### **Biography**

Alison Lorrimer's career path in librarianship has moved from the general nature of work in branch libraries in Belfast Public Libraries to the more specific work of a busy reference department in Belfast Central Library and from there to the very specific niche of Departmental Solicitor's Office Library in 1995. As she freely admits, "Perhaps my career path is not so much a straight trajectory as a case of 'ever decreasing circles'!"

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# An Emerging Welsh Legal Identity: a Brief Overview of the Information Landscape

**Abstract:** "Wales, it has to be said, has come a very long way in a short time." was the opening line by Sir David Lloyd Jones in his speech on, "The Law Commission and Law Reform in a Devolved Wales" to the Wales Governance Centre Annual Lecture in Aberystwyth in March 2013. This brief overview by Lillian Stevenson attempts to discuss this statement using selected documents published after the 2011 referendum in which the people of Wales voted in favour of extending the law making powers of the National Assembly. **Keywords:** devolution; legal information; Welsh law

#### **BACKGROUND**

The Government of Wales Act 1998 (GOWA) established the National Assembly for Wales but it was generally seen as having limited legislative powers in that its competence was restricted to the power to make subordinate legislation in certain areas under the Transfer of Functions Order. However Marie Navarro presents research which "shows that having been given subordinate legislative powers the Assembly exercised them in a way which was quite different to that of the Welsh Office prior to devolution and to that made in England postdevolution."2 Osian Rees states "When one considers the fact that, as has been emphasized, the law-making powers of the Assembly were limited under the 1998 Act, some of the developments that came about between 1999 and 2006 were quite remarkable." From the very start it seems the National Assembly grasped the nettle and used the powers devolved to it.

GOWA 1998 was followed by GOWA 2006 and under Part III of the Act, the National Assembly was able

to make primary legislation for Wales, known as Measures, in certain designated areas. This was extended following the 2011 referendum which brought Part IV of GOWA 2006 into force, thereby allowing the National Assembly to pass primary legislation, known as Acts, in 20 designated areas as detailed in Schedule 7 of the Act, as qualified by the exceptions and restrictions in that Schedule and in s. 108.

To quote Sir David Lloyd Jones again, "The recent implementation of Part 4, Government of Wales Act 2006 means that, for the first time in over 450 years, it is meaningful to speak of Welsh law as a living system of law. The law of Wales is now made in Brussels, Westminster and in Cardiff Bay – but the fact that a democratically elected National Assembly now possesses direct legislative powers in certain specified subjects means that Wales has some laws which are peculiarly its own, as Professor Thomas Glyn Watkin puts it. Welsh law in this sense extends to England and Wales – it is part of the law of England and Wales – but it applies only in relation to Wales ..... inevitably, in the years to come

we are going to see an increasing divergence between English law and Welsh law in relation to the devolved subjects." Welsh law could therefore be interpreted and used in any court in England and Wales, though only effective in relation to Wales.

So what are these 20 devolved subjects under Part IV of GOWA 2006? They are wide ranging and helpfully listed in alphabetical order under main headings as follows – Agriculture; Ancient Monuments and historic buildings; Culture; Economic development; Education & training; Environment; Fire and rescue services and fire safety; Food; Health and health services; Highways and transport; Housing; Local government; National Assembly for Wales; Public administration; Social welfare; Sport and recreation; Tourism; Town and country planning; Water and flood defence; Welsh language.

The Welsh Language is one of the 20 devolved subjects but it also deserves a special note in the context of Wales's bilingual laws and in court proceedings. GOWA 2006 s. III(5) provides that the National Assembly must enact all its legislation bilingually, with equal standing being **given to both** versions of the text. The Welsh Language Act 1993 s. 22 permits the Welsh Language to be spoken by any party, witness or other person who desires to speak it during legal proceedings.

#### **SELECTED DOCUMENTS**

Let us now consider what a selection of documents published in the last two years have to tell us about the emergence of Welsh laws.

The National Assembly for Wales conducted an inquiry and the Welsh Government a consultation during this period and I will consider both in turn.

