

DEVELOPING LEGAL WALES

DAVID LLOYD JONES

Introduction: The problem of accessibility

Since the acquisition by the National Assembly of primary law making powers under Part 4 of GOWA 2006, the extensive use made by the National Assembly of these powers means that for the first time since the age of the Tudors it has once again become meaningful to speak of Welsh law as a living system of law. As a result of this and as a result of the corresponding development of Westminster legislating for England only, we are now witnessing a rapidly growing divergence between English law and Welsh law. At present this is particularly apparent in areas such as education, planning, social services and residential tenancies. No doubt, this divergence will accelerate and extend more broadly when the Wales Act 2017 – our fourth devolution settlement but the first on a reserved powers basis - comes into force.

If Wales is to succeed in these changed circumstances, the law of Wales must be readily accessible to its subjects – in particular to those in many different walks of life who have to apply it. This is so for two fundamental reasons.

- (1) First, it is essential to the rule of law that the content of the law should be readily accessible. Lord Bingham in his great work on the Rule of Law identified as a primary consideration that the law must be “accessible, and, so far as possible, intelligible, clear and predictable”. If citizens are not able to find out what the law is, they are no better placed to plan their futures than if they were subject to the arbitrary exercise of governmental power.
- (2) Secondly, accessible laws are crucial for commercial certainty and, therefore, for the future economic prosperity of Wales. No one would choose to do business in a nation where the parties’ rights and obligations are vague or undecided. Put bluntly, “Who is going to invest in a nation where you can’t know with any degree of certainty what its laws are?”

It seems to me, therefore, that perhaps the greatest single challenge we now face is to make the law of Wales accessible to the people of Wales. The volume and complexity of the legislation

produced so far by the National Assembly and the Welsh Government suggest that this will be no easy undertaking. The Law Commission of England and Wales in its 2016 report on the accessibility of the law in force in Wales – produced at the request of the Welsh Government – gave the following example. It has been much cited since it was published. Depending on how widely “the law of education” is defined, the law which applies to education in Wales is to be found in between 17 and 40 Acts of Parliament, 7 Assembly Measures and 6 Assembly Acts, as well as hundreds of statutory instruments. (Law Comm No. 366; *Form and Accessibility of the Law Applicable in Wales*, ¶ 7.2, at p. 70.)

Codification

Those of you who have been regulars at Legal Wales conferences will be well aware of the repeated calls to improve the accessibility of Welsh law by adopting a system of codification. In particular the Lord Chief Justice, Lord Thomas of Cwmgiedd, has on many occasions pointed to the advantages of a US style code.

The Law Commission, in its 2016 report recommended that the ultimate goal of the Welsh Government and the National Assembly should be the organisation of primary legislation into a series of codes dealing comprehensively with particular areas of devolved law. It recognised that this goal could only be achieved slowly in view of the scale of the task and that progress could only be achieved in stages. It also recognised that the speed of progress towards the goal will depend on the resources that can be made available. It therefore suggested that priorities should be identified.

In a paper presented to the Constitutional and Legislative Affairs Committee in April 2017 the Counsel General responded to this recommendation. He stated that he considers consolidation of the existing statute book, codification of Welsh law and improved publication and accessibility of Welsh laws to be a necessity. “It will”, he said, “help the citizens of Wales access and understand the law, it will bring more clarity to our highly complex system of government and make developing, interpreting and administering the law more efficient.” He made the further telling point that as, generally speaking, the assistance of lawyers is out of reach for most, something else must be done about the proliferation and complexity of our laws. He therefore announced that during 2017 and 2018 the Welsh Government would undertake a pilot programme of consolidation, codification and better publication.

Although he described the Law Commission report as “a light to lead the way”, he made clear that the Welsh Government’s vision of a code is different from that described in the Law

Commission report. In particular, whereas the Commission had recommended the codification of primary legislation in a given field, the Welsh Government considered that a code should be comprehensive and it could, therefore, see no immediate reason why a code should not be wider than a single Act, nor why it should exclude the subordinate legislation and quasi-legislation on a topic. The preliminary expectations of the Welsh Government as to the key features of a code were that a code may consist of one or more principal Acts which set out the primary law and contain key concepts and defined terms which would apply across the code, horizontally to any other principal Acts in the code and vertically to subordinate legislation and guidance. The specific Acts, statutory instruments and guidance comprising the code would be listed within the code as forming part of the code. He contemplated that subsequent legislative reform on a topic that had been codified would not take place outside the code but rather within it, thereby avoiding future fragmentation of the statute book. He also accepted that codes, once produced, must be available in an easily accessible manner.

