"Deepening and broadening the relationship between the Law Commission and Wales"

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Cardiff

6th October 2023

A. Introduction

The Law Commission has attended this annual conference over many years during which we have emphasised the importance of our relationship with Wales.

Our expertise in Welsh law has grown rapidly over recent years, as has our relationship with Welsh stakeholders. We are now asking - what next? What more can we do to fulfil our role as the Law Commission of Wales? Over the past 12 to 18 months a series of discussions between the Commission and the Welsh Government have taken place during which we have begun to map out the shape of a new, deeper, and broader relationship.

What I wish to do in this paper is explain how that might work.

To place this into context I need, first, to provide a thumbnail sketch of the Law Commission as it is today, to describe the existing legal framework which governs the relationship between the Commission and Wales, to provide a brief overview of some of the more important legislative projects that we have undertaken, and then to describe how we propose to go about developing the relationship between the Commission and Wales in its broadest sense.

B. Who we are

The Law Commission of England and Wales was created by the Law Commissions Act 1965. This created both the Law Commission of England and Wales, and the Scottish Law Commission.

We have about 70 lawyers and researchers involved in frontline law reform. At the apex of the organisation sit five commissioners comprising the Chair and four others. The Chair is a judge of the High Court or Court of Appeal, the latter also being a Privy Counsellor. The position of the other Commissioners, like that of the Chair, is created and governed by statute. Constitutionally, we are "*Office Holders*", and are therefore independent of Government. Each Commissioner leads a team of lawyers who are allocated to various law reform projects.

Law Commission lawyers are a unique breed. You will not find a similar corpus of specialists elsewhere across Government whether in London or Cardiff. They have unique skills. They are versed in the arts of consultation. They understand legislative drafting and procedure. They have a deep understanding of how government works and of the prevailing political landscape. And they are subject matter experts of the highest order. I am routinely astonished at the sheer quality of the work they produce.

The published reports of the Commission are however the shared responsibility of the five Commissioners. We agree on the content of a report through a protracted and intensive "peer review" process whereby the Commissioners review and analyse the detailed contents of each draft report. This is a remarkably rigorous bulwark against confirmation bias and group think. We are fiercely evidence based. We do not bring personal opinions to the table.

At any one time the Commission might be engaged in over 25 law reform projects at different stages of completion. We are nowadays increasingly involved in post-report implementation, working with Departments and Parliamentary and Legislative Counsel, in order to bring legislation to Parliament and ensure its passage into law.

It should be a statement of the obvious, and a truism, that since the Commission is objective and independent in everything it does, it is for the Commissioners, collectively, to decide whether to accept an invitation to undertake a law reform project and as to our final conclusions. However, we cannot remain oblivious to the political pressures that swirl around us and would be naive if we failed to appreciate the realities of life.

On the other hand, when it comes to accepting invitations to take on a project, we are astute to avoid issues which are essentially "*political*" in their nature in the sense that the answer to a difficult problem might lie simply in the making by Parliament of a pure social policy, or ethical, judgement call.

Equally, we routinely accept projects which are difficult where there are strongly held, competing, views as to the solution to a problem. We are often at our best when grappling with such large scale, controversial issues where, because of both the intensity and the even-handedness of our consultation approach, we are able to find workable and durable solutions, which are often recognised as the best way forward to an otherwise intractable problem. It is our independence and objectivity that ultimately explains why we are valuable to Government.

What the Commission brings to the development of Welsh law is therefore a hinterland of almost 60 years' experience of working with a wide range of different governments and stakeholders. Historically, a high percentage of our recommendations for legislative reform have been implemented, though it is increasingly common that we recommend non-legislative methods of reform as well, for example, through development of the common law or through the institution of industry-wide working groups to implement our proposals or through judicial procedural rules.

C. <u>The existing legal relationship with Wales</u>

The statutory framework

The Law Commissions Act 1965 recognised that there was a separate corpus of Scottish law, and for this reason the Act instituted the Scottish Law Commission as a separate body. At the time however, no one envisaged the existence of devolved Welsh law.

The constitutional status of Wales has, however, undergone profound change since then. A series of Acts have given rise to a constitutionally discrete legislature and government. These include the Government of Wales Act 1998, the Government of Wales Act 2006, the Wales Act 2014, and the Wales Act 2017.