# Selected documents: National Assembly for Wales

The Constitutional and Legislative Affairs Committee of the National Assembly for Wales agreed at its 14 July 2011<sup>5</sup> meeting to ask the Assembly to confirm that its next Inquiry should be on the question of a separate Welsh jurisdiction and to agree the terms of reference.6 The background, details, history and meetings including evidence are all available on the National Assembly for Wales web site.7 They sought views on the "meaning of separate Welsh jurisdiction; the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction; the practical implications of a separate jurisdiction for the legal profession and the public; the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system."8 The Inquiry was duly confirmed by the Assembly on 28 November 2011 which then began taking written and oral evidence. The concluding report entitled "Inquiry into a Separate Welsh Jurisdiction" was published in December 2012.

The "Inquiry into a Separate Welsh Jurisdiction" contains much to interest legal information professionals.

The Historical background very briefly summarises the position prior to 1998, then moves on to Wales' separate legal identity since 1999. This is evidenced with particular reference to changes in the administration of justice within Wales. Of particular note is the establishment in 2007 of Her Majesty's Court Service Wales (HMCS Wales) which administers justice on an all-Wales basis and of a number of courts – Mercantile Court for Wales; Administrative Court of Wales; Chancery Court in Wales – and regular sittings of both the Court of Appeal Civil Division and the Criminal Division in Cardiff and importantly the appointment of a fluent Welsh speaking High Court judge.

The Divergence of laws and the implications which flow from this are central to the argument for a separate legal jurisdiction but the report also discusses evidence on whether there is, at this stage, a sufficiently large body of law to justify it. However there are many other factors including how legislation emanating from Wales could be interpreted and David Hughes, barrister states – "...if a separate Welsh jurisdiction is not established, at some point in the future Welsh legislation drafted to be different from that applying in England and Wales will be interpreted to mean the same as that applying in England." Others made similar comments.

The chapter on Implications for the legal profession in Wales discusses legal education, with a short note on the position in Northern Ireland where "a bespoke legal training provision has evolved which runs alongside general law legal education. This allows Northern Ireland's law schools to recruit students from outside the country."11 The Assembly's recommendation was "As a body of Welsh law evolves over time, we recommend that additional legal training is put in place to allow specialisms to develop, reflecting the legal traditions and emerging legal identity of Wales."12 Legal education and qualifications were also discussed under Other Issues, concluding that "an undergraduate law degree from Welsh universities should remain transferable and that any change to a separate jurisdiction in the future must not present a barrier to students from outside Wales."13

Evidence is also presented on the question of a Law Commission for Wales and /or a body to review Welsh law, which was the recommendation in the Report. It was pleasing to see Welsh Legal Commentary covered with the Assembly's view "We heard plenty of evidence about the lack of commentary on Welsh law. We welcome the steps being taken by the Counsel General to develop an "encyclopaedia of Welsh law" as outlined in his statement to Plenary on 26 June 2012."14

## Selected documents: the Welsh Government

In parallel with the Assembly, the Welsh Government issued a Consultation Document on 27 March 2012.

entitled "A Separate Legal Jurisdiction for Wales". The Foreword by The Rt Hon Carwyn Jones AM, First Minister summed up the inextricable link between devolution and law in Wales as follows:

"The UK Government has now appointed a Commission on Devolution in Wales, chaired by Paul Silk.... The Welsh Government will submit written evidence to the Commission in due course. That evidence will in part be informed by the outcome of this consultation.

Currently, all law passed for Wales, whether by the Assembly, Welsh Ministers, Westminster Parliament or UK Government Ministers, becomes part of the law of England and Wales. This is because England and Wales share a single legal jurisdiction; and a single system of courts, judges and legal professions has grown up as a distinctive feature of that jurisdiction.

The devolution of powers to the Welsh Government and Assembly will inevitably mean more distinct Welsh law applying in Wales in future.....

