



Cymdeithas y Cyfreithwyr
The Law Society

**National Eisteddfod of Wales
Cardiff and District 2008**

Carwyn Jones AM, Counsel General
Law in Wales: The Next Ten Years

supporting
solicitors





Cymdeithas y Cyfreithwyr
The Law Society

CARWYN JONES

Counsel General to the Welsh Assembly Government

Carwyn Jones was born in 1967, he was educated at Brynteg Comprehensive School, Bridgend, University of Wales, Aberystwyth and Inns of Court School of Law, London. Prior to his election to the Assembly, he was a barrister in chambers in Cardiff specialising in Criminal, Family and Personal Injury Law and a professional tutor at Cardiff University Law School.

He was appointed as a Deputy Secretary in March 2000 and replaced Christine Gwyther as Agriculture and Rural Development Secretary on the eve of the Royal Welsh Agricultural Show in July 2000.

He has held a range of ministerial roles, notably Minister for the Environment, Planning and the Countryside and is currently Counsel General.

LAW IN WALES – THE NEXT 10 YEARS

It is a great privilege for me to be invited to deliver this year's Law Society Lecture as the first Counsel General to the Welsh Assembly Government, appointed under the Government of Wales Act 2006.

The 25 July 2006 was a significant date in Wales' history, marking the opening of the second chapter in the story of Welsh devolution. That was, of course, the day that the Government of Wales Act 2006 received Royal Assent.

The first chapter opened back in 1998 with the first Government of Wales Act. That Act created the National Assembly for Wales, giving the people of Wales a new democratic voice in many of the key decisions affecting them and their country. The legal persona given to the National Assembly by the 1998 Act was that of a statutory corporation, made up of 60 Assembly members, and drawing very much upon the model that was at that time current in local government.

A diverse range of executive powers, including powers to make subordinate legislation, were subsequently acquired by the National Assembly, across the fields of health, education, the environment, economic development and culture, to name but a few.

It was impractical for decisions relating to this vast range of functions to be taken on a day-to-day basis by the 60 Assembly members, and therefore the 1998 Act allowed the National Assembly to delegate its functions to its First Minister, who could in turn delegate them to the other Ministers.

Then, in June 2005, the outline of the second chapter in the story of Welsh devolution started to emerge. The Secretary of State for Wales presented to Parliament a new White Paper, “Better Governance for Wales”. The White Paper recognised that, in practice, the day-to-day business of carrying out the Assembly’s functions was being discharged by its Ministers.

It acknowledged that the constitutional structure of the Assembly often made it difficult for the wider public to understand who was responsible and accountable for the majority of the policies and actions of the Assembly.

The White Paper also acknowledged that local government, which provided the constitutional model for the Assembly, had moved on since 1998. Most local authorities had moved to a Cabinet style of government, with executive members taking decisions, for which they were held to account by scrutiny committees.

Thus it was that the White Paper proposed the creation of a separate Ministerial executive authority for Wales, fully accountable to the National Assembly for Wales, but legally distinct from it. These proposals led to the enactment of the Government of Wales Act 2006 which established the Welsh Assembly Government and re-constituted, as it were, the National Assembly for Wales as the devolved legislature.

The 2006 Act gave effect to the Welsh Assembly Government separate from the legislature, but it is important to grasp the nature of its existence, in order to understand how, in legal terms, the Welsh Assembly Government operates.

The scheme of the Act does not envisage functions being legally vested in the Welsh Assembly Government. Instead, the Act provides for that which is to comprise the Welsh Assembly Government – the First Minister for Wales, the Welsh Ministers, the Counsel

General to the Welsh Assembly Government and the Deputy Welsh Ministers. The Act allows functions to be vested in the First Minister, the Welsh Ministers or the Counsel General.

The vast majority of the executive functions which were formerly vested in the National Assembly for Wales were transferred to the Welsh Ministers by the 2006 Act. Most of the functions acquired by the Welsh Assembly Government will be vested in the Welsh Ministers. The "Welsh Ministers" is a collective reference to the First Minister and the Ministers appointed under section 48 of the 2006 Act. The Act allows the functions of the "Welsh Ministers" to be exercised by any one of those persons. This aligns the Welsh Assembly Government far more with the Whitehall model - with the First Minister, like the Prime Minister, at its head.

The role of the Deputy Welsh Ministers is to assist the First Minister, the Welsh Ministers and the Counsel General in the exercise of their functions. That brings me to the role of Counsel General to the Welsh Assembly Government.