To put the legislative framework into context, it is worth recording that the Wales Act 2017 included a declaration that the Assembly and the Welsh Government were "*a permanent part of the United Kingdom's constitutional arrangements*". The Act further enshrined the "*commitment*" of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government Act in the form of a declaration that the Assembly and the Welsh Government could not be abolished "*except on the basis of a decision of the people of Wales voting in a referendum*".

The Wales Act 2014 amended the Law Commissions Act 1965 to take account of these developments and the Commission thereby acquired a formal responsibility for devolved law. Welsh Ministers were given the power to invite the Law Commission to undertake law reform projects. They were also empowered to enter into a "*protocol*" with the Law Commission pertaining to its work on devolved Welsh law. This echoed an equivalent statutory power that the UK Government has in relation to the law of England and Wales.

Under the then Chair, Lord Lloyd-Jones, a protocol between Welsh Ministers and the Law Commission was negotiated and agreed in 2015. This explains that the Commission may undertake a law reform project relating to Welsh devolved matters either by including it in a programme of law reform or by accepting the project on an ad hoc reference from Welsh Ministers. It describes how in practice Welsh Ministers and the Law Commission will work together on such projects. The Protocol does not however address the day to day nuts and bolts of the relationship between Wales and the Commission.

The Wales Advisory Committee (WAC) / The Legal Wales Conference / the Law Council of Wales

Part of the overall constitutional framework comprises various non-statutory bodies.

The Wales Advisory Committee is a non-statutory body. It was set up in 2013 by the Law Commission, also under the leadership of Lord Lloyd-Jones. It comprises judges, academics, legal practitioners and representatives or public sector bodies with expertise or an interest in the development of Welsh law. In order to guarantee independence, it does not contain representatives of the Welsh Government. It advises the Commission upon the exercise of its statutory functions in relation to Wales in respect of both devolved and non-devolved matters. It assists us in identifying issues of real concern to Wales.

The Commission also participates, by invitation, in the annual Legal Wales Conference which has afforded us an opportunity over the years to report on current law reform projects. But also to be visible and accountable to the Welsh legal community.

The importance of this event in the evolution of Welsh law is highlighted by the fact that during the 2017 conference, Lord Lloyd-Jones (by then a former Chair), echoed calls made by some eminent academics for the establishment of an Institute of Welsh Law to promote the study of Welsh law. He envisaged the Welsh Government having a coordinating role bringing in the Welsh law schools, the professional bodies and the Judicial College. He also saw a role for the Learned Society of Wales, the Legal Wales Foundation and for close liaison with the Law Commission in view of its responsibilities for law reform in Wales. This call for action was taken up by Lord Thomas who adopted the suggestion in the Report of the Commission on Justice in Wales, entitled "*Justice in Wales for the people of Wales*", October 2019 ("*The Thomas Commission Report*"), and it came into being in the form of the Law Council for

Wales. Lord Thomas observed that the Council should be: "*a voice for legal Wales*". The Chair of the Law Commission sits as a member of the Council.

D. The development of existing projects on Welsh law

One might have thought that in relation to a new body of law and a new jurisdiction, the Welsh Government and the Law Commission would, as first projects, have chosen relatively modest issues to experiment upon following the eminently sensible and cautious sentiment: start small and build gradually.

In the event, we did nothing of the sort. From the outset our engagement with the Welsh Government focused upon ambitious and far reaching projects of signal importance.

By way of example, I will refer to four such projects.

Form and Accessibility

The first is the report on the "*Form and Accessibility of the Law Applicable in Wales*" published in 2016. This project was proposed to us by both the Wales Advisory Committee and by the Welsh Government. This was a remarkable project espousing as much philosophy as it did law.

The essential aim of the reform proposal was to create a system whereby the law of Wales could be accessible. As Lord Bingham explained in his seminal work "*The Rule of Law*" (2010) accessibility is integral to the rule of law: "*The law must be accessible and so far as possible intelligible, clear and predictable*".

The project drew inspiration from Welsh legal history. The preamble to the book of *Iorwerth* in 1240 records that the 10th century laws of Hywel Dda involved a codification of the law and an ordering of it into published books: "*And by the common counsel and agreement of the wise men who came there they examined the old laws, and some of them they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew*…". We cited this in the opening paragraphs of the Report.