At the same time the government announced a pilot programme which will involve scoping and drafting a consolidated text in relation to the historic environment in Wales. This programme will run alongside work which the government is already carrying out with the Law Commission on a planning code for Wales.

More recently, in his Final Response to the Law Commission report published on 19th July the Counsel General on behalf of the Welsh Government agrees that “a sustained, long term programme of consolidation and codification of Welsh law would deliver societal and economic benefits, and is necessary in order to ensure that The laws of Wales are easily accessible.” He makes the further point that this would also make the work of the Government in developing new laws – and the work of the National Assembly in scrutinising them – considerably more straightforward and therefore more efficient. In this way he reaffirmed the Government’s commitment to developing more orderly systems of law making and publishing. He recognised, however, that this will be a lengthy and difficult journey.

This Final Response does contain a further cautionary note in that it states that issues which the Welsh Government is likely to face in consequence of the United Kingdom’s withdrawal from the EU may mean postponing activity to implement the Law Commission

recommendations. Nevertheless, it does make a long term commitment to the task of improving access to the law.¹

The Law Commission in its 2016 report also recommended that a flexible streamlined legislative procedure should be introduced into the Standing Orders of the National Assembly for (1) codification or consolidation Bills that include alteration or reform of the law and (2) other law reform Bills prepared by the Law Commission where the alterations or reforms are judged by the Assembly not to be controversial. In such circumstances, it might be thought unnecessary to subject the Bill to the full political process in the Assembly. Such procedures already exist in Westminster and in the Scottish Parliament. Following the publication of the Law Commission report, the Counsel General wrote to the Llywydd indicating the government's wish to agree with the Assembly an appropriate way to scrutinise the Bills that the government would need to bring forward. More recently, the Business Committee of the Assembly has decided to proceed with developing a standing order for consolidation Bills.²

The Law Commission further recommended that a Code Office should be set up to manage the process of codification and consolidation and maintain codes. It proposed that the Code Office should be distinct from the existing Office of the Legislative Counsel and should include the following functions:

- (1) approval or oversight of the exercise of technical maintenance of the codes;
- (2) periodic technical reviews; and
- (3) managing the process of identifying more substantive defects in codes and drafting amendments to correct them.

It recommended that the Code Office should be accountable to the Counsel General and led by First Legislative Counsel.³

In its response the Government agrees that the functions of consolidation and codification (if adopted) should be carried out within government rather than establishing a new, separate or independent body for this work. It observes, first that creation and management of legislation is primarily a matter for the Government and secondly that that is where the necessary expertise already exists.

¹ Letter dated 19 July 2017 from the Counsel General to the Chairman of the Law Commission.

² Ibid.

³ Recommendations 16-18.

This is a very satisfactory response by the Government to the Law Commission project. It is also particularly pleasing to see that the Law Commission will continue to have an involvement in the process of codification through its project on Welsh planning law. More generally, the initiatives which are now being taken by the National Assembly and the Welsh Government, in relation to the codification of Welsh law, are most encouraging.

The study and teaching of Welsh law

But, equally, there is now an urgent need to promote the study and teaching of Welsh law. Here, there is, once again, an important role to be played by the Welsh government. However, there is also a great deal that practising and academic lawyers, and legal publishers can contribute.

Text books

In its Consultation Paper on the Form and Accessibility of Welsh Law (CP No. 223), published in 2015, the Law Commission made the point that whereas lawyers practising in England will usually have the benefit of a choice of textbooks explaining the law and its effect, this is not a luxury currently available to their Welsh equivalents. (The Commission might have made the further point that lawyers based in England, practising in this shared legal system of England and Wales also need to have access to information on the law of Wales – although they may not always be aware of the need.) As we all know, books that address the law of England and Wales do not commonly consider in detail the differences between the law applicable in England and that applicable in Wales, although there are some signs that this may be changing and some honourable exceptions.⁴

The limited scope of application of Welsh law by comparison with English law means, of course, that it will often not be viable for commercial publishers to publish text books devoted solely to the law applicable in Wales. However, important initiatives are being taken here.

In order to address the lack of literature exploring the law applicable in Wales the University of Wales Press has formed an editorial board, under the Chairmanship of Professor Thomas

⁴ L Davies, J Luba and C Johnston, *Housing Allocation and Homelessness* – the publishers stated that the 2015 edition would include a comprehensive account of the Housing (Wales) Act 2014.