As I have already indicated, the Counsel General is a member of the Welsh Assembly Government and an office in which functions can be vested. It is an office which, though it is not one of the Welsh Ministers, has "Ministerial status". The Counsel General is appointed by Her Majesty, on the recommendation of the First Minister - a recommendation which the Assembly must first approve. However, the Counsel General does not necessarily have to be an Assembly Member.

The Counsel General attends and participates in Cabinet meetings by invitation of the First Minister, and is accountable to the Assembly for the exercise of functions vested in his office.

The Counsel General is the final and authoritative legal advisor to the Welsh Assembly Government. He or she will be consulted on legal questions which are particularly complex or sensitive, or which have the widest implications. The Counsel General will also be consulted where a situation raises devolution issues, of which I will say more in a moment.

Examples of the circumstances where the Counsel General is to be consulted include where there is a question over whether a proposed provision of an Assembly Measure would be within the Assembly's legislative competence, or whether proposed subordinate legislation or administrative actions would be lawful. He or she will also be consulted on significant constitutional issues.

The Counsel General will represent the Welsh Assembly Government in legal proceedings although not usually in person. In particular, he or she may institute or defend legal proceedings relating to matters where the First Minister, the Welsh Ministers or the Counsel General have functions, provided it is appropriate to do so for the promotion, or protection, of the public interest.

He or she may also institute or defend proceedings to decide a devolution issue. For instance, whether a provision in a Measure passed by the Assembly is within the Assembly's legislative competence or in determining whether a particular power can be exercised by the Welsh Ministers.

Consequently, the office of the Counsel General has an important portfolio of legal responsibilities in which he or she will be supported by the Welsh Assembly Government's Legal Services Department – which already provides a large, varied and complex range of legal services to the Welsh Assembly Government - and with which I am in the process of developing my working relationship.

Although the 2006 Act did not formally establish the Counsel General as a law officer, it is in many practical respects, very much akin to that of a Law Officer. Indeed the Counsel General will be the representative of the Welsh Assembly Government in exchanges with the UK Government's Law Officers and those of the other devolved administrations.

The Government of Wales Act 2006 introduced new law making powers and re-defined the relationship between Wales and Whitehall. This has been proven to have had a significant impact in many ways. To date, this represents the biggest potential for the transfer of power since the creation of the National Assembly for Wales back in 1999.

One significant element of the enhanced devolution settlement is that Welsh legislation no longer has to compete for scarce Parliamentary time. As the First Minister has often said, Assembly Measures – the new category of legislation introduced by the 2006 Act – are, in effect, Welsh laws. They are “made in Wales” legislation.

The National Assembly for Wales has been given a new and innovative legislative role. The Assembly formerly made legislation, but it was subordinate legislation of the type that, in Whitehall, would be made by Ministers of the Crown. Those functions of making subordinate legislation have now been transferred to the Welsh Ministers.

As a result of the 2006 Act, the National Assembly for Wales is now able to pass laws to be known as Assembly Measures. These are laws which are passed by the Assembly and approved by Her Majesty in Council and subject to the provisions of the Act, they may make any provision that could be made by an Act of the UK Parliament.

The Assembly has the power to pass Measures which are within its legislative competence, and the scope of its legislative competence at any given moment in time will be defined by the contents of Schedule 5 to the Act.

Schedule 5 lists 20 Fields, all being Fields in which the Welsh Ministers have functions. They include health, education and training, economic development, the environment and culture - and under some of those Fields can be found Matters. The 2006 Act gives the National Assembly legislative competence to pass Measures relating to those Matters which appear in Schedule 5, subject to some general restrictions.

I will deal with how Matters come to be inserted into Fields below.

As part of the Assembly's 2007/8 legislative programme, three government Measures were proposed. These are the NHS Redress Measure, the Learner Travel Measure and the Learning and Skills Measure.

The first of these, the NHS Redress Measure (Wales) 2008 received Royal Approval in July 2008 and has now entered the 'statute book' as the first Assembly Measure. This Measure gives patients in Wales greater rights through an NHS Redress Scheme and simplifies the procedure by which patients can seek financial redress from the NHS.

The Learner Travel Measure is currently going through the legislative scrutiny process set down by the Assembly's standing orders. It proposes to reform the law on school transport in Wales, promote the creation of a greener school transport system and give the Welsh Assembly Government the power to expand the Safer Routes to School Scheme.