We are clear that separate jurisdictions can exist within a United Kingdom – Scotland and Northern Ireland have their own jurisdictions separate from that of England and Wales."<sup>15</sup>

On 17 August 2012 the Welsh Government issued "A Summary of Consultation Responses; A Separate Legal Jurisdiction for Wales" in which it stated "The Welsh Government's conclusions on this issue, therefore will form part of its evidence to the Silk Commission's call for evidence in relation to Part II of its remit." Their evidence was duly published on 18 February 2013, as "Evidence submitted by the Welsh Government to the Commission on Devolution in Wales". The Summary to the Report contains a series of "Proposals on Legislative and Executive Competence" and the Welsh Government's formal response on a separate legal jurisdiction for Wales is as follows:

"While it would not be appropriate to establish a separate legal jurisdiction for Wales now, such a development is very likely in the longer term and action can be taken which would help to ensure a smoother transition to such a jurisdiction in due course. These include achieving a more clearly Welsh identity in the higher courts of England and Wales; new Welsh offices for the Court of Appeal and the High Court; and acceptance of the principle that the legal business of people in Wales should be administered and dealt with in Wales wherever possible. The Assembly should have legislative competence in respect of Administrative Justice issues within areas of devolved competence, and the Assembly and the Welsh Ministers together should have powers enabling coherence to be created in relation to devolved Administrative Justice in Wales. The Welsh Ministers should be able to refer law reform projects to the Law Commission on the same basis as UK Ministers can do now."18

This was reported in the Law Society Gazette under the heading "Wales says no to separation – for now" 19

The Commission itself will submit its final report to the UK Government in the Spring of 2014.

#### **Selected documents: Commentaries**

As noted previously the National Assembly heard evidence of the lack of commentary on Welsh law and whereas there may not yet be a Halsbury's Laws of Wales, it is interesting to note that there were 28 references under Wales in the Halsbury's Laws of England Index to the 1963 edition<sup>20</sup> and 189 references in the Halsbury's Laws of England Index to the 2012 edition.<sup>21</sup>

There is a growing body of legal material, as we shall see. **Researching Welsh Law: What is unique in Wales?** 22 was published online in September 2012, as part of Globalex, New York University School of Law's Foreign Law Guides Series. It gives a brief overview of the development of the Welsh Legal System and sources for researching Welsh law, including Legal Wales; Sources of Welsh legislation: public domain; Sources of Welsh legislation in print; Referencing and Citing Welsh legal authorities; Welsh Law Journals; Law Dictionaries – English/Welsh; Law Schools in Universities in Wales.

#### [2012] Statute Law Review 33(2)

Daniel Greenberg in his inaugural editorial of the Statute Law Review, published by Oxford University Press, stated, "The acquisition by the National Assembly for Wales of powers to make Acts of the Assembly following the successful referendum under the Government of Wales Act 2006 is a source of excitement and interest not only for the people of Wales but also for everyone around the world interested in legislation. A relatively small legislature, with 60 members and a single Chamber, has been given new power to make what is effectively primary legislation in a wide variety of policy areas, and the approach that they take to use that power will have lessons and implications for others."<sup>23</sup>

He said he hoped that one of the 2012 issues would focus on this topic and he did not disappoint because the next issue of Statute Law Review, 2012, 33 (2) did just that. Importantly his second Editorial highlights the implications for the legal profession of England and Wales, "What may once have been seen by some as primarily an issue for local politicians in Wales is now part of the minimum required knowledge of the UK legal system for every lawyer practising in England and Wales; even the most city focused of commercial lawyers is likely at some point to have clients who are wholly or partly based in Wales..... who may be directly affected by Acts of the Assembly, or by the emergence of parallel texts of legislation of general application."<sup>24</sup>

The Special Issue contains a foreword by the Chair of the National Assembly's Constitutional and Legislative Affairs Committee, David Melding, AM.<sup>25</sup> This provides an overview of developments post 1997, the Assembly inquiry into a separate legal jurisdiction and issues relating to bilingual legislation. The latter is of particular importance to legal information professionals. Section 156(1) of GOWA 2006 states:

The English and Welsh texts of -

- (a) any Assembly Measure or Act of the Assembly which is in both English and Welsh when enacted, or
- (b) any subordinate legislation which is in both English and Welsh when it is made, are to be treated for all purposes as being of equal standing.

