory Committee.

Disqualification from membership of the National Assembly

You will recall that problems arose following the last Assembly election when two members were elected despite holding disqualifying offices. It has been suggested that these events raise issues as to the appropriateness of the present system of disqualifying offices. The list for that election was long and complicated and it has

been pointed out that in Wales there is a comparatively high proportion of public bodies relative to population. Accordingly, elections to the Assembly may raise more significant issues than other elections. A project could consider both the underlying principles relating to disqualification and the process used to implement disqualification. For example, a system of post-election choice by the candidate might be considered. If we were to take on this project, it would fit in very well with the elections project we are currently conducting jointly with the Scottish and Northern Ireland Law Commissions.

Planning and development control in Wales

There are already important substantive differences between the planning law in force in England and in Wales. Those differences will increase with the passage of the Planning (Wales) Bill which is likely to be introduced into the Assembly in the near future. However, the Welsh Ministers have proposed this as a project on the basis that in Wales the system of plan-making and the system of development control have grown up in parallel. While it is in theory a “plan-led system”, the Welsh Ministers consider that there is insufficient real relationship between the plan and individual development control decisions. More fundamentally, the current planning law of England and Wales is designed for a jurisdiction with a population of 56 million and 340 planning authorities, with a scale of development to match. It may be that different legal structures would be appropriate for a country of 3 million people with 25 planning authorities. We are currently carrying out further research before deciding whether to take this on as a project.

Environmental law in Wales

Many of you will be aware that the Welsh Ministers have recently established Natural Resources Wales, a single body which has taken over the functions of the Environment Agency, the Countryside Council for Wales and the Forestry Commissioners in Wales. The Welsh Ministers see this as a first step towards a more co-ordinated approach to sustainable development of natural resources. A further proposal to the Law Commission by Welsh Ministers is for a project to consider the reform of the existing functions of Natural Resources Wales and the integration of environmental law. A major challenge here would be to do so while maintaining correct transposition of the EU legislation governing much of environmental practice.

The form and accessibility of Welsh law

Problems with the form and accessibility of the law relating to Wales have been apparent for some time and they are becoming more intense. In part this is due to the piecemeal manner in which powers have been devolved to Wales. The result has been that in many areas it can be very difficult to find and understand the law. A power conferred by a Westminster statute on the Secretary of State will, in many cases, in fact be exercisable by Welsh Ministers but it can take skill, understanding, perseverance and determination to uncover this fact. The problem is particularly serious in relation to executive powers but it is by no means confined to them. There are many instances in which Westminster legislation has been amended both in Westminster and in the Assembly. As a result statutes have some sections and subsections relating to England and Wales, some to England only and some to Wales only. The Silk Commission in its second report had this to say on the subject:

“According to several submissions we received, it is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. We recommend that a mechanism be sought to ensure the expeditious publication of up-to-date law applying in Wales, and that a programme of consolidation of law should be undertaken. The Law Commission would have an important role in this process.”²¹

The Welsh Advisory Committee has proposed that the Commission should undertake an advisory project on the accessibility and form of Welsh law. I confess it is one that appeals greatly to me because I think that now would be a good time to take stock of these issues on the accessibility of Welsh law, while the situation is still remediable. Moreover, the fact that modern Welsh law is in its infancy opens up many opportunities. In his speech to the Legal Wales conference in Cardiff last September, the Lord Chief Justice called for better drafted and better organised law. With regard to Wales he said this:

“Although this is primarily a matter for the legislature and the executive in Wales, it is essential that all of Legal Wales (judiciary, profession and academics) support and press for the attainment of these objectives. In Wales, there is the huge advantage that Welsh legislation has but a short history.

²¹ Commission on Devolution in Wales, Second Report, 3 March 2014, para. 10.3.45.

There is no reason, therefore, why it cannot develop its own innovative style. There is no doubt that the style of Westminster drafting can be improved. Furthermore, Wales can begin its own sensible organisation of Welsh law into a Code with chapters into which new laws can be inserted and old laws amended, much along the lines of what is done in most states. Westminster is burdened by history. It is therefore a model that does not have to be followed. Progress has been made with the help of Legal Wales, but very much more needs to be done.”²²

I would simply add that at the Law Commission we hope to be able to contribute to this task and to seize these opportunities.