The Learning and Skills Measure was introduced into the Assembly on the 7th July 2008. This Measure is designed to reform the 14-19 curriculum in the field of education.

Building on the achievements of the 2007/8 legislative programme, the First Minister recently unveiled five further government Measures for 2008/9. These Measures are in the areas of Child Poverty, Additional Learning Needs, Charging for non-residential social care, Better local services and Affordable Housing.

In addition, the Welsh Assembly Government sought six ‘Legislative Competence Orders’ (“LCOs”) during the last legislative programme. The LCOs are made by Her Majesty by Orders in Council under the Government of Wales Act 2006, and a request for an LCO is in effect a request to Parliament to devolve legislative powers in particular policy areas to the Assembly. Once made, they become Matters, and the Assembly can then, subject to the provisions in Part 3 of the 2006 Act, legislate freely in those areas, making any provision that could be made by an Act of Parliament.

The six LCOs that have been sought last year are in the areas of Education and Training, Environmental Protection and Waste Management, Vulnerable Children, Domiciliary Care, Affordable Housing and the Welsh Language.

The first of these LCOs, ‘The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008’, became the first Order of its type to be made in April this year. It will allow future Measures to be passed enabling a substantial reconstruction of the Statementing system in special education.

Over time, further Matters will be added to Schedule 5, either by Acts of Parliament (framework powers) or by Her Majesty making Orders in Council under the 2006 Act. Therefore at any moment in time, the scope of the Assembly’s legislative competence can be identified by an examination of the contents of Schedule 5.

During the legislative programme for 2008-9, the Welsh Assembly Government will be seeking legislative competence in the following areas:- provision of support for carers; promotion of culture; provision for Further Education Institutions to award foundation degrees; and powers over the Red Meat Industry.

As part of the Welsh Assembly Government's transparent democratic process, the public (whether it is a business, a charity or a voluntary organisation) can be closely involved in decisions that have an impact on subjects that fall under the jurisdiction of Wales. The processes established for both LCOs and Measures give the people of Wales more opportunities to give their views on proposed legislation. For instance, proposed LCOs are laid before the Assembly for pre-legislative scrutiny. Consequently, they can be amended before they are introduced by the Assembly as final draft LCOs, for formal approval.

This period of pre-legislative scrutiny has been built into the Assembly's Standing Orders. During this period, the people of Wales have the opportunity to express their views on the areas in which the Assembly could acquire powers to pass Measures. In addition, the Assembly introduced a new petitions system. For the first time, members of the public are not only able to petition the Assembly and ask for action to be taken in those areas of policy for which the Assembly is responsible, but the Assembly will be required to act upon the petition, if it falls within the scope of its powers or alternatively refer it to the Welsh Assembly Government or any other person or body for them to take such action as considered appropriate.

The Welsh Assembly Government is always open to good ideas from the public about how it should exercise its powers on behalf of the people of Wales in the future. Organisations such as Trade Unions and charities have a vital role to play in this respect. One recent example is the proposed ban of Electric Shock Dog Training Collars in Wales. The Rural Affairs Minister, Elin Jones recently announced that the Welsh Assembly Government would be bringing forward legislation to make their use a criminal offence. This announcement makes Wales the first part of the United Kingdom to commit to bring forward legislation that will ban the collars. In arriving at its decision, the Welsh Assembly Government took on board representations from a number of animal welfare groups such as the Kennel Club and the RSPCA who supported such intervention, as well as the Electric Collar Manufacturers Association, who opposed such a ban.

So what do these changes mean for the legal community in Wales? Just as devolution is now a settled part of our politics, delivering real benefits for our people, it is equally so in legal terms.

The creation of the National Assembly for Wales began a process of divergence between the law applying in England and the law applying in Wales. Since 1999, Acts of Parliament have conferred powers on the former Assembly – now the Welsh Ministers – which are different from, or which have no equivalent, to those conferred on UK Ministers.

In addition, the former Assembly exercised former Minister of the Crown powers to make subordinate legislation differently from the way in which they have been exercised in Whitehall.

With the advent of Measures, there will be more and more Welsh made law on the statute book in the future. Although it is important to recognise that the effect of the Government of Wales Act 2006 is not entirely confined to Wales. Measures form part of the body of law that applies throughout the England and Wales jurisdiction and they will have the same effect as an Act of Parliament, including modifying Acts of Parliament. Therefore they can have an impact in England, albeit a limited one.

In addition to the growth of the Assembly's legislative competence, and the Measures which may be passed under it, there are a number of other developments on the horizon that I think will be of interest to the legal profession.