The response of the Welsh Government to our consultation paper emphasised that for the laws of Wales to be accessible it was essential that they were intelligible, clear and predictable in their effect, and were easily available. The Government identified three factors militating against the achievement of these elemental objectives. The first was the sheer volume of legislation with its plethora of interconnecting and cross-referenced provisions which created a complex and largely indigestible patchwork of law. The second was the process of devolution which tended to make legislation within the devolved areas more complex than would otherwise be the case. The third was the extent to which legislation in its updated form was freely accessible to the public and available in the two official languages of Wales.

In our final report, we made 32 detailed recommendations designed to bring accessibility to the entire system of law. Among these recommendations we proposed a scheme of codification that would involve bringing together legislation whose subject matter was within the legislative competence of the National Assembly of Wales, but which was, at that point, scattered between various pieces of legislation of both Westminster and Cardiff. We recommended that the areas in which the law was most in need of codification should be identified in advance. We further recommended a flexible and streamlined legislative procedure which should be introduced into

the standing orders of the Assembly to achieve these objectives, but which also involved the possibility of improvements being made to the legislation as it underwent the process and in this way we took the opportunity to suggest adoption of the most up to date methods of codification. In addition, we recommended that when a bill was introduced it should be accompanied by an explanatory memorandum endorsed by the Counsel General which would explain the effect and purpose of each of the sections of the relevant bill.

The Government implemented our recommendations in the Legislation (Wales) Act 2019 and corresponding provisions were included in the Standing Orders of the Senedd. In keeping with the object of Welsh Ministers to enhance the accessibility of Welsh law, an early project, that the Law Commission was pleased to take on, was ambitious and far reaching and concerned codification of Welsh planning law, a major project on any view. All things being equal a bill will be introduced to the Senedd in 2024.

Devolved Tribunals

The next project that I would like to refer to is the project on "*Devolved Tribunals in Wales*". We published our report on 9th December 2021. We observed that a tribunal was a body set up to settle disputes usually arising out of the decision of public bodies which provided justice to some of the most vulnerable in society. But we also observed that the extant rules and procedures were complicated, inconsistent and in some cases, unfit for purpose. We recommended the institution of a new tribunal, the first-tier tribunal for Wales, to replace the existing body of tribunals and we suggested that this new tribunal be divided into chambers, for example a property chamber and an education chamber. We also recommended the creation of an Appeal Tribunal to hear appeals from the first-tier tribunal and we further recommended the creation of a tribunals procedure committee with responsibility for reviewing and updating procedures. Finally, we recommended the creation of a non-ministerial department to replace the existing Welsh tribunals unit independent from the Welsh Government responsible for managing the system.

In chapter five of the report, entitled the President of Welsh Tribunals, we observed that the President was the most senior judicial figure within the system of devolved tribunals in Wales. The office was created by section 60 of the Wales Act 2017, and it bore similarity to the position of the Senior President of Tribunals in England and Wales and the President of Scottish Tribunals. An enhanced Presidential role was in our view instrumental to the creation of the new system. The President would be key to ensuring that the transition to the new system occurred smoothly and with minimal disruption to users of the tribunals.

What is the significance of this report? On one view it focused upon a highly technical set of legal and procedural rules which governed what was, in relative terms, a modest number of cases. But on another view the report contemplates a platform or blueprint for a (future) more comprehensive Welsh judicial system. It is much to the point that the project was the subject of a strong recommendation by Lord Thomas in his report about the need for cohesion in the Welsh justice system. And many of the suggestions and recommendations that he made were, ultimately, endorsed by the Commission in our final report.

On 19th June 2023, the Counsel General published a White Paper entitled *"A New Tribunal System for Wales"*. This takes forward and builds upon the recommendations of both the

Commission on Justice in Wales and the Law Commission's Report. The consultation on the White Paper closed on 2nd October 2023.

