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Lessons from a single jurisdiction with two governments

Governments and the initiation of law reform in England and Wales[1]

Richard Percival[2]

Abstract

This article sets out the centrality of government to the initiation of law reform in respect of the (England and Wales) Law Commission and the Scottish Law Commission (and by extension, those law reform agencies based on the British model), and then considers in the light of recent experience how the existing approach works in the unique context of a single jurisdiction – England and Wales – which now has two governments – the UK Government for England, and the devolved Welsh Government. Having identified shortcomings, the article makes suggestions for improved institutional arrangements to meet the particular law reform needs of Wales.

Keywords Law reform, UK devolution, law reform agencies, relations with governments, reform proposals

This article considers recent developments in the relationship between the UK and Welsh Governments and the Law Commission (that is, the Law Commission relating to the jurisdiction of England and Wales). It relies in significant measure on the experience and knowledge of the author, a member of the staff of the Commission from 1998 to 2015. From 2001, I was the team manager of the Public Law Team, which undertook virtually all of the law reform projects in devolved areas. This included responsibility for the Wales-only projects initiated in 2011, discussed below. I was also formally charged with oversight of the Commission's relationship with the Welsh devolved institutions. It is hoped that, as a result, the article may provide both information and insights unavailable through published sources alone.

The discussion starts with the centrality of government to the initiation of law reform in Britain, and in many common law/Commonwealth jurisdictions; and then asks the question – what happens with the initiation process when you have two governments, as is the case in England and Wales under the UK's odd, asymmetric form of devolution?

The focus of the inquiry is, in the first instance, on the mechanics of law reform initiation. However, in this context, issues with initiation of law reform are also key to the success of the law reform process as a whole. The article closes with some consideration of how the

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[1] An earlier form of this paper was presented at the third IALS Law Reform Project workshop on 1 November 2017.

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institutional architecture of law reform in England and Wales can be improved to ensure that the law reform needs of Wales are fully addressed.

Government plays a key role in the initiation of law reform projects. This role is set out for the two GB agencies in the Law Commissions Act 1965. Further, this model has been influential throughout the common law world wherever law reform agencies have been established, so it is not merely of parochial UK interest.

The scheme of the Law Commissions Act 1965 essentially gave the UK Government either positive control, or a negative veto, over the agenda of the Commissions.

Section 3 of the Act, and in particular subsection (1), sets out the duties of the Commission. The drafting is not of the clearest. But the key to how initiation of law reform works is section 3, and in particular the list set out in section 3(1). The provision reads as follows, as variously amended:

> (1) It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law, and for that purpose—
> (a) to receive and consider any proposals for the reform of the law which may be made or
> referred to them;
> (b) to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;
> (c) to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;
> (d) to prepare from time to time at the request of the Minister comprehensive programmes
> of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;
> (e) to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government of the United Kingdom or the Scottish Administration with proposals for the reform or amendment of any branch of the law;
> (ea) in the case of the Law Commission, to provide advice and information to the Welsh Ministers;
> (f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

The way that the list of specific duties of the Commission in (a) to (f) has been interpreted creates two ways in which a law reform project is to be adopted by the Commission. Section 3(1)(b) provides for the Commissions to submit to the Minister – the Lord Chancellor, for the England and Wales Commission, Scottish Ministers in Scotland – a programme; and, by (c),

for the Commission to undertake a project approved by the minister as part of a programme. By subsection (1)(e), the Commissions may "provide advice and information to government departments".

The practice of the Law Commission, therefore, is that a project comes either under a programme of law reform, or it is provided directly to a government department. In the case of the latter, the Commissions have interpreted the provision to mean that, for a project to be initiated under subsection (1)(e), it must be requested by the relevant government department. This approach may owe something to the difficulty in construing 3(1)(e) – in particular, it is possible to read the "at the instance of the Government" as relating to the provision of advice and information to departments, as well as to other bodies concerned with proposing law reform. This is wrong. What has to be at the instance of the government is the concerning of the other body with law reform. But that it is an easy mistake to make is illustrated by the fact that the drafter of the statutory instrument which amended section 3 in the light of the Scotland Act 1998[3] makes exactly this mistake.

For many years, the Commissions have interpreted (3)(1)(e) as requiring that the advised department must request the advice and information – hence its identification as a "reference". This approach is adopted in the statutory protocol agreed between the Law Commission and the UK Government (see below).