Firstly, there is scope within the Government of Wales Act 2006 for the National Assembly for Wales to acquire primary legislative powers. The range of subject areas in which the Assembly could exercise such powers is set out in Schedule 7 to the 2006 Act.

However, these powers will only come into being following a successful referendum vote by the people of Wales. In order to hold a referendum there needs to be approval in both the National Assembly and both Houses of Parliament.

The One Wales agreement, between Labour and Plaid Cymru in the Welsh Assembly Government, gives a commitment to work together to proceed to a successful outcome for a referendum. In order to prepare the ground for a possible referendum on full law making powers for the National Assembly an 'All Wales Convention' was set up earlier this year. It consists of various professionals from both the public and private sector each with a particular interest in the future of Welsh devolution. The executive committee of the Convention met for the first time on the 14th July 2008.

The role of the Convention is to raise awareness and improve the understanding of how the devolution settlement currently operates in Wales and how it may operate in the future. The Convention will also report to the Welsh Assembly Government so that it can make a fully informed decision on whether Wales is ready for a referendum.

In tandem with the development of Welsh devolution there has been some progress in the creation of further institutions of justice located within Wales. The year 2000 saw the opening of the Mercantile Court in Cardiff. When speaking at its opening Lord Bingham, then Lord Chief Justice of England and Wales said:

"This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a very proud, distinctive and successful nation."

The Welsh Assembly Government fully endorses the sentiment expressed by Lord Bingham.

Continuing this progress, the report of Lord Justice May's Working Group on Justice Outside London recommended the establishment of a full Administrative Court office in Cardiff where judges should regularly sit to hear cases. There should also be a strong expectation that Welsh cases in the Administrative Court should be heard in Wales. It has been proposed that the Court will be established in Cardiff from April 2009, although this remains subject to final approval by the Lord Chancellor.

The listing of cases before the Administrative Court in Wales has been an issue in two recent court decisions. The Court of Appeal in the 2006 case of *National Assembly for Wales v Condon*¹ called for practitioners and listing officers to list such cases in Wales more frequently. This is what happened in the more recent *Deepdock* case² – a judicial review case concerning Beaumaris Harbour. The Administrative Court in Wales rejected an application that the case be transferred from Cardiff to London and instead ordered that it be heard in Anglesey. The case was eventually heard in Caernarfon.

There have also been important developments in the field of tribunals. The Tribunals, Courts and Enforcement Act 2007, enables tribunals that are presently devolved in Wales to remain outside the new tribunals system established by that Act. The UK Government has agreed that the Upper Tribunal should have a permanent base in Wales, just as in England and Scotland.

The Welsh Assembly Government believes that the need for more institutions of justice located in Wales has to be looked at in the context of the increasing divergence of the law in relation to England and the law in relation to Wales, and the bilingual character of the legislation produced by both the Welsh Assembly Government and the National Assembly for Wales.

¹*National Assembly for Wales v (1) Elizabeth Condon and (2) Miller Argent (South Wales) Ltd.* (2006)

²(2007) EWHC 3347 (Admin.)

This has given rise to a need for institutions of justice managed locally, which are responsive to the needs of Wales and are familiar with the law as it applies to Wales. The Welsh Assembly Government would welcome further progress along this road.

There are clear and tangible benefits of justice being administered in locally accessible courts capable of dealing with Welsh bilingual legislation, including Measures. There are also wider benefits of expanding the Administrative Court office in Cardiff. For instance, such a step will result in increased employment opportunities for staff working within the court system.

Furthermore the continual development of the law in relation to Wales, creates a need for a greater span of lawyers located here, who understand the law as it applies in Wales, and have the knowledge and experience to take on the most complex and sensitive of cases. One such example is the recent Skanda Vale case which the Court of Appeal heard in Cardiff.

It is crucial that the legal professions in Wales fully prepare themselves for the challenges and opportunities that lie ahead as a result of the establishment of a full Administrative Court in Wales.

An example of one such opportunity is my decision to advertise for the appointment of Panels of QCs and Junior Counsel to undertake advocacy and advisory work for the Assembly Government. This was an open advertisement and application process, with adverts being placed in the April editions of the journals, 'Counsel' (The Journal of the Bar of England and Wales) and the 'Law Society Gazette.' Membership of the Panels is open to both barristers and solicitors with the appropriate qualifications.