Regulating Coal Tip Safety

The final report I wish to refer to concerns the reference made to us by Welsh Ministers on regulating disused coal tips in Wales. In February 2020, following storms Ciara and Dennis there were coal tip landslides. These evoked raw memories of the Aberfan tragedy in 1966 when the collapse of a coal tip resulted in the death of 116 children and 28 adults. The prevailing legislation had been enacted following that calamity. It related to a period when there was an active coal industry, but no adequate provision was ever established for disused tips. Research indicates that there are thousands of such tips in Wales, the majority in private ownership, some dating back to Roman times. A number were in valleys above centres of population. Climate change had brought with it a risk of increased moisture in the air which, in turn, exacerbated the possibility of tip instability. In October 2020, Welsh Ministers asked the Commission to undertake a project to create a new framework for the management and regulation of such tips. The project was urgent given the subject matter and the threat posed by climate change. We accepted the invitation working to an expedited timetable. The final report, which followed an intensive consultation, containing detailed recommendations was published in March 2022. We received a response from the Minister for Climate Change in March 2023 accepting in modified form the majority of our recommendations.

In the round

When I look back on these early projects, they were anything but mainstream. They are aspirational and forward looking, rooted in history, formative in their desire to lay the foundations of a proper system of Welsh law, and tapped into the emotional heritage of Wales. In different ways they are all constitutionally important. This early work has in many senses been remarkable. I believe that it underscores the strengths of the Commission and what it is able to contribute to the evolution of Welsh law.

Our role has been recognised by the Counsel General in the Eighth Annual Report on the Welsh Government's implementation of Law Commission proposals, which was laid before the Senedd in February this year. There the Counsel General provided an update on the progress made over the past twelve months on a range of issues the subject of Law Commission recommendations. He stated that the progress described in the report "…*demonstrates the importance the Welsh Government places on Law Commission proposals*".

Very recently I received a letter from the First Minister, formally asking us to include devolved tribunals in Wales in our existing review of the law of contempt of court, which, within the Commission, is a joint project between the Criminal and Public law teams. This is a project concerning the law of England and Wales, not a devolved law project. The letter was the culmination of discussions between the Commission and Welsh Government officials, and with the President of Welsh Tribunals. There is support for the extension of our existing England and Wales project to include devolved tribunals and I have replied to the First Minister expressing our enthusiasm. This is the first occasion when we have been asked to consider a reform project which investigates both UK wide law and devolved law simultaneously.

E. Why now?

I want now to concentrate upon the future and our plans to deepen and broaden our engagement with Wales.

We believe the time is right.

First, the Thomas Commission Report is required reading for anyone interested in the evolution of devolved justice in Wales. It will in my view stand as the *locus classicus* for future law reform for a long time to come. It advocated a series of recommendations concerning such matters as improved accessibility of Welsh law and the creation of new bodies to devise overall criminal and civil justice in Wales. Lord Thomas also thought that the time was ripe for change. He cited from our report on Form and Accessibility:

> "Between 2012 and September 2019 the Assembly passed 41 Assembly Acts on a wide range of topics, including seven Acts relating to housing, six relating to education and 10 relating to health and social services, as well as substantial Acts on planning, the environment and taxation. This is in addition to 22 Assembly Measures passed between 2008 and 2011. In 2016, the Law Commission reported "*it has become meaningful to speak of Welsh law as a living system for the first time since the Act of Union in the mid sixteenth century …*"

We now have a substantial and growing body of work under our collective belts. Credentials on both sides have been proven. Now is the time to move on.

Secondly, there is the need to put in place a structure capable of dealing with an expected future increase in legislative activity in Wales. Of importance is the recently published *Senedd Cymru (Members and Elections) Bill*, to which I will return later, which contemplates a substantially enhanced legislative and scrutiny role for the Senedd and an increase in the number of Welsh Ministers. The essential premise behind the Bill is that there is a need to make legislative reform more efficient and streamlined. Not only does this envisage a growth in the Senedd, to 96 members, but it also envisages an increase in the maximum number of Welsh Ministers who can be appointed from 12 to 17 plus the First Minister and the Counsel General, combined with an additional power to permit a further increase to 18 or 19 with the approval of the Senedd.