Watkin, and commissioned a series of books on the public law of Wales. When announcing the series the UWP explained that:

“In the wake of the enhanced legislative powers acquired by the National Assembly for Wales, the law applicable in Wales on devolved subjects will become increasingly divergent from that applying in England. Lawyers and law students in Wales (and in England) will need to be able to identify and access the law as it applies in Wales. This series will provide, for the first time, much-needed books offering a comprehensive examination and presentation of the law as it applies in Wales: what that law is and how it differs from the law applicable in England, to meet the needs of lawyers and others working within the devolved environment, as well as students and teachers.”

Professor Watkin and the University of Wales Press are to be congratulated on their vision in commissioning this series which, I am confident, will do a great deal to promote the accessibility of the law of Wales. In his preface to the series Professor Watkin writes:

“The purpose of this series therefore is to present to the professions and to the public an account of the law as it applies in Wales in the areas where there is now divergence, and in so doing to both redress the deficit and provide the foundation for a legal literature to serve the distinct needs of Wales.”

That is a noble objective. The first volume in the series, David Gardner’s book on “Administrative Law and the Administrative Court in Wales” was published last year.

Two further volumes are published this week and launched at this conference:

- Graham Walters’s book on Planning Law in Wales
- A collection of papers on comparative administrative justice edited by Sarah Nason entitled “Administrative Justice in Wales and Comparative Perspectives”.

A further volume, “Legislating for Wales” by Daniel Greenberg and Thomas Watkin will be published early next year.

Meanwhile, Bangor University Law School, with the assistance of a grant from Coleg Cymraeg Cenedlaethol, is publishing a series of text books on the law applicable to Wales in the Welsh language. The books are aimed at students but Bangor University has announced that the books are also intended to reach a wider audience, setting out “basic legal principles in clear and accessible language”. The first book in the series was published last year. Sylfeini’r Gyfraith Gyhoedd by Keith Bush is available free of charge on the website of Coleg Cymraeg Cenedlaethol. It is already widely used to teach public law through the medium of Welsh.

Cyfraith Cymru / Law Wales

In July 2015 the Welsh Government in partnership with Westlaw UK launched a new online service for Wales *Cyfraith Cymru / Law Wales*. Its aim is to provide a guide to the law applicable in Wales, organised by reference to, although not necessarily in strict accordance with, devolved subject fields. It provides overviews of relevant areas of the law, with relevant links to legislation on legislation.gov.uk. The intention is that the website should include articles contributed by academic lawyers. This is a substantial undertaking and is currently work in progress. In his April 2017 paper on consolidation and codification of Welsh law, the Counsel General states that consideration will be given to making better use of this website. In particular, consideration will be given to encouraging more contributions of explanatory material on Welsh law. This website has the potential to be a particularly valuable resource if it could achieve comprehensive coverage and if sufficient funding were available. It could become an online encyclopaedia of Welsh law with the advantage that it could be constantly updated and could provide links to primary sources in legislation.

The Welsh Law Schools

Wales has five law schools, all of which are involved in various ways in the teaching and study of Welsh law at undergraduate and post-graduate level. In particular they include three specialist bodies:

- Aberystwyth University's Centre for Welsh Legal Affairs was established in 1999 to consolidate, and provide a focus for, the Department's expertise and work on the law as it applies within Wales and on general legal developments of relevance to Wales.
- Swansea University's Hywel Dda Institute seeks to contribute to the maintenance and development of Legal Wales by promoting and facilitating research.
- Cardiff University's Governance Centre has a wider scope in that it is not limited to the law. It undertakes research into all aspects of the law, politics, government and political economy of Wales, as well as considering their wider UK and European contexts.

Although the focus of each of these bodies is slightly different, they all make an important contribution to the study of Welsh law and the dissemination of legal knowledge in this area.

The Judicial College

The Judges' Council Committee for Wales in July 2017 has reaffirmed the need for judges sitting in Wales to be trained in the emerging body of Welsh law. The Wales Training

Committee of the Judicial College had recognised (in April 2017) that current training arrangements are inadequate to meet this need. In addition, it drew attention to the fact that there is insufficient awareness of the impact of Welsh legislation among the legal professions and the population of Wales as a whole. The greatest current need which has been identified is training for civil judges in housing and landlord and tenant law as a result of the changes introduced by the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2014. Three one day seminars will be held early in 2018. It is intended to provide further training thereafter, in particular in areas of devolved law affecting the family jurisdiction – in particular the Social Services and Well-Being (Wales) Act 2014. In addition, the training leads, DJ Harold Godwin and DJ Hywel James are preparing bulletins identifying developments in devolved law and including hyperlinks to legislation wherever possible.

