

LAW REFORM AND WALES (LEGAL WALES, 11TH OCTOBER 2019, 9.50AM – 10.15AM)

Speakers: Sir Nicholas Green and Jeremy Miles AM

Chair: Lord Lloyd-Jones

Introduction (general points about our relationship with Wales)

- 1 I would like to start my address with a few observations about our relationship with Wales. The Law Commission is, of course, the Law Commission of Wales and of England. We have a duty to review and improve the law in both countries.
- 2 We have been in existence since 1965 and have since then produced over 350 law reform proposals the great majority of which have applied both to England and to Wales. Our implementation rate by Government in the form of legislation is well over 70% but that under reflects our success rate. A good many of our reports do not require implementation through legislation. For instance, our proposals on expert evidence in criminal proceedings were simply adopted by the Courts and transposed into the criminal procedure rules. Other reports on points of law (such as our report on illegality) have been taken upon by the Supreme Court and used to guide development in the common law. Just last month we published our report on electronic signatures in which whilst acknowledging that at some point the Government might wish to pass clarificatory legislation we have set out both a high-level statement of legal principle and a detailed exposition of the law and made clear that the courts can plug any gaps and lacunae. In other areas we provide advice to Government on options for reform leaving it to Government to then decide how to proceed.

- 3 In recent years, and particular under David's Chairmanship, we have taken steps to establish relationships with the Welsh Government and the Assembly.
- 4 The Wales Act 2014 amended the Law Commissions Act 1965 to enable us to agree a Protocol with the Welsh Government setting out the approach that the Law Commission and Welsh Ministers would jointly take to our work in Wales. The 2014 Act gave new powers to Welsh ministers to refer reform work directly to us and required Ministers to report annually to the Assembly about the implementation of our reports relating to Welsh devolved matters.
- 5 To assist with our work, we set up a Welsh Advisory Committee in early 2013 to advise on Welsh law reform matters and to ensure that proper account was taken of the Welsh dimension to our work more generally. Its members – many of whom are here today - include distinguished lawyers and members of public and third sector bodies in Wales, and all the Welsh law schools.
- 6 Our mission is to be relevant and to ensure that our work brings about significant and lasting benefit. At present we are working on about 20 projects stretching from reform of aspects of leasehold land through hate crime and on-line abuse to automated vehicles, smart contracts and intermediated securities. But a very important part of our function is to work with the Welsh Government and National Assembly on projects which are Welsh specific.
- 7 We exist in profoundly uncertain times. Assuming Brexit goes ahead, there will no doubt be ongoing discussions between Cardiff and Whitehall as to the future division of repatriated powers and competencies between the two nations. Standing back, and avoiding being political, I think that there will be increased scope for the Law

Commission to assist with some of the technical aspects of this work, where our impartial and independent approach could be of real value.

- 8 But over and above this I wish to emphasise that we see it as important as a matter of principle that we always have Welsh projects on our books. We do not see how we can properly serve the Government, the Assembly or the people of Wales if we do not.

Accessibility of Welsh law

- 9 This brings me to accessibility. I am delighted to share this platform with Jeremy, for whose support I am grateful, and whose wider work and interest in making Welsh law accessible is invaluable.
- 10 Many ordinary individuals feel disconnected from the law. So much of it is, jargon-strewn, highly complex, and technical. The substantial curtailment of legal aid has also served to reduce access to the law. More private citizens represent themselves in courts and tribunals and they need to understand their rights and their obligations. Many others need to know what the law is in order to conduct their everyday lives. Businesses of all sizes need certainty so that they can make effective decisions on when and where to invest. The need for accessible law has never been greater.
- 11 In our report for the Welsh Government on the *Form and Accessibility of the Law Applicable in Wales*, published in 2016, we noted the need for the law to be clear and accessible and surveyed the reasons why the law in Wales had become inaccessible.
- 12 These were in part reflections of problems of inaccessibility affecting the United Kingdom, as a whole, but were compounded in Wales by the nature and process of devolution.

- 13 The Assembly has passed 56 Measures or Acts (including the Legislation (Wales) Act 2019) and approximately 2,500 statutory instruments. In the forty years since 1979 the Westminster Parliament has passed a further 12 Acts applying just to Wales (several relating to the powers of the Assembly). And some 5,000 other Acts and 80,000 statutory instruments, passed in Westminster, apply in both Wales and England. In relation to any one topic, whether it be social security or housing, there is a vast amount of complex, detailed legislation, most of which is inaccessible to the ordinary person.
- 14 I feel strongly that improving accessibility can have a genuinely positive impact upon the lives of individuals.
- 15 The Legislation (Wales) Act [which Jeremy has just mentioned] reflects far-sighted and enlightened legislative practice. It is an important constitution development. It encapsulates in simple terms a clear duty on the Counsel General to keep the law under review, and a duty on the Counsel General and the Welsh Ministers to prepare a programme of reform to improve accessibility. These are bold duties, and they create a motor for perpetuating greater accessibility to the law.
- 16 We welcome the provision in the Act for the programme to include activities undertaken in collaboration with ourselves; our participation will of course have to be in accordance with our own statutory powers, but we see the Welsh Ministers' power to refer projects directly to us as a convenient means of achieving this.
- 17 The Counsel General described in an earlier statement this accessibility project as "*generational*" and I wholeheartedly agree. It is a process that of course must be approached with pragmatism. It may not always be possible to bring together all the legislation into a single measure or a code; there may need to be a group of instruments. And the speed at which accessibility can be achieved will inevitably depend on political