However David Melding notes concerns that the Welsh text on legislation.gov.uk is not updated "which means that the texts that are available do not necessarily correspond, and it is therefore necessary to look separately at legislation amending the Welsh text to ascertain the current state of the law." This concern is explained in more detail by Dylan Hughes in his article on Accessible Bilingual Legislation for Wales (Deddfwriaeth Hygyrch a Dwyieithog i Gymru) published in English<sup>27</sup> and in Welsh. <sup>28</sup>

This Special Issue contains eleven articles, a significant contribution to the commentary on Welsh law:

- Hughes, D. and Davies, H.D. Accessible Bilingual Legislation for Wales (Deddfwriaeth Hygyrch a Dwyieithog i Gymru).
- Hughes, D. and Davies, H.D. Deddfwriaeth Hygyrch a Dwyleithog i Gymru (Accessible Bilingual Legislation for Wales).
  - This is of particular relevance to law librarians covering the publication and access to legislation applicable to Wales, concluding "Making law easily accessible is difficult. As is convincing those with influence and power (mainly non-lawyers inside and outside government) that scarce public resources should be spent on this activity when there are so many other pressing concerns."<sup>29</sup>
- Bush, K. A. Tale of Two Cities Legislating for Member Remuneration at Cardiff Bay and at Westminster. This compares the National Assembly for Wales (Remuneration) Measure 2010 with the parallel Parliamentary Standards Act 2009<sup>30</sup>
- Jones, T. H. Wales, Devolution and Sovereignty.
   "The model that may be closest to the longer term future of the legal system in Wales is provided by Northern Ireland, which constitutes a separate jurisdiction within the United Kingdom, but in practice operates close to a parallel system to England and Wales." 31
- Navarro, M. A Substantial Body of Different Welsh
  Law: A Consideration of Welsh Subordinate Legislation.
   "Subordinate legislation is a very important part of
  legislation, which seems to have been forgotten in the
  debates post March 2011, which mainly focus on
  primary legislation. Subordinate legislation is a bigger
  source of law in terms of volume than primary

- legislation. Even if so far there have been few Wales made pieces of primary legislation, there have been more than 2000 statutory Instruments (Sis) made in Wales since 1999 which potentially could amount to a substantial body of different legislation."<sup>32</sup>
- Rees, O. Devolution and Family Law in Wales: A Potential for Doing Things Differently. "While acknowledging that the law in Wales is, for the most part, the same as in England, the article demonstrates that increasing divergencies have been brought about as a result of the distinct policies of the Welsh Government, including, for example, the establishment of the Children's Commissioner for Wales, and the incorporation of the United Nations Convention on the Rights of the Child into Welsh law by virtue of the Rights of Children and Young Persons (Wales) Measure 2011. The article explains how such developments have taken place despite the limited law-making powers of the National Assembly...."33
- Bishop, J. Scope and Limitations in the Government of Wales Act 2006 for Tackling Internet Abuses in the Form of 'Flame Trolling'.<sup>34</sup>
- Huws, C.F. Is Meaning Plain and Ordinary? Are You Sure About That?
   "A duality in both legislature and language adds another layer to the question of whether meaning is plain and ordinary .."
- Huws, C.F. The Language of Education Law in England and/or Wales.<sup>36</sup>
   Education is one of the 20 matters on which the Assembly can pass primary legislation. The article examines the potential for divergence.
- Griffiths, A. et al. Measuring a Measure: Much Ado about £50 a Week?
   "This article illustrates the extent to which social care provision in Wales is different to that in England......
   The discussion provides clear evidence that the Welsh Assembly and its Government are becoming very ambitious in terms of legislative objectives, a process which the new constitutional settlement will facilitate."<sup>37</sup>
- Williams, J. A New Law on Adult Social Care: A Challenge for Law Reform in Wales.
   "This legislation is recognized as being no longer appropriate for 21<sup>st</sup> century needs in either Wales or England. Reform is necessary and long overdue. In Wales, the reform of adult social care is a legislative priority and features in the post referendum Government legislative programme. The debate in Wales has progressed at a faster pace than in England where a White Paper is awaited."

#### **University of Wales Press**

The University of Wales Press, Cardiff has been publishing books relating to Wales since 1922. It has published

four books relating to law in the last two years and is currently commissioning more.

Watkin, T.G. 2012. The Legal History of Wales. 2nd edition.

Parry, R.G. 2012. Cymru'r Gyfraith: Sylwadau ar Hunaniaeth Gyfreithiol [Legal Wales – Observations on legal identity].

Bishop, P. and Stallworthy, M. (editors). 2013. Environmental Law and Policy in Wales.