The Law Society

The Law Society has focussed its efforts in this regard on supporting and providing information to solicitors as opposed to providing formal training courses. For example, in the area of planning law it has the benefit of input from its planning policy adviser and its specialist planning committee. It has commissioned articles to raise awareness of the differences between English and Welsh planning law and policy. It is able to communicate this information to its members through its weekly Professional Update newsletter, the Law Society Gazette and its specialist planning newsletter. Again, so far as the new Welsh taxes are concerned, the Law Society is collaborating with the Chartered Institute of Taxation, is engaged in a communications campaign and proposes to hold seminars later this year and in January 2018.

The Wales and Chester Circuit of the Bar

The structure of the Bar – a profession of individual practitioners – inevitably places it at something of a disadvantage when organising professional training. As a result these matters are usually left to individuals or to sets of chambers. However, the Wales and Chester Circuit is currently considering a proposal that it produce a handbook on Welsh law.

A need for co-ordination

There is, therefore, I would suggest, no shortage of initiatives or activity in relation to the study, teaching and propagation of the new Welsh law. It does seem to me, however, that – given that so many different bodies and organisations are following very similar paths - what is needed

now is a measure of co-ordination in order to avoid duplication of effort, frustration, inefficiency and the waste of resources.

There are precedents for co-ordination of this kind.

- Policy matters concerning the use of Welsh in the justice sector are considered by the Lord Chancellor's Advisory Committee on the Welsh Language. This body has the great advantage that it includes representatives from all the bodies in Wales concerned with the administration of justice. At a practical level the Justice Wales Network (Rhwydwaith Cyfiawnder Cymru) has been set up to enable justice agencies to share good practice in relation to language training and bilingual service provision and to co-ordinate efforts and share resources. In this way duplication of effort is avoided, or at least reduced.
- At the Legal Wales conference in Llandudno in October 2012 I proposed that the Welsh law schools should give some thought to the establishment of a law reform institute to work closely with the Law Commission of England and Wales to promote Welsh-centred law reform. The Law Commission's Welsh Advisory Committee was created in the following year.⁵ Its membership includes the Ombudsmen, representatives of all the Welsh law schools, the Wales and Chester Circuit of the Bar, the Law Society, Legal Wales, Citizens Advice Wales and the Wales Council for Voluntary Action. It continues to play an important role in securing that the law reform needs of Wales are addressed by the Commission. In particular, all five Welsh law schools are deeply involved in the work of the Advisory Committee.

Today, I should like to propose a further initiative: the creation of an Institute of Welsh Law which could co-ordinate the efforts of so many different bodies in promoting the study and propagation of Welsh Law. In making this proposal I realise that many of the bodies I have mentioned have slightly different objectives. The academic study of law obviously differs from the training of judges. But the initiatives which these bodies are currently undertaking have far more in common with each other than divides them. For example, it ought to be possible to share efforts in producing manuals for practitioners or judges in relation to residential tenancies or the law relating to social care or planning law in Wales. It ought to be possible to disseminate a knowledge of Welsh law without reinventing the wheel on each occasion. Moreover – and

⁵ "Seminar to discuss creation of committee." Cambrian News, 1 March 2013.

this seems to me to be vital - it should be possible to co-ordinate efforts without in any way impinging on the independent functioning of these various bodies.

Views may differ as to who might participate in such an Institute. In the case of the Welsh Advisory Committee of the Law Commission, the Welsh Government has not been represented because of the need for the Commission to maintain its independence from government, both central and devolved. (There, amendments to the Law Commissions Act 1965 effected by the Wales Act 2014, have established a particularly effective relationship between the Commission and the Welsh government.) However, I can see no reason why the Welsh Government should not play an important part in a co-ordinating institute of the sort I have in mind. The Welsh law schools, the professional bodies – the Bar, the Law Society and Ilex – and the Judicial College would, I suggest, be ideal collaborators in such a project. The Learned Society of Wales and the Legal Wales Foundation may also have a role to play in this. Similarly, there might be considerable benefits in close liaison with the Law Commission in view of its responsibilities for law reform in Wales.

Overall, I can see great potential benefits from the pooling of expertise in relation to Welsh law. There would, moreover, be scope here for joint initiatives in research and teaching. Co-ordination of effort of this kind could secure more effective dissemination and a wider engagement with this rapidly growing body of law.