Thirdly, there is at least the possibility that in the future there might be changes to the devolution landscape, possibly broadening the transfer of powers away from the centre. The Brown report[1] has promoted increased devolution and decentralisation. In relation to Wales, it suggests an increase in devolved powers in the criminal law sphere over probation and youth justice. Whilst this falls short of full scale devolution of criminal law, it still anticipates a substantial increase in jurisdiction. It is known publicly that the Welsh Government has already embarked upon an assessment of how this would work in Wales, were it to come to pass. I should add, though I hope it is obvious, that the Commission must always remain institutionally distant from political questions such as the plans for a possible new Government to increase devolution. Nonetheless, we do not remain oblivious to such possibilities since they could materially affect our statutory remit.

[1] Report of the Commission on the UK's future (Labour party publication – December 2022)

Fourthly, there is an emerging structure of non-governmental bodies and organisations focusing upon the need for change and reform. I count among these the WAC. But of course, there is now the Law Council of Wales which will over time generate a renewed impetus for legislative change.

Fifthly, there is a divergence of policy development between Westminster and Cardiff. In relation to the law of England and Wales, in recent years, our work has become more cutting edge. We have for instance been working on projects relating to the impact of AI on legislation for example in relation to automated vehicles and remote driving and commercial air transport (which includes drones). We are also looking at issues relating to the digital economy. These are projects which benefit all of the people of the United Kingdom. In relation to Wales, by contrast, the reports on Form and Accessibility and Devolved Tribunals have domestic constitutional significance. The report on Regulating Coal Tip Safety was a project of deep emotional significance to Wales albeit that it also had far reaching ramifications relating to the impact of climate change. I repeat the prescient observations of Lord Lloyd-Jones who stated this, during the conference marking the 50th anniversary of the Law Commission in 2015:

> "Devolution brings new responsibilities for the Commission and will open up many new opportunities in the future. In particular, we are already seeing a divergence of English law and Welsh law into in the devolved areas within the shared legal system of England and Wales and this divergence is now accelerating rapidly."

Finally, I wish to add a word about the galvanising effect of the Thomas Commission Report. In the Hamlyn lecture delivered in Cardiff on 5th October 2023, Lord Thomas explored the nature of the structure of Welsh devolution and its relationship to the concept of nationhood. He engaged in a forensic critique of its strengths and weaknesses. In particular, he pointed out what he considered to be a lacuna in the structure arising out of the absence of a fully fledged Welsh judicial system. He expressed some pessimism about the lack of support for some of the measures in his Report. I am more sanguine. It is the experience of the Law Commission that high quality reports have a "*lurking*" impact. They represent an enduring intellectual pivot or point of reference for those with an interest in the subject matter. Already many of the recommendations in the Thomas Commission Report have been or are being implemented, for example the creation of a coherent system for devolved tribunals and the creation of the Law Council. In my view the report will serve as an ever-present spur for law reform albeit that progress might take a long time and even be generational.

In the light of all of this, we have concluded that we need to develop a more mature relationship with Wales. We have reflected on the differences in the way that we work on law reform for England and Wales, and the way we work on devolved law. We believe we need to bring the two ways of working more closely together and make our method of working with Wales more closely attuned to the particaulr characteristics of Welsh law.

F. <u>Proposals for a new relationship with the Government</u>

I now turn to the matters that we are discussing with the Welsh Government relating to the future.

First, it is about time that the Law Commission had a physical presence in Wales. When we deal with devolved Welsh law, we are not the Law Commission of England and Wales. We are, purely and simply, the Law Commission of Wales. We need to reflect this by being present in Wales from where we can, for instance, conduct consultations and stakeholder events. Being physically present would also facilitate day-to-day dialogue and discussion between respective officials.

Secondly, we wish to ensure we are more regularly and systematically engaged with Welsh policy development at every level. We already have strong relations with, for instance, the Counsel General and First Legislative Counsel and with officials. But we can strengthen these ties. We need to be more aware of evolving Government priorities and aspirations, just as we are in relation to Westminster when dealing with the law of England and Wales. This can be achieved through regular and periodic briefings, roundtables, seminars and general discussions during which ideas for law reform may emerge. Such exchanges can occur at the level of Chair and Commissioner for Wales, and Welsh Ministers and the Counsel General, and also between officials.