Williams, J. (editor). 2013. The United Nations Convention on the Rights of the Child in Wales.

#### **CONCLUSION**

The emergence of a post devolution Welsh legal identity is evidenced in many ways, not least of which is its information sources, on which I have concentrated. Even in this area, I have only been able to cover the "tip of the iceberg" in terms of recent information being published, much of which, as can be seen in the references, is available online only.

The pace of change is rapid, indeed, with new publications such as the Law Commission Report on Renting Homes in Wales being published in April 2013<sup>39</sup> and a new opt-out organ donation law was passed by the National Assembly on 2<sup>nd</sup> July 2013. The Human Transplantation (Wales) Bill<sup>40</sup> (it is awaiting Royal Assent) makes Wales the first UK nation to introduce such a system.

These changes will hasten the requirement for more commentaries on Welsh law and for more law books on the law of England and Wales covering aspects from a Welsh legal perspective. A good examples of the latter is Clements and Thompson's *Community Care and the Law* (5th edition, Legal Action Group London, 2011). Griffiths et al highlight this "This text breaks new ground in legal writing in that although the focus is on Westminster-led provision, it provides detailed cross-referencing to Wales in both the body of the text and in the references.<sup>41</sup>

I hope this overview has gone some way in convincing you of the veracity of Sir David Lloyd Jones words "Wales, it has to be said, has come a very long way in a short time."