As noted, the GB Commissions provided the basis for what has become the standard model of law reform agency throughout the Commonwealth, and more generally in the common law world. In nearly all of those agencies, the power of initiation falls to government, although sometimes – as in, for instance, the influential Australian Commonwealth agency – by reference alone.

The primary concern of this paper is to set out the role of government as a matter of fact, and explore the opportunities and problems that has created in England and Wales. But without developing the argument, my view is that government control of initiation is right; or at least, not wrong, for both principled and instrumental reasons.

Before turning to devolution, it is worth emphasising that, independently of devolution, recent years have seen a re-emphasis on the importance of government buy-in to law reform. In particular, in 2009 the 1965 Act was amended to provide for a statutory protocol between the government and Law Commission, much of the substance of which is to enforce good practice in terms of close and persisting relations with government before during and after a law reform project. The amendments also imposed a duty on the Lord Chancellor to report on implementation of Law Commission proposals.[4]

This was a reaction against, in earlier times, the tendency for the Law Commission to include in programmes of law reform projects in which the government did not really have any interest, but which it did not veto in the context of a programme. There was a perception that at an earlier time, too much latitude was given to incoming commissioners, and indeed Chairs of the Commission, to undertake pet projects. It should be emphasised that the push against this came

[3] Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999/1820, Sch 2, Part I para 36(3)(a).
[4] Law Commissions Act 1965, ss 3C and 3B.

largely from the Commission, not from government, although changes to the structure of government both made the problem worse and the government more receptive.

Thus "the government" is responsible for setting or approving the agenda of the Law Commission. But the introduction of devolution in Great Britain after 1998 made the identification of the right government a question, or at least it should have done.

In relation to Scotland, the position was clear. The Scottish Law Commission was to be devolved. Scottish Ministers took over financial responsibility for the Commission, and it became Scottish Ministers who were responsible for both programmes and references. This is so, despite the fact that generally about a third of Scottish Law Commission projects relate to law reserved, by the Scotland Act 1998, to the UK Parliament.

The same is true in principle for Northern Ireland, although the position is complicated by the fact that the (short lived, as it turned out) Commission there was itself a product of the peace process, and devolution of justice was delayed.

In both cases, the devolved country also constituted a separate legal jurisdiction. The case in respect of England and Wales is radically different. England and Wales is a single jurisdiction, but one with, now, two legislatures. This appears to be unique in the common law world. It should be noted that the Welsh devolution settlement has changed substantially a number of times since its original inception with the Government of Wales Act 1998. Following amendments made to the Government of Wales Act 2006 by the Wales Act 2017, Wales is embarking on what is essentially the fourth Welsh devolution settlement (the "reserved powers model", effective from April 2018). It was only with the third settlement, introduced in 2011 under Part 4 of the Government of Wales Act 2006, that something approaching normal legislative functions were accorded to the Welsh Assembly (which will become the Welsh Parliament, or Senedd Cymru, before the next elections in 2021).

The question this position poses is – if government is central to the initiation of law reform, how does that work when one law reform agency, for one jurisdiction, has two governments?

This was not a question that either the Commission or the governments posed in advance. The question has, rather, worked itself out over time in the context of the practice of law reform.

What did become apparent, in the context of whole-jurisdiction law reform projects that dealt with law devolved in Wales was that the lack of an institutional relationship between the Welsh devolved bodies and the Law Commission was a problem. Initially, however, the primary locus for these issues was consultation on existing projects, rather than initiation. The first result was an agreement, adopted in 2008, between the Law Commission and the Welsh Assembly Government. The agreement effectively formalised the reasonably effective practical arrangements that had been developed by that time. While there was a section in that agreement on initiation of projects, its primary focus, and utility, was on other forms of engagement by the Welsh Government and other Welsh stakeholders in on-going projects.

However, particularly with the advent of wider legislative powers under part 4 of the Government of Wales Act 2006 in 2011, it became increasingly clear that this voluntary approach was unsatisfactory. The result was moves to put the relationship between the Law Commission and the Welsh Government on a more formal footing. It is worth noting one important personal contribution to the development of the relationship between the

Commission and the devolved Welsh institutions. In 2012, Lord Lloyd Jones JSC (as he now is) took office as the Chair of the Commission. A Welsh language speaking Welshman, who had been the presiding High Court judge for Wales, he thoroughly understood the Welsh political and legal scenes.

