



LAW COMMISSION WRITTEN EVIDENCE TO THE COMMISSION ON JUSTICE IN WALES, 21 JUNE 2018

The purpose of this document is to provide background information on the approach taken by the Law Commission to its functions in relation to Wales.

Introduction

The Law Commission of England and Wales has the statutory duty of keeping all the law of England and Wales under review with a view to its simplification and modernisation. We are committed to providing the same level of service to the people of Wales as to the people of England. As the nature of the devolution settlement in Wales has changed, we have sought to change with it. We now have established processes and firm relationships with the Welsh Government and the National Assembly, which allow us to take on useful and productive law reform for Wales. In this note we seek to describe briefly how the Commission works, with an emphasis on how we work in Wales. We then turn to address the role we believe the Commission has played and can continue to play in making the law in Wales more accessible. We do not comment on the desirability or otherwise of further adjustment of the devolution settlement, but will respond proactively to any further changes.

Work of the Law Commission

In brief the Law Commission undertakes three types of work:

- **Law reform and advisory work.** This is perhaps the best known work we take on. We begin by identifying an area of the law, or a particular issue within the law, which we believe to be in need of reform. After detailed study and public consultation we make recommendations to the UK Government or the Welsh Government for reform. Our final reports are often accompanied by draft legislation.

Law reform projects may be included in a formal programme of law reform – we are currently in the Thirteenth – or may result from an ad hoc reference by a Government department or the Welsh Ministers. The Thirteenth Programme was adopted by the Commission and approved by the Lord Chancellor (as our Act requires) in December 2017. We launched our consultation on the Programme with events in London and Cardiff, and conducted a large scale consultation with judges, lawyers, academics, central and local government, other public bodies, businesses, consumer organisations and the public.

The Commission selects projects on the basis of their:

- importance – the extent to which the law is unsatisfactory, and the potential benefits from reform;
- suitability – whether the independent non-political Commission is the most suitable body to conduct the review; and
- resources – the existing expertise and experience of Commissioners and staff, and the availability of funding.

Our statutory powers include providing advice and information to United Kingdom government departments and the Welsh Ministers. This enables us both to conduct

law reform projects at the request of a United Kingdom or Welsh Minister and, where appropriate, to provide advice in connection with law reform. An example is our report on *The Form and Accessibility of the Law in Wales/ Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru*, referred to below.

- **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.
- **Statue law repeals.** The Commission makes recommendations for the repeal of Acts of Parliament, in whole or in part, where they have become obsolete, because they have ceased to have any practical utility or are otherwise spent.

Law reform work in devolved areas

In recent years we have maintained a more or less continuous stream of work within devolved law, conducted for the Welsh Government. In 2012 the Welsh Ministers asked us to update our project on Renting Homes, in which we had made recommendations for England and Wales; these had eventually been rejected by the United Kingdom Government as regards England, but the Welsh Government was keen to implement them in Wales, the Assembly having recently acquired legislative competence to do so. In 2013 we produced a further Report *Renting Homes in Wales/Rhenttu Cartrefi yng Nghymru*, which was implemented by the Assembly in the Renting Homes (Wales) Act 2016.

The first of our reports to be implemented in Wales by Assembly legislation had been our 2011 Report on *Adult Social Care*. This concluded an England and Wales project commenced during the currency of Part 3 of the Government of Wales Act 2006. Part 4 of the Act came into force during the lifetime of the project, and we accordingly recommended that implementation in Wales be by way of Assembly legislation. This was done in the Social Services and Wellbeing (Wales) Act 2014.

Our 12th Programme of Law Reform – laid before Parliament in 2014 – included two projects for the Welsh Government. The first, an advisory project, concluded with a report on *The Form and Accessibility of the Law in Wales/ Ffurf a Hygyrchedd y Gyfraith sy'n Gymwys yng Nghymru* in 2016, in which we recommended that the Welsh Government pursue a policy of codification, executed in accordance with our further recommendations. Our conception of codification is that legislation whose subject-matter is within the competence of the Assembly and is currently scattered across the statute book is brought together in a piece of Assembly legislation, accompanied by reform as appropriate; further legislation in the subject area of a code should take effect by way of amending the code. In March of this year the Welsh Government launched a consultation on a new Legislation (Wales) Bill which, if passed, would give effect to some of our recommendations. We continue to work closely with officials in the Welsh Government with a view to the implementation of other parts of that report.