Thirdly, we propose introducing a system of "*kite flying*" documents in which we set out various ideas for law reform. Governments tends to respond to events as they unfold and rarely have the luxury to sit down and ponder what *ought* to be done in the future. The Law Commission can help fill this gap. For us, ideas for reform are generated through an iterative and constant process of discussion with officials, parliamentarians, and stakeholders. We wish to put in place a system whereby we can, through such a process, generate ideas and convey them to Ministers for their consideration. A kite flying document might be the outcome of months or even years of thought and debate. But there will come a point in time when a consensus exists as to the need for reform and all the emerging thinking can be reduced to a succinct but reasoned proposal for legislation.

Fourthly, in relation to projects on English and Welsh law we have, seconded to us from the Office of Parliamentary Counsel in London, a number of drafters. From the outset they work closely with teams as projects unfold providing advice on the law, on legislative procedure and on how proposed solutions might best be translated into statutory language. This close involvement is invaluable and enables us in many cases to produce a draft Bill contemporaneous with the publication of a final report. As time progresses, and the flow of Welsh devolved work increases, we might wish to consider some similar relationship with Welsh counterparts.

Fifthly, we wish to deploy, more strategically and efficiently, the wisdom and skills available to us through the WAC and the Law Council of Wales. They include representatives from the most important segments of the Welsh legal community, academia and Welsh society. These bodies could become more active proposers of issues for law reform. For example, they could play a part in helping us evaluate kite flying documents. It is relevant that it was in part due to encouragement by the WAC that the Law Commission accepted the invitation to engage in the groundbreaking project on form and accessibility.

Sixthly, whilst we already have good relations with Welsh stakeholders (due to engagement on projects on law reform for England and Wales, as well as on devolved matters) we believe that we can deepen and improve our "*contact list*" to ensure that we stimulate more responses to

consultation exercises and more proposals from communities for legislative reform which matters to them. We think that having a physical presence in Wales will facilitate this.

These measures should enable the Commission and the Welsh Government to plan a sequence of reform work. This is of importance to the Commission because it enables us to allocate appropriate resources to projects according to timetables and terms of reference that we would agree with Welsh Ministers. Like any other public body, the Commission is resource constrained and however much we would like it to be otherwise, we have to plan and schedule our workload with care and in detail. It is not always appreciated that the capacity of the Law Commission is limited by the fact that there are only four Commissioners engaged in active law reform. The Chair does not, normally, lead on individual projects. There is therefore a *de facto* limit upon the capacity of the Commission.[2]

G. A new relationship with the Senedd

Last, but most certainly not least, we wish to enhance our relationship with the Senedd. We have to date tentatively suggested to the Senedd that we develop a closer relationship but now is, I believe, the time to sit down with the Senedd and discuss how we can play a fuller part in their activities.

The Senedd Cymru (Members and Elections) Bill

An important driver for this is the contemplated reform to Senedd structure and constitution that I have already referred to. *The Senedd Cymru (Members and Elections) Bill* was published on 18th September 2023. It seeks to realise the recommendations made by the Special Purpose Committee on Senedd Reform, endorsed by a majority of Senedd Members in June 2022.

The avowed aim of the Bill is to create a modern Senedd, better able to represent people in Wales, with increased capacity to scrutinise, make laws, and hold the government to account. It proposes the following structural changes: (i) The Senedd will have 96 Members elected using closed proportional lists with seats allocated to parties using the D'Hondt proportional formula; (ii) the 32 new UK Parliament constituencies would be paired to create 16 Senedd constituencies for the 2026 Senedd election and each constituency will elect six Members; and (iii), Senedd elections would be held every four years from 2026 onwards.

This increase in membership indicates a clear appetite for more reform work.

Broadly, we would like to replicate in Wales more of the relationship that we have with the House of Commons and House of Lords in relation to law reform that covers England and Wales, where we take the view that we have a duty of transparency to both Houses of Parliament as a whole. In the Welsh context in addition to our more traditional role in giving evidence to Senedd committees this might include: periodic informal or formal briefings on our work to Senedd members (of whatever political persuasion) or its working groups and

[2] In oral evidence given to the House of Commons Justice Committee on 17th October 2023, in the context of a discussion about the capacity limits of the Law Commission, the possibility of a one digit change to the Law Commissions Act 1965 was mooted which would be to increase the number of commissioners from 5 to 6. As the Chair of the Committee (Sir Bob Neill KC) observed, a new Commissioner might assume responsibility for Wales as a single portfolio.

committees and discussions with individual members of the Senedd about possible new projects for law reform.