I hope that in this way it might be possible to strengthen the legal infrastructure of Wales, on the basis of voluntary co-operation between the principal actors. Resources are always a problem in an enterprise of this kind, but the modest proposal for co-ordination of activities which I have in mind should not be particularly demanding of resources and the efficiencies and savings which are likely to result may be substantial.

I leave the matter for your consideration.

A broader horizon

These are exciting times for Legal Wales. The National Assembly and the Welsh Government are using their legislative powers to the full to make fundamental changes in many areas of the law – including many which have a vital impact on the everyday lives of the people of Wales. In parallel, the movement which has become known as Legal Wales - and which is epitomised by this conference - is supporting these developments and creating an atmosphere in which

future developments in the law can be promoted and debated. It is entirely understandable that the principal focus should be the emerging body of Welsh law i.e. law made in Wales for Wales.

I would, however, urge the Legal Wales movement not to lose sight of the broader picture. Although many of the recent reforms brought about by the Assembly are very far-reaching – I have in mind here, in particular, the law relating to residential tenancies – it remains the case that much of the statute law in force in Wales has been made in Westminster and is shared with England. It is impossible to quantify with any precision what proportion of the statute law in force in Wales is made by the Assembly and what proportion by Westminster. However, there are many areas of the law that are outside the competence of the Assembly. That will remain the case even when the provisions of the Wales Act come into force. Moreover, so much of the private law shared by England and Wales – the law of contract, of tort, property law and trusts – is governed by principles of common law and equity. It seems to me that Legal Wales should be keeping at least one eye on how this shared body of law may have a particular impact on Wales. In other words, it should be looking beyond the devolved areas.

In this regard I should like to draw your attention, by way of example, to what is taking place in relation to log book loans. This is a form of sub-prime consumer credit secured on a vehicle. It is a form of chattel mortgage. Borrowers transfer ownership of a car, van or motorcycle which they own to a logbook lender while remaining in possession of the vehicle and continuing to use it. The borrower hands the logbook lender the V5C registration document, the logbook, but this is symbolic and has no legal effect. The legal effect is produced by a document called a “bill of sale” which must meet the complex requirements of two Victorian statutes, the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882, including registration at the High Court.

The present state of the law is very unsatisfactory. Often borrowers do not understand what they are signing. Borrowers who default risk having their vehicles seized too readily; they do not enjoy the protections enjoyed under the Consumer Credit Act by a hire purchaser who has paid more than a third of the price. Someone who unwittingly buys a second hand vehicle subject to a logbook loan can often be faced with the unpalatable choice of paying off someone else’s logbook loan, paying for the vehicle a second time, or losing the vehicle for which they have paid.

Concerns relating to log book loans and the problems they are causing in society were drawn to the attention of the Law Commission by Angela Williams, of Citizens Advice Cymru, who was a member of the Commission's Welsh Advisory Committee. The scale of the problem is considerable. In 2014 there were 52,223 bills of sale registered against vehicles in England and Wales. Clearly this problem is not by any means confined to Wales, but it is also clear that a very significant proportion of these transactions are effected in Wales and that it is a particular problem here.

The Law Commission report published in July 2016 (Bills of Sale, Law Com No. 369) recommends repeal of the Victorian legislation and wholesale reform of this area of the law. In particular it recommended that a court order should be required where a lender seeks to repossess a vehicle from private premises or where one third of the total loan amount has been paid. In addition it recommends that a private purchaser of a vehicle acting in good faith and without actual notice of the log book loan should acquire good title to the vehicle.

I am delighted that the Queen's Speech in June included a Goods Mortgages Bill which would implement the Law Commission proposals. Although there will be great pressure on legislative time during this session of Parliament, because of the Brexit legislation, it is likely that the Goods Mortgages Bill could be introduced and could pass through the special Law Commission procedure for non-controversial law reform measures.

If this proposed reform of the law can be achieved, it would be of great potential benefit to many people in Wales – in particular the less well-off and the underprivileged who are more likely to have resort to such forms of sub-prime borrowing. I draw it to your attention in part because of its intrinsic interest and in part because it shows that law reform has the potential to improve social conditions whether this is the responsibility of the Assembly (as in the case of renting homes) or Westminster (as in the case of bills of sale). I would suggest that there is a role for Legal Wales in respect of both.

Conclusion

It is a particular pleasure to see that the Legal Wales Foundation and the wider Legal Wales movement are both in good heart and flourishing. The challenges before us are considerable

but the opportunities for the development of the law for the benefit of the people of Wales are huge and most inviting.