In November 2012, the Commission agreed to seek an amendment to the 1965 Act to allow the Welsh Government to make references on the same basis as government departments. This was accepted, and a provision to this effect made its way into the Wales Act 2014, a piece of legislation that made moderate adjustments to the devolution settlement, and which fortuitously happened to be in the process of drafting at the time. The 1965 Act was amended, avoiding the error made in relation to the Scottish Commission (see section 3(1)(ee)). Provision was made at the same time for Welsh implementation reports and a protocol (although interestingly, the Lord Chancellor had to agree the protocol before the Law Commission could).[5]

But adapting references was the easy part. It left the question of initiation through a programme of law reform untouched, and that depended on the approval of the Lord Chancellor. During this period, the Welsh Government did seek to open up the question of the programme. But the problem was that a plausible mechanism was never clearly enunciated. It was accepted that it would be impractical for the Welsh Government to be responsible for a full scale Wales-only programme, paralleling the role of the Lord Chancellor in respect of what would become an England-only plus un-devolved England-and-Wales programme. The upshot was that the Welsh Government reserved its position in relation to the programme for the future, while concentrating on the change in relation to references.

So by this point we have arrived at the current legal position in relation to Welsh Government initiation of law reform projects: equality with individual Whitehall departments in making references to the Commission: no legal point of entry to the process of the making a programme of law reform.

This new settlement was soon to be put to the test, in the context of the adoption of the Commission's 12th Programme of Law Reform. Over the previous period, from about the 10th Programme in 2008, programmes of law reform had become comparatively more important as a source of law reform projects than references, with greater emphasis on public consultation on the content of the programme.

Consultation opened on the 12th programme in June 2010. Although the consultation was public, a significant number of proposals for programme projects come from government departments themselves. For the first time in 2010-2011, the Welsh Government set up its own internal process to develop proposals for law reform projects. The result was that the Welsh Government proposed three projects for inclusion in the 12th programme. As with a department's proposals, there was a period of discussion to explore and refine the projects. In respect of the Welsh Government's, one in particular changed radically – that which became the project on the form and accessibility of the law in Wales. But the end product was that three Wales-only projects made the final cut – that on the form and accessibility of the law in Wales, plus a project on planning law in Wales and a shorter scoping project on environmental law in Wales.

[5] Law Commissions Act 1965, ss 3C and 3D.

Once the Commission has decided on its list of projects for the programme, the list is submitted to the Ministry of Justice for submission to the Lord Chancellor. A project will not be included on the list unless it has the support of the department with policy responsibility for that area of law. Naturally, there is also a discussion at this stage with Ministry of Justice officials. It should be understood, therefore, that the programme as submitted to the Lord Chancellor will always be accompanied by a recommendation from officials that it be approved.

The Lord Chancellor at the time was Chris Grayling. He approved all of the projects for inclusion in the Programme, with the exception of one, the scoping project on environmental law in Wales.

The first point to be made here is that this was an unheard of occurrence. It cannot be claimed that anyone has exhaustively researched each programme of law reform, but it was certainly unknown in the collective memory of the Law Commission in 2011 for a draft programme agreed between the Law Commission and the Lord Chancellor's officials to be partly rejected by the Lord Chancellor personally.

Secondly, the official reason given for the excision of this project was that it was necessary having regard to "the balance of the work" of the Commission. What this meant was that the Lord Chancellor thought that there were too many Wales-only projects. There was no policy dispute involved – DEFRA, the UK Department responsible for environmental law in England, was aware of the proposal and had not objected.

Finally, the Welsh Government was committed to fund all of the projects, so there were no resource implications for the UK Government.

In this situation, it was not realistic to have recourse to the new reference power, and to do so was never suggested. In the face of a clear refusal to allow a project to go ahead by the UK Government, the Law Commission would certainly not accept such a reference, a fact of which the Welsh Government would of course be fully aware.

But even with this unfortunate outcome, the 12th programme may well turn out to be the high water mark of Law Commission engagement with the Welsh devolved institutions. As it has turned out, the form and accessibility project, although it significantly over-ran its initial timetable, has been generally thought a success and has been broadly accepted by the Welsh Government. The planning law project has gone through some significant changes, becoming more of a codification project following a scoping paper produced in 2016. A consultation paper was published in November 2017, and the project is continuing.