The second is our continuing work on the simplification of planning law in Wales. We will produce a final report in the autumn of 2018, which we hope will inform a new Planning Bill for Wales, produced by the Office of the Legislative Counsel. We are optimistic that the Planning Code will be comprised, in part, of the first codification Bill to pass through the National Assembly under new legislative procedures designed with reference to our earlier recommendations on the form and accessibility of the law.

The Welsh Government's response to our report on the form and accessibility of the law and its ongoing support of our work in planning law has highlighted a divergence in thinking between Cardiff and Westminster. In particular, Cardiff has demonstrated a commitment to consolidation/codification which has been lacking in recent years in Westminster. The Welsh Government is keen to ensure that the Welsh statute book is clear and accessible and the

Welsh Planning Law project could be the first of several similar codification exercises. The end result will be a far more streamlined body of planning law in Wales compared to that which will remain in place in England.

Recent discussions with the Welsh Government have highlighted the value of a law reform project focussing on devolved tribunals in Wales. We look forward to starting work on this project in 2019.

The Wales Act 2014

In July 2015 the Law Commission and the Welsh Ministers agreed a Protocol setting out the approach that the Commission and Welsh Ministers will jointly take to the Commission's law reform work in Wales. It covers all the stages of a project, from our decision to take on a piece of work, through to the Ministers' response to our final report and recommendations.

The protocol was entered into pursuant to provisions in the Wales Act 2014, which amended the Law Commissions Act 1965 to take account of Welsh devolution. The Act also gives the Law Commission a new power to provide information and advice to the Welsh Ministers, enabling the Welsh Ministers to refer law reform work directly to the Commission.

In a direct reflection of the obligations placed on the Lord Chancellor by the Law Commission Act 2009, the Wales Act 2014 also requires Welsh Ministers to report annually to the Assembly about the implementation of our reports relating to Welsh devolved matters.

At the time of its launch, our then Chairman Sir David Lloyd Jones observed:

"The Protocol and the Wales Act 2014 represent a landmark in the development of a productive working relationship between the Commission and the Welsh Government. They set out how we will work together in relation to Welsh devolved matters of law reform, placing obligations on both; and how the Welsh Government will account to the National Assembly for its response to the Commission's work.

"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."

The ability of the Welsh Government to ask the Commission to consider areas of law reform is a welcome development, helping to ensure that the Commission provides a relevant and tailored law reform capability for the people of Wales.

Wales Advisory Committee

In 2013 the Law Commission created a Wales Advisory Committee, the membership of which is drawn from different areas in Welsh life relevant to law reform. Its members are detailed at **Annex A**. 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 has been a considerable success and we are grateful to all members of the Committee for their time and commitment.

It may well be that, in the future, the Committee could be given a more formal and structured role in relation to contributing views on the substance of Law Commission project[s], devolved or otherwise. At present it tends, in practice, to focus attention mainly on strategic issues affecting the Commission. An alternative model could see a similar Committee specifically consulted on Law Commission proposals.

Funding

A further consideration in relation to how we select work is that, as a result of cuts to our core-budget provided by the Ministry of Justice (54% in a little over 8 years), there is increased reliance on projects where a Government Department funds the marginal cost of a project.

This means a reduced capacity to undertake projects making use of our core funding. It also makes it increasingly difficult to undertake consolidation and Statute Law Repeals work, unless Government is willing to fund it.

Our budget cuts could have increased pressure on our ability to undertake projects for Wales. In the past the Welsh Government has funded Wales-only projects but, with austerity biting, it was unable to give such a commitment in relation to the current 13th Programme. As a result, the Commission faced the prospect of there being no Wales-specific dimension to our work. Commissioners took the view that this would be unacceptable and therefore asked for funds to be found from the core budget to finance the work. The Commission will always endeavour to ensure that Wales is reflected in our work, but we suggest a more settled model of funding should be formulated so that the Commission and Welsh Government can operate with greater certainty in the future.

Logistics

On a practical level, the Commission works hard to cater for the people of Wales. Consultation events are, wherever possible, held in Wales and the Commission has developed a Welsh Language policy which exceeds the requirements laid out in our sponsoring Department's formal Scheme. As such, we work on the basis of language parity in relation to events specifically relating to Wales, so far as budgetary and timescale pressures allow.

We have been hampered on occasion by an inability to access high quality translation services, which has resulted in some unfortunate errors in the more complex legal texts we have published. This is primarily because we are under the auspices of a Ministry of Justice-wide contract which does not, in our view, always cater for the technical legal language the Commission uses. We believe this aspect of the Commission's work can and should be improved and we are exploring ways to do that.