#### **Footnotes**

- David Lloyd Jones to the Wales Governance Centre Annual Lecture in Aberystwyth in March 2013. The Law Commission and law reform in a devolved Wales. http://lawcommission.justice.gov.uk/docs/20130413\_The\_Law\_Commission\_and\_Law\_Reform\_in\_a\_Devolved\_Wales\_lecture.pdf p.1. [Accessed 3 July 2013].
- <sup>2</sup> Navarro, M. 2012. A Substantial Body of Different Welsh Law: A Consideration of Welsh Subordinate Legislation. Statute Law Review 33 (2), p. 165.
- <sup>3</sup> Rees, O. 2012. Devolution and Family Law in Wales: A Potential for Doing Things Differently? Statute Law Review 33 (2), p. 196.
- <sup>4</sup> David Lloyd Jones to the Wales Governance Centre Annual Lecture in Aberystwyth in March 2013. The Law Commission and law reform in a devolved Wales. http://lawcommission.justice.gov.uk/docs/20130413\_The\_Law\_Commission\_and\_Law\_Reform in a Devolved Wales lecture.pdf p.1. [Accessed 3 July 2013].
- <sup>5</sup> Steve George, Committee Clerk. Constitutional and Legislative Affairs Committee. Proposed Committee Inquiry A Separate Welsh Jurisdiction? November 2011. Paper Reference: CLA(4)-13–11(p3) http://www.senedd.assemblywales.org/documents/s4083/CLA%204-13-11p3%20-%20Draft%20Terms%20of%20Reference.pdf [Accessed 3 July 2013].
- <sup>6</sup> Above.
- <sup>7</sup> National Assembly for Wales. Inquiry into the establishment of a separate Welsh jurisdiction. Website. http://www.senedd.assemblywales.org/mglssueHistoryHome.aspx?IId=2594&Opt=0 [Accessed 3 July 2013].
- <sup>8</sup> Above.
- <sup>9</sup> National Assembly for Wales: Constitutional and Legislative Affairs Committee. Inquiry into a Separate Welsh Jurisdiction. December 2012. http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/cr-ld9135-e.pdf?langoption= 3&ttl=CR-LD9135%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20-%20Inquiry%20into%20a% 20Separate%20Welsh%20Jurisdiction [Accessed 3 July 2013].
- <sup>10</sup> Above 9, paragraph 46, 23-24 [Accessed 3 July 2013].
- 11 Above 9, paragraph 88, p. 37 [Accessed 3 July 2013].
- <sup>12</sup> Above 9. The Committee's conclusions and recommendations. Conclusion 7. Recommendation 1. p.5 [Accessed 3 July 2013]. [Accessed 3 July 2013].
- <sup>13</sup> Above 9, paragraph 145, p.56 [Accessed 3 July 2013].
- <sup>14</sup> Above 9, paragraph 154, p.59 [Accessed 3 July 2013].
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- <sup>18</sup> Above 17, pp. 2–3. [Accessed 3 July 2013].
- <sup>19</sup> Hyde, J. (2013) Wales says no to separation for now. [Online] *The Law Society Gazette*, Monday 18 February. http://www.lawgazette.co.uk/news/wales-says-no-separation-now [Accessed 3 July 2013].
- <sup>20</sup> Halsbury's Laws of England 3<sup>rd</sup> Edition. vol 42 General Index L-Z p.845 Butterworths October 1963.
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- $^{23}$  Greenberg, D. 2012. Editorial. Statute Law Review. 33 (1), pp. iii–v.
- <sup>24</sup> Greenberg, D. 2012. Editorial. Statute Law Review. 33 (2), p. 5.
- <sup>25</sup> Melding, D. 2012. Foreword. Issue on Welsh Devolution. Statute Law Review. 33 (2) p. 97.
- <sup>26</sup> Above p. 97.
- <sup>27</sup> Hughes, D. and Davies, H.D. 2012. Accessible Bilingual Legislation for Wales (Deddfwriaeth Hygyrch a Dwyieithog i Gymru). Statute Law Review, 33 (2) pp. 103–121.
- <sup>28</sup> Hughes, D. and Davies, H.D. 2012. Deddfwriaeth Hygyrch a Dwyieithog i Gymru (Accessible Bilingual Legislation for Wales). Statute Law Review, 2012, 33 (2) pp. 122–140.
- <sup>29</sup> Hughes, D. and Davies, H.D. 2012. Accessible Bilingual Legislation for Wales (Deddfwriaeth Hygyrch a Dwyieithog i Gymru). Statute Law Review, 33 (2) pp. 103–121 at pp.120–121.
- <sup>30</sup> Bush, K.A. 2012. A Tale of Two Cities. Statute Law Review, 33(2) pp. 141-150.
- <sup>31</sup> Jones, T.H. 2012. Wales, Devolution and Sovereignty. Statute Law Review, 33 (2) pp. 151–162 at p.162.
- <sup>32</sup> Navarro, M. 2012. A Substantial Body of Different Welsh Law: A Consideration of Welsh Subordinate Legislation. Statute Law Review, 33 (2) pp. 163–191 at p.163.
- <sup>33</sup> Rees, O. 2012. Devolution and Family Law in Wales: A Potential for Doing Things Differently. Abstract. Statute Law Review, 33 (2) pp. 192–206 at p.192.
- <sup>34</sup> Bishop, J. 2012. Scope and Limitations in the Government of Wales Act 2006 for Tackling Internet Abuses in the Form of 'Flame Trolling'. Statute Law Review, 33 (2) pp. 207–216.
- 35 Summary LNB News 30/08/2012 41 of Huws, C.F. 2012. Is Meaning Plain and Ordinary? Are You Sure About That? Statute Law Rev (2012) 33 (2) pp. 230–251.
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- <sup>37</sup> Griffiths, A. et al. 2012. Measuring a Measure: Much Ado about £50 a Week? Abstract. Statute Law Review, 33 (2) pp. 281–303 at p. 281.
- <sup>38</sup> Williams, J. 2012. A New Law on Adult Social Care: A Challenge for Law Reform in Wales. Statute Law Review, 33 (2) pp. 304–322 at p. 305.
- <sup>39</sup> Law Commission. 2013. Renting Homes in Wales. (Law Commission Report 337; Cm 8578) http://lawcommission.justice.gov. uk/publications/renting homes in wales.htm
- <sup>40</sup> National Assembly. Assembly Business. Website. http://www.senedd.assemblywales.org/mglssueHistoryHome.aspx?lld=5178 [Accessed 4 July 2013].
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## **B**iography

Lillian Stevenson is Academic Services Manager and Law Librarian at Aberystwyth University. She studied law at Birmingham University and Sheffield University and information studies as a postgraduate at the College of Librarianship Wales, now the Department of Information Studies, Aberystwyth University. Subsequently she worked in legal publishing and as Law Librarian at Manchester Metropolitan University and Norton Rose, City law firm in the United Kingdom. She is currently on the Council of the British and Irish Association of Law Librarians and has represented them at the Joint Studies Institute and the Special Libraries Association Conference.