The 13th programme of law reform consultation opened on 14 July 2016, with a launch in both London and Cardiff. The deadline for responses was 31 October 2016. The booklet published to inform the consultation process included two suggestions for Wales-only projects. Both followed up recommendations in the form and accessibility project. One suggested the Commission start on a codification project, proposing either education or local government law as the subject matter. The other was a project to develop legislative standards for Wales.

Publication of the 13th programme was significantly delayed. The expectation was that it would be published in July 2017, but with a surprise general election in May 2017, some delay was to be expected. Nonetheless, it was only finally published on 14 December 2017.

During the consultation process, the Welsh Government did not formally propose any projects for the programme. The Welsh Government funded the Wales-only projects included in the 12th Programme of Law Reform, following a practice that had developed particularly since the 12th Programme in 2011 of central Government departments, other than the Ministry of Justice, providing funding for projects they supported within the area of their policy responsibility.

Despite not including any Wales-only projects, the introduction to the 13th Programme included a substantial passage on Wales. The Commission notes discussions with the Welsh Government "have not yet yielded" a new Wales-only projects, and goes on to say that the Commission "remain committed to including at least one Wales-only project in the Programme so we have put aside resources to enable this, as and when an appropriate area of work arises". This is an extraordinary statement of the Commission's commitment to law reform in Wales; but equally leads to the surprising conclusion that the Welsh Government has failed to come up with an appropriate law reform proposal, even if it is not being asked to fund the project.

Other projects in the 13th Programme, being undertaken on an England and Wales basis, raise devolution issues. It is noteworthy that the Commission has agreed the terms of reference for an important project on certain aspects of leasehold property with both the UK Government, for England, and the Welsh Government. This is despite the fact that, on the face of it, it may raise difficult issues as to whether the subject matter is reserved or not, which may depend on detailed consideration of the proposals that are eventually made.[6]

Other projects which seem likely to involve devolved areas of law include one on the law relating to museum collections, and another on disposing of the dead.

The extent to which government departments other than the Ministry of Justice are contributing to the funding of these projects is not known. But in any event, whether in this programme or a future one, it seems likely that we will see a project covering devolved matters but wholly funded by a Whitehall department only responsible for the relevant policy area in England.

What might this say about the future?

The answer to my first question – how does the government control of initiation work where there are two governments and one law reform agency? – seems to be "not very well". And indeed, this may be inevitable, given the asymmetry of the UK devolution settlement, which is arguable at its most intense when the focus is on the jurisdictional division of England and Wales. In this jurisdiction, the UK Government is at once the "upper tier", quasi-federal government for the UK as a whole and the lower tier, operational government for England; where England constitutes about 95% of the population of the joint jurisdiction. That the issues are fundamentally institutional is perhaps illustrated by the fact that it is difficult to see what

[6] The modification of "private law", which includes "property," is reserved; but there is an exception where the modification otherwise does not relate to a reserved matter (Government of Wales Act 2006, Sch 7B, Part 1, para 3). Thus, depending on the nature of the proposals, the modification of leasehold law may be for the purpose of a non-reserved area of law/policy, such as housing. In this connection, it may be relevant that under the previous, "conferred powers model" of devolution, "housing" was a devolved subject (Sch 7, para 11, now repealed), allowing the National Assembly for Wales to make wholesale reforms to the law of short term tenancies (which constitute the same estate in land as long leaseholds) in the Renting Homes (Wales) Act 2017. It would be surprising if the reserve powers model excluded something that was allowed under the conferred powers model (although it has been argued that this is exactly the effect of the legislation in some areas, given the approach to conferred powers adopted by the Supreme Court).

more the Law Commission could itself have done to seek to meet the law reform needs of Wales.

So there must be, from the perspective of the Welsh Government, and indeed the Welsh legal community, real doubt as to whether the Law Commission for England and Wales is institutionally capable, in the longer term, of addressing the law reform need of Wales.

The natural response to this is to consider alternative ways for the law reform needs of Wales to be met. One possibility is the establishment of a purely Welsh Law Commission. Such a proposal was made in the context of the Welsh Government's recent scheme to create a distinct Welsh jurisdiction – a law reform agency being seen as a near-inevitable incident of jurisdiction status.[7] And it is true that there are a significant number of law reform agencies in jurisdictions with a smaller population than that of Wales.[8]

However, at least in the absence of jurisdiction status, and even then, unless that is accompanied by the devolution of significantly more powers to Wales, there are strong arguments against the creation of a standard model Law Commission for Wales. These were set out in detail in speeches made by Lord Lloyd Jones in 2012 and 2013.[9] Very broadly, given the greater size of England and the broader responsibilities of the UK Government, a standing Welsh Law Commission on the standard model would inevitably end up exercising a subsidiary role to the England-only; or (an alternative model) the England and England-and-Wales Law Commission. While it could valuably perform the function of undertaking Wales-only law reform, it would constantly be hamstrung by the need to be the Welsh arm of broader law reform projects that must extend to the whole jurisdiction, or wider.