and financial resources. But nonetheless the Act is an important statement of democratic principle.

Codification and Consolidation (and Planning Law in Wales)

- 18 I wish now to turn to a different subject. Codification is an important aspect of accessibility. In our report on the Form and Accessibility, we recommended that the Government pursue a policy of codification. Our experience is that smart codification reaps real benefits, not only in terms of improving the position of individual citizens, but also in administrative savings. Our recent codification exercise in relation to sentencing in criminal cases, which cover Wales and England, is estimated to be capable of saving up £250m over ten years.
- 19 We therefore welcomed the Counsel General's announcement in April 2017 of the launch of a pilot programme of consolidation, codification, and better publication of legislation, accompanied by a draft taxonomy showing how such a programme might apply across the range of non-reserved subject areas.
- 20 One constituent of the pilot programme has been the codification of Welsh planning law. Planning law in Wales is unnecessarily complicated and, in places, difficult to understand. The legislation has not been consolidated since the Town and Country Planning Act 1990, and that has been supplemented (and often confounded) by a succession of subsequent piecemeal changes – introduced in Westminster and, latterly, in Cardiff Bay.
- 21 It is in consequence ever increasingly difficult to identify precisely what the planning law applicable in Wales actually is. Most new planning legislation for Wales is now made in the Assembly; but that sits alongside earlier legislation, made in Westminster,

which may apply only in Wales, or only in England, or sometimes in both Wales and England.

- 22 Planning law and procedure are, *par excellence*, the sort of measures that, if simplified, can stimulate inward investment as a consequence of improved legal certainty. They can accelerate planning decisions that mean that people are more likely to invest in Wales than elsewhere.
- 23 In November 2018, we published a Final Report containing 193 recommendations for technical reforms to be incorporated alongside straightforward consolidation. This will form part of the evidence base for the Welsh Government to consider in simplifying planning legislation. The Law Commission lawyer who worked on this project is now working closely with the Welsh Government on new legislation that will, we anticipate, incorporate many of our recommended reforms.
- 24 The result should be the first consolidation and codification Bill under the new programme envisaged by the Wales (Legislation) Act – we hope the first of many.
- 25 In our engagement with stakeholders in Wales, several other areas have been offered and suggested as ripe for codification and consolidation. We look forward to a productive partnership with the Welsh Government in the coming years, to help the programme become a reality.

Other principles of accessibility (language and digitalisation)

- 26 I should like to say a few words about another aspect of accessibility of law. Although codification is important, accessibility is not just about bringing everything together. It is also about using comprehensible language. In Wales, there is the important additional dimension of making legislation available and understood both in English and in Welsh.

- 27 The Law Commission is interested generally in the digitalising of legislation. There are many aspects to this. It can mean making legislation in written form being readily accessible online. But it can also mean other things. For instance, we are looking at how legislation can be coded so that when a user embeds the code into its own systems compliance with the law is automatic.
- 28 We are already working on one project, automated vehicles, where for the project to come to fruition it is contemplated that the whole of the Highway Code and all local authority traffic orders will have to be coded so that the automated, robot, cars digitally comply.
- 29 We predict that at some point in the next few years we will issue a consultation paper and a draft Bill accompanied by a software coded version of the draft Bill and then consult on all three.
- 30 In Welsh terms these are all aspects of accessibility. And in this area the Welsh government has taken an international lead.

Future Welsh projects: Devolved Tribunals

- 31 Finally, I would like to mention our future project on Devolved Tribunals in Wales, which we will be introducing here, later this morning. The rules and procedures governing tribunals in Wales have developed piecemeal out of a wide range of disparate legislation. Much of this was produced outside the devolution process, resulting in unsatisfactory gaps. As a result, the Welsh Government has asked the Law Commission to start a review, which will sweep away the complexity and help rationalise the law on devolved tribunals in Wales, following the creation of the office of President of the Welsh Tribunals, and the Welsh Tribunals Unit.

Conclusion

32 In conclusion I wish to return to and reiterate a single core message: The Law Commission stands ready and willing to work with the Government, and the Assembly – and, in due course, the Senedd – on future law reform projects. We do consider this to be of *the* very highest importance.