Access to Justice

We note one of the themes of the Commission on Justice is access to justice. We believe the Law Commission has a vital role to play in this context.

At one end of the spectrum of our work are projects which codify the law, for example Welsh Planning Law. The origin of this project is a desire on the part of the Welsh Government to bring about greater clarity in the law so that access to justice is improved for citizens, particularly those who are not represented. Although accessibility is the key component of this work, it may also promote investment, given costs should be reduced for those seeking to navigate planning laws.

The Welsh Government's long-term aspiration, we understand, is for a number of areas of the law to be codified, with potential future candidates including education, housing and health. Such projects are lengthy, detailed pieces of work, requiring considerable legal and drafting expertise.

At the other end of the spectrum, Law Commission projects focus efforts on the practical impact of legal complexity, making recommendations – often non-legislative – to improve the justice system. By way of example, our project on the Enforcement of Family Financial Orders recommended changes to the way in which enforcement cases are allocated, an increase to the period of time to enforce arrears before the court's permission is required and the introduction of a new power for courts to remit arrears. Overall, our recommendations are designed to create an effective system that produces compliance with court orders in a way that is fair to both the creditor and the debtor.

Our future relationship with Wales

We believe that the current model of a Law Commission for England and Wales should be maintained.

First, the costs of creating and running an effective law reform organisation are considerable. The Commission has an expert cadre of staff who have built up experience over many years. As experience in Northern Ireland (whose Law Commission has essentially been mothballed) shows, maintaining an effective organisation requires ongoing commitments and resourcing which can be problematic in a small jurisdiction. We believe that the Commission as currently constituted provides cost effective law reform advice for Wales in both reserved and devolved areas.

Secondly, a Welsh Law Commission would inevitably tend to focus predominantly on devolved areas of the law. The question then arises as to how law reform in Wales in respect of non-devolved areas would be managed. At present the Law Commission works closely with the Welsh Government and stakeholders, including our Welsh Advisory Committee, to ensure that our proposals regarding reserved law take into account the position in Wales. If the Law Commission lost its role in relation to reserved law in Wales, there would be a danger of the UK Parliament simply extending to Wales Law Commission proposals in reserved areas of law on which the Law Commission had only been able to consult in England.

We are keen to explore ways of ensuring that the Commission's portfolio of work continues to have relevance in Wales. That could mean more Wales-specific projects. It may also mean more formalised mechanisms for ensuring that projects that we undertake in reserved areas of law more fully take into account the position in Wales. In relation to reserved law, the Commission already consults fully with the Welsh Government and takes into account the Welsh dimension of an issue, but the general expectation is that only one set of recommendations, covering both England and Wales, will be produced. That could change. This could involve our entering into Memoranda of Understanding with the both Governments (rather than, as in the past, MoUs for projects in areas of reserved law being with a Westminster Department only) and/or jointly agreed terms of reference. On a practical level, the Commission may need to give greater consideration as to how potential policy differences between Wales and England are catered for. It may become necessary to have chapters in our Consultation Papers and Reports dedicated to the position in Wales and, in theory, specific recommendations in relation to Wales.

ANNEX A – LIST OF CURRENT WALES ADVISORY COMMITTEE MEMBERS

Nick Bennett, Public Services Ombudsman for Wales

HHJ Neil Bidder, Circuit Judge

Keith Bush QC, Honorary Professor, Swansea University

Professor Dermot Cahill, Head of Law School, Bangor University

Brian Dowrick, Senior Lecturer, School of Law, Accounting & Finance, University of South Wales

Ruth Henke QC, Barrister, 30 Park Place

Calum Higgins, Citizens Advice Cymru

Mr Justice Clive Lewis, High Court Judge and Presiding Judge for Wales

Emyr Lewis, Partner, Morgan Cole LLP and Senior Fellow in Welsh Law at the Wales Governance Centre, Cardiff University

DJ Wendy Owen, District Judge

Professor R Gwynedd Parry, Professor of Law and Legal History, Swansea University

Mr Justice Picken, High Court Judge and Presiding Judge for Wales

Professor Rick Rawlings, Professor of Public Law, UCL

Sarah Rochira, Older People's Commissioner for Wales

Mabel Thompson, Manager, Personal Support Unit, Cardiff

Professor Thomas Glyn Watkin, Honorary Professor of Law, Cardiff University and former First Legislative Counsel for Wales

Professor John Williams, Professor of Law, Aberystwyth University

Professor Dan Wincott, Head of Law School, Cardiff University