The consolidation procedure

In this context I should mention the Standing Orders of the Senedd which impact upon legislative consolidation work. Under SO 26C.1: "*A Consolidation Bill is a Bill introduced by a member of the government for the purpose of consolidating existing primary legislation, secondary legislation, and common law*". SO26C came into being as a result of a recommendation made by the Law Commission in its report on Form and Accessibility[3]. Any exercise of consolidation represents an ideal opportunity not only to bring together in a single measure the disparate laws being consolidated, but also, simultaneously, to improve the law for example by correcting obvious errors or anachronisms or effecting more substantial changes which nonetheless fall short of a significant or material change of substance or policy[4].

SO26C is, therefore, a mechanism which reflects best modern drafting practice.

Under 26C.2 Consolidation Bills may restate existing legislation with any changes of structure, language or format appropriate for the purpose of improving the presentation of the law and ensuring consistency with current drafting practice; clarify the application or effect of existing law; remove or omit provisions which are obsolete, spent or no longer have a practical utility or effect; and, make minor changes to existing law for the purposes of achieving a satisfactory

[3] In recommendation 2 we suggested that codification could include "*reform of the legislation as appropriate*". In recommendation 4 we proposed a flexible and streamlined legislative procedure in the Senedd for codification or consolidation bills which included a power of alteration or reform of the law including of law reform bills prepared by the Law Commission where the alteration or reform was judged by the Senedd not to be controversial. In paragraph 2.64 we broadly described reform of consolidated or codified measures under the heading "*technical*". We recognised that this was a broad term which it was difficult to define with precision. In chapter 3 we described in detail consolidation procedures which were used in relation to the law of England and Wales which also permitted corrections and minor improvements to be made as part of the exercise and (in paragraph 3.12) we observed that amendments might be made which although substantive fell short of significant changes to policy.

[4] Craies on Legislation (2018 edition) say as follows about consolidation of enactments:

> "*The essence of consolidation is to reorganise and restate so as to improve clarity and intelligibility without altering the substance of the law. So the draftsman is expected to assure the Joint Committee, subject to what follows, that in his or her judgment the Bill makes no change to the substance of the law at all. But there are three ways in which minor changes may be made to the law by a Consolidation Bill: (1) The draftsman may become aware in the course of preparing the Bill that a very minor change requires to be made to correct an obvious error or anachronism of no practical significance. In such a case the draftsman may on his own initiative make the change in the Bill as introduced and draw the attention of the Joint Committee to the change by way of a Note submitted to the Committee along with the Bill. (2) or something a little more substantial but still falling short of significant change of policy or substance, the Bill as introduced may be accompanied by a Law Commission Recommendation that a particular minor change be made. (3) There is also a statutory procedure under which "corrections and minor improvements" may be certified as such by the Lord Chancellor and, at the discretion of the Joint Committee, proceeded with and incorporated into the consolidation*."

consolidation. Such a bill may also include appropriate transitional and saving provisions and consequential amendments and repeals of existing legislation including to ensure that the existing legislation continues to operate correctly in relation to England.

Of particular significance to the Commission is SO26C.2.(v) whereby a Consolidation Bill may also:

"... make other changes to the law which the Law Commission of England and Wales recommends are appropriate for inclusion within a Consolidation Bill."

This is a valuable and important provision. It confers upon the Commission a potentially broad power to recommend changes which the Commission thinks are "*appropriate*". There is no definition of "*appropriate*" which thus seems open ended though, on normal principles of construction, it must be read in the context of the Standing Orders as a whole and their purpose which is to improve legislation in the course of a consolidation procedure, not to generate substantive legislation and policy *de novo*.

The Commission has limited experience of working with the Government and Senedd under this power. The Commission has, to date, been able to advise that various changes suggested were "*appropriate*". It is nonetheless a potentially far reaching procedure.

I can give two example of issues which perhaps test the outer limits of the power.