All applicants will be appointed on the basis of ability and expertise. However, it is also important that Panel Counsel adopt a collegiate approach in their relationships with one another. In this respect, it is absolutely vital that Panel Counsel respect the values of the Welsh Assembly Government and the public that it serves.

I was disappointed with the low level of response that it received from local applicants. Although appointment to the Panels cannot be a guarantee of work, the Welsh Assembly Government wishes to pass on the message to the Welsh legal professions, that where circumstances permit, its preference would be to instruct local Counsel.

That said, the Welsh Assembly Government recognises that it would be difficult for local practitioners to generate sufficient work based on administrative cases alone. Welsh public bodies such as Local Authorities and NHS Trusts have a crucial role to play in instructing local Counsel and therefore promoting opportunities for the legal profession here in Wales. It is only through instructing local Counsel that Wales can develop further expertise in Administrative law matters. I would therefore strongly encourage Welsh public bodies to instruct local Counsel wherever possible.

There are also a number of challenges for the judiciary to face. Judges need to be familiar with Welsh laws and understand the context in which they have been made. The judiciary may be called upon to interpret provisions of the Government of Wales Act 2006, which have not previously been tested in the courts.

In addition, the Welsh Assembly Government considers that changes are required to the educational and training framework for new entrants to the legal profession. It is crucial that the Welsh devolution settlement under the Government of Wales Act 2006, becomes part and parcel of the educational training given to law students and trainee solicitors. The position of the settlement within the constitutional framework of the United Kingdom should be recognised as a standard and fundamental part of any teaching on this subject. To do otherwise would misrepresent the balance of legislative and executive power that exists in the United Kingdom today.

I have already set out some of the key legal developments that have taken place, or are shortly due to take place in Wales in the future. I would now like to take some time mapping out

some of the changes that could feature on the legal horizon, in the event that the Welsh electorate in a further referendum, voted in favour of the Assembly being able to exercise primary legislative powers.

The “All Wales Convention” on primary powers will stimulate further debate on the implications of moving to Part 4 of the Government of Wales Act 2006. It is inevitable that questions around the impact on the single England and Wales jurisdiction and related issues about devolution of the administration of justice will arise in this context.

The new law making powers that we have already acquired under the Government of Wales Act 2006 mean that the potential exists for much greater divergence to develop between the law in relation to Wales and the law in relation to England. If the Welsh electorate, in a further referendum, allowed the Assembly to exercise primary legislative powers, then it is my view that the scope for divergence would increase materially again.

I recognise that nothing in the Government of Wales Act 2006 in and of itself creates a separate legal jurisdiction of Wales within the United Kingdom, and I don't believe there is a case at the moment for a separate jurisdiction.

However, should the situation arise where the Assembly is able to exercise primary legislative powers, I consider it inevitable that a debate will have to take place as to whether England and Wales should retain a single legal jurisdiction. I am not aware of anywhere else in the world where a legislature has primary law-making powers, and yet has no associated territorial jurisdiction.

This is just one of the reasons why it is vital that I, as a member of the Welsh Assembly Government, its chief legal advisor and as a member of the legal profession, need to have effective lines of communication with the legal community in Wales.

The One Wales agreement between the two parties of the Welsh Assembly Government includes a commitment to consider the evidence for the devolution of the criminal justice system.

I very much hope that the legal community in Wales fully engages with this debate. They have a vital role to play in ensuring that the Welsh Assembly Government is kept informed of all relevant considerations.

Even if the criminal justice system were to be devolved, I would envisage that justice would still be administered in a similar way to that which is applicable in the law of England and Wales today. I anticipate that the structure of the court system, judiciary and the legal profession will retain its existing features – though criminal justice need not be devolved for there to be a Welsh jurisdiction, just as employment law is not devolved in Scotland.

As far as the legal profession is concerned, I consider it important that there would still be free movement between the Bar in England and Wales. It may well be that lessons can be learnt from the approach that Northern Ireland have adopted. In Northern Ireland, any member of the Bar is eligible to apply to practise at the Bar of England and Wales.

It is not suggested that Wales will operate as a completely separate entity from England. In legal terms, London provides legal expertise for the world. It follows therefore, that the Welsh Assembly Government needs to tap into this expertise if it is to develop further. We do not need a legal wall around us but we do need a court and judicial structure that suits Wales, should primary powers come.

I finish today hoping that I have left you with a flavour of the exciting developments that are due to unfold in the coming years. I believe that these developments will present a significant challenge to the legal profession in both England and Wales, one which I have no doubt it will rise to with its usual professionalism.