But there is another model of law reform agency well established in parts of the common law world which might provide a starting point of a distinctively Welsh model for a Wales-only law reform agency. From the founding of the Alberta Law Reform Institute in 1967 to the most recent, in South Australia in 2010, an institute model of law reform agency has developed in a number of Canadian provinces and Australian states – it is notable from the Welsh perspective that all Institute model agencies currently exist at sub-state level.

There are considerable differences between the law reform agencies within this wide model, but they share some broad characteristics. They are established by agreement between stakeholders, not by legislation. The stakeholders typically include the provincial or state government, the local professions, and a university. Governance is provided by a board composed of the stakeholders, rather than full or part time employed commissioners. Most are also housed within the university administratively. They are usually funded from a variety of sources, principally governments and the professions, but they may also have project-specific funding from not for profit bodies, or grant giving foundations, or even commercial stakeholders.

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[7] March 2016, in response to the process that eventually led to the Wales Act 2017. The draft bill is at https://gov.wales/docs/cabinetstatements/2016/160307governmentlawsinwalesen1.pdf.

[8] See Ed R Percival, *Changing the Law: A Practical Guide, The Commonwealth and the Commonwealth Association of Law Reform Agencies*, chapter 10: Law Reform in Small States, available at http://www.calras.org/pub/Main/LawReform/Changing%20The%20Law.pdf as a free PDF file or at https://books.thecommonwealth.org/changing-law-paperback.

[9] At the Legal Wales Conference, October 2012, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/05/20121012_Law_Reform_in_a_Devolved_Wales_2012.pdf and #.

Institutes currently operate in a similar way to standard model commissions, in that they constitute the only law reform agency for the relevant jurisdiction, and maintain a standing presence with a director and some full time staff. However, it may well be that a specifically Welsh variant on the model could provide an adaptable model suited to the unique position of Wales in the joint jurisdiction.

Institutionally based in one of the six Welsh law schools (or, perhaps, supported in a collaborative way by all of them), a Welsh Law Reform Institute could maintain a standing presence, but adapt its resources to the perceived law reform needs of Wales at any particular time. There may be sufficient resources to employ a very small staff permanently, but even if there were not, the board, operating essentially on a voluntary basis, could maintain an overview of law reform needs; then, when a clearly identified need for a specific Wales-only law reform project became apparent, funding could be secured – perhaps primarily from the Welsh Government, but possibly from other sources as well – on a project-by-project basis. Further, if close working relationships were to be developed with the London Law Commission (and the Scottish Law Commission for GB or UK projects[10]), were a project to be undertaken on an England and Wales basis in respect of devolved law, provision could be made within the context of the joint jurisdiction project for the Welsh Law Reform Institute to input the specifically Welsh perspectives and issues via a working relationship with the London Law Commission (and similarly the Scottish Law Commission for wider projects).

It is true that developing such a hybrid, adaptable body, as opposed to a "proper" standard Commission, could be seen as continuing the tradition of Welsh exceptionalism in terms of devolution that has dogged recent constitutional developments in relation to the country. The response to that, however, is that, while constitutional exceptionalism remains, exceptional work-rounds will also be necessary.

The recent history covered by this article shows that, despite the very considerable best efforts of the Law Commission itself, the institutional architecture of law reform for Wales in the context of the joint England and Wales jurisdiction is lacking. The proposal for a Welsh Law Reform Institute suggests one way in which this could be addressed. There may well be others. But addressed it should be, for otherwise the very considerable law reform needs of the new, emergent polity in Wales will go unmet, to its detriment. And, incidentally, likely to the detriment of the England and Wales jurisdiction as a whole.

[10] The Northern Ireland Law Commission has been de-funded by the Northern Ireland Department of Justice, but has not been abolished, and a chair has formally been appointed. In this "warm storage" state, it currently provides jurisdictional cover for the UK-wide project on electoral law, which is formally a joint project of the three UK Commissions.