VI. A Welsh Law Commission?

So that is an update on where we stand at present. I should like to finish by asking the question which many of you may be 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...”²³

It then goes on to state its view that the 1965 Act should be amended in three ways:

- (1) to enable Welsh Ministers to refer law reform projects to the existing Commission on the same basis as is open to UK Government Ministers;
- (2) to provide that Welsh Ministers are to be statutorily consulted about the Commission’s law reform programmes; and

²² Lord Thomas of Cwmgiedd, Speech to Legal Wales Conference, 11 October 2013.

²³ Evidence submitted by the Welsh Government to the Commission on Devolution in Wales, 18 February 2013, para. 22.

- (3) 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.

The first of those reforms will be achieved by the Wales Bill, now before Parliament. The Bill does not make provision for statutory consultation with Welsh Ministers about the Commission's law reform programmes, but, of course, we work very closely with the Welsh Ministers and it is unthinkable that we should not consult them about our proposals for law reform projects relating to Wales. Again, there is no provision requiring the Welsh Ministers' consent to projects within the devolved fields, but there would be no point in our undertaking a law reform project if there is no prospect of the Welsh Ministers acting on our final proposals. So, I would suggest that we have a workable machinery for the moment.

How might the machinery of law reform be refashioned in future if, as seems likely, there were to be a greater divergence of English and Welsh law than exists at present? The practice in other jurisdictions shows that there are several possible models and I simply propose to describe these different models.

The majority of the work of the Commission is, and is likely to remain, in areas which are not devolved. So far as our projects on criminal law, commercial and common law and property, family and trust law are concerned, 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 – the project on conservation covenants and the proposed project on bills of sale are good examples of that - but essentially in these fields the areas of law covered are not devolved and not significantly divergent. However, that is not true of the work of the public law team at the Law Commission, the large bulk of whose 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 can 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 do about a quarter of its work in areas in which the Welsh Government would have the policy lead, and about three quarters in

areas where the lead would be a Whitehall department. If that is the starting point, how might it work in practice?

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. Many would 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 Wales. One answer would be that undeveloped law in so far as it applies in Wales would remain unreformed. That, I think, has only to be stated to be dismissed as a possibility. 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 England and Wales. 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 in the same way for 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 applicable to 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 issue of the Statute Law Review in 2012 devoted to Wales.²⁴

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.

There may, on occasion, 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 an England and Wales Commission were to victim to that very Anglo-centricity that it has tried so hard, thus far, to avoid. If such a model were adopted the Commission would have to be vigilant to avoid such a result.

Nevertheless, 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 Wales but, no doubt, that could be achieved

A further model.

²⁴ Professor John Williams, A New Law on Adult Social Care: A Challenge for Law Reform in Wales, (2012) 33 Statute Law Review 304.

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 create internally 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 England and Wales.
- 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.
- One might expect the development of distinct programmes of law reform for England and Wales, on the one hand, and for Wales on the other.

VII. Conclusion.

These are all possible options for the future and I simply present them for your consideration. In view of the stance of the Welsh Government in its evidence to the Silk Commission, any such developments are likely, I should have thought, to be some considerable way in the future. 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. I make clear that it will, of course, be for others and not for us in the Law Commission to decide the way ahead. No doubt, many of you present this evening will have an important contribution to make in this regard.

In the immediate future, in July we will be announcing our Twelfth Programme of Law Reform. I very much hope that, for the first time, it will include specifically Welsh projects, relating to the devolved law of Wales.

The Law Commission of England and Wales will, of course, continue to make strenuous efforts to discharge its statutory duty to be an effective law reform body for Wales within the existing constitutional settlement. In particular, the reforms of the law on adult social care and renting homes are likely to have a major impact on Welsh society 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 it is, of course, that ability to improve the quality of life which is the ultimate justification for law reform and the reason why it really matters.