First, a request might invite the Commission to approve, as "*appropriate*" a measure that the Commission has not itself investigated or consulted over and about which the Commission considers that there are or might be factual or contextual uncertainties that it needs to understand better before it can express a conclusion. It is not, at least historically, our practice to express conclusions about law reform proposals that we have not ourselves investigated and collected an evidence base about. On the other hand, the offering of advice on reform proposals, including on consolidation bills, suggested by some other body, such as the Senedd, is clearly within our statutory remit and of course SO26C is the end result of a Commission recommendation. Section 3(1)(a) Law Commissions Act 1965 include the following as part of our "*functions*": "*… to receive and consider any proposals for the reform of the law which may be made or referred to them*". Section 3(1)(ea) empowers us to "*…provide advice and information to the Welsh Ministers*". In coming to a conclusion that a proposed measure is "*appropriate*" we might need to see the evidence base that underpins the suggestion or even conduct some form of limited evidence collection exercise ourselves.

Secondly, a request under the SO might involve an invitation to the Commission to approve as "*appropriate*" the inclusion in secondary legislation measures which might, more routinely, be included in primary legislation, for example criminal sentences for new consolidated offences. We would wish to be satisfied that if new criminal sanctions were being proposed that the procedure in the Senedd for the scrutiny of such measures was thorough and akin to the type of scrutiny that we would expect to see if criminal sanctions were introduced in new, primary, legislation.

For present purposes it suffices to record that SO26C, as a measure implementing a Commission recommendation, is a valuable tool and the Commission will work with the Senedd to ensure that it is used effectively. As we acquire more experience of working under

this procedure, we will wish to discuss with the Government and with the Senedd how its utility might be optimised.

A special procedure

In relation to legislative reform of UK wide law, for technical and uncontroversial law reform proposals, the Commission can use a much abbreviated Special Procedure[5] whereby (and I oversimplify) bills are introduced in the House of Lords where they are scrutinised intensively and in detail by a Committee, after which they are laid before the House of Commons before receiving Royal Assent. In our Report on Form and Accessibility we recommended the creation of a Welsh equivalent.

This procedure is an effective way of ensuring that important law reform measures can be implemented in circumstances where, otherwise, they might struggle to find a slot in a busy legislative agenda. Because of the procedure adopted, whilst such bills always receive detailed scrutiny they absorb little legislative capacity. An illustration is the recent Electronic Trade Documents Act 2023 which received Royal Assent in July and came into force in September 2023. This very short measure has been described, by commentators in the City, as one of the most important pieces of legislation in the field of commercial law in centuries. It is highly technical but received support from all political parties. Had the Law Commission been required to propose this measure as an ordinary bill, following normal procedures, it is not at all certain that it would have attracted Parliamentary time. It seems to me therefore that it might, at an appropriate point, be possible to devise an equivalent procedure for bills which might be laid, with the support of all, before the Senedd.

H. <u>The inevitable caveat</u>

Finally, all of the above might sound as if the Commission is planning a revolution. I should therefore add the inevitable caveats about time and money.

The changes we contemplate will take time to introduce and bed down and they will become more fulsomely deployed over a number of years. If we establish a new physical presence in Cardiff, it will not be brim full of staff from the outset. It will be a facility to use and grow over time as the work expands. A presence of course is important, not just to increasing our engagement on devolved law but also on the Welsh component of projects on Welsh and English law. And of course, there is money. We have carefully to marshal our resources. We cannot simply say that we will devote unlimited resources to an unlimited number of devolved projects, starting tomorrow. Nonetheless, our commitment to deliver law reform for the people of Wales, *y Cymry*, remains high, and we will work to find the best way to do that.

[5]See Law Commission Bills, Procedure Committee, First Report (2007- 08) HL Paper 63. The procedure was created during the passage of the Legislative and Regulatory Reform Bill as an alternative to a contentious clause giving the Government powers to introduce Law Commission recommendations by order: See Makower and Smyth, "*Law Reform Bills in the Parliament of the United Kingdom* "(2020) 22 European Journal of Law Reform 164, 167

I. Conclusion

Standing back, the new arrangements are about long-term capacity building and the creation of a more mature structure that will enable both Welsh Minsters and the Senedd to be more active in law reform and better fulfil their aspirations.

By placing the full capabilities of the Commission at the disposal of Wales, we can play a central part in enabling the Welsh Government and the Senedd to fulfil these objectives and in this way, we can most effectively fulfil our statutory function as the Law Commission of Wales.