



## **Law Reform in a Devolved Wales<sup>1</sup>**

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Major themes of this conference, as of any gathering of thoughtful Welsh lawyers at the moment, are those of the new constitutional settlement in Wales and the possibility, in future, of a separate Welsh jurisdiction. I would like to spend a little time this morning looking at what these developments might mean for law reform in Wales.

The Law Commission is, of course, the statutory law reform agency for the unitary jurisdiction of England and Wales. As such, it is incumbent on us to ensure that, in this post-devolution age, we are properly meeting the law reform needs of Wales, as well as those of England. My colleague Frances Patterson QC, one of the Law Commissioners, spoke at last year's Legal Wales conference about our work

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- in areas such as adult social care, where many of our recommendations are now set to be implemented by the National Assembly in the Social Services Bill, and
- in current projects, like that on wildlife law.

I do not propose to repeat what she said to the conference last year. However, I do want to emphasise that in all of these projects the Commission has been greatly assisted by the extensive consultation which has taken place with interested parties throughout Wales. This has involved not only large scale conferences – although I understand that the conference on adult social care which the Commission held in Cardiff was the largest of all the events held on that project – but also consultation at a much more local level. For example

- in the adult social care project, the Commission held workshops here in North Wales with Conwy Connect, a local organisation for people with learning disabilities, and visited disabled service users in their own homes in Newport, Barry and Neath.
- in connection with the wildlife project, a lawyer from the Commission has been speaking about biodiversity – for example, a fortnight ago in Pontypridd and this week in Treuddyn, Flintshire.

We are grateful for all the responses we receive to our consultations. These can only strengthen our recommendations.

I also want to say something about the recently announced decision of the Welsh Government to act on the Commission's proposals on housing tenancy reform. The Law Commission reported its recommendations in this ambitious project on renting homes in 2006. In our annual report for 2007-8, we expressly contrasted the lack of interest in our proposals in England with "the imaginative and positive policy reaction ... in Wales". In due course, our proposals were rejected in England, but accepted in principle in Wales. We were delighted when in June of this year the Welsh

Government announced that a further housing bill would be added to the legislative programme for the current Assembly to implement these proposals. Since then, we have been working with the Welsh Government to update our recommendations, to tease out any devolution issues and to examine how the proposals can assist with other current policy initiatives in the field. We will be publishing a report on these issues early next year.

We are currently in the process of agreeing a concordat with the Welsh Government which is intended to provide a formal framework for the relationship of the Government and the Law Commission. However, one deficiency in the present statutory scheme has already become clear. As matters stand there is no route 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. Similarly, the statute creating the Northern Ireland Law Commission made provision for references from the Northern Ireland Executive to the Northern Ireland Law Commission. There is a clear case for similar provision to be made in the case of Wales. Of course, in practice, a reference could be made by the Wales Office on behalf of the Welsh Government but that would not be an entirely satisfactory route.

So that is an update on where we stand at present. However, I should like to consider this morning how the machinery of law reform could work in future if, as seems likely, 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.

I must make two qualifications before I go any further. First, as a judge, it would not be appropriate for me to express any view on the desirability or otherwise of a separate jurisdiction. As the Lord Chief Justice has made clear on a number of

occasions – in particular in his speech to this conference in Cardiff in 2009 - it is not for the judges to make the running on such issues of policy. Secondly, and for similar reasons, it would not be appropriate for the Law Commission to express a view on that question. Today, I should like to discuss some of the possible implications of divergent law or a separate jurisdiction for law reform. I do so in a spirit of open enquiry. Nothing I say should be taken as representing my personal views or the policy of the Law Commission. I aim to put before you considerations, not conclusions.

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

The argument for a separate jurisdiction starts with the fact of divergent substantive law; and in Wales, divergent law, overwhelmingly, is a product of devolution. This is not true of Scotland where divergent law preceded devolution, rather than being accomplished by it. Similarly, in Northern Ireland the divergent law preceded the current devolution settlement.

The current state of affairs in the United Kingdom is that where there is a separate jurisdiction, there is a separate Law Commission. So, on the face of it, there would be a strong case for a separate Law Commission for Wales, if Wales became a separate jurisdiction. How might law reform work in that context?

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. In some, a distinct Welsh identity can be seen to be developing. One of these is family law, as Judge Michael Farmer QC pointed out in a lecture at the National Eisteddfod in Ebbw Vale in 2010 and as Mr. Osian Rees of Bangor University has demonstrated in an article in the most

recent issue of the Statute Law Review. 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.

One could say, then, that the starting point would be that a Welsh Law Commission in a Welsh jurisdiction would be 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?

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 the implication of that is that the three quarters of the law to which we currently devote our time would remain un-reformed or under-reformed in 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 Welsh law would remain unreformed.

Westminster might, of course, decide to keep the law of Wales in step with the law of England by replicating the English Commission's recommendations in Wales, in a single Westminster Act dealing with both jurisdictions. But one might think that that would be the worst sort of legislation for Wales, where this country was just added on 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 undeveloped. 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.

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 undeveloped, there is often a specifically Welsh perspective on reform. Our current project on conservation covenants, for instance, is a land law project, and hence undeveloped. But it is intimately bound up with environmental policy, which is devolved. It is therefore important that the project properly engages with Welsh policy makers and interested parties. There might be a danger that if we did not have a firm footing in *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 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 a statutory Welsh committee. 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 the Counsel General for Wales.

### **A law reform institute?**

There are, no doubt, many possible variations on these models. For instance, in some parts of the world, there exist law reform institutes, attached to University law schools, to promote law reform. I can see real advantage in the Welsh law schools giving thought to the establishment of such an institute to work closely with the England-and-Wales Law Commission to promote Welsh-centred law reform. One advantage of this approach would be that it could be pursued without legislation, and indeed might well be a useful development even in the absence of a separate jurisdiction. Dare I suggest that, whatever the future may hold in terms of the possible further progress of devolution or the creation of separate jurisdictions, the creation of a law reform institute is something we should be seriously considering now?

## **Conclusion**

This has been an exercise in “what if ?”.

To us in the Law Commission of England and Wales, the Welsh dimension of our work of law reform is an abiding concern. As the process of devolution, and legal Wales in the broad sense, continue to develop, we in the Law Commission hope to be part of the discussion about how law reform should be accommodated. I hope that what I have said today can be taken as a contribution to that discussion, and that the discussion can continue in an open and constructive way.