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LEGAL INFORMATION AND ASPECTS OF DEVOLUTION

Welsh Devolution

Abstract: The emergence of the National Assembly for Wales as a devolved legislature producing first Measures and now Acts, together with the establishment of a Welsh Government with a range of powers to make secondary legislation, has added a new layer of complication to the already over-complicated legislative landscape of the United Kingdom. This article, written by Daniel Greenberg, examines briefly some of the resulting complications.
Keywords: devolution; government; legislation; Wales

INTRODUCTION

The devolution arrangements for Wales are unlike those for Scotland and Northern Ireland in a number of respects. From a technical legal view, one of the most important differences is that there is still no such thing as the law of Wales, while long before devolution there were concepts of the law of Scotland and the law of Northern Ireland.

Technically, England and Wales remain a single legal jurisdiction. A legislative provision may apply only in relation to England or only in relation to Wales, but in so far as extent is concerned – the legal concept which addresses the question of the law of which the legislation forms part – the only option remains extent to England and Wales.

One does come across a small number of statutory instruments which express themselves in terms of extent to Wales. This is not, however, an intentional contribution to the debate as to whether a separate jurisdiction of Wales is emerging and should emerge, but is mere ignorance on the part of a few departmental lawyers.

That debate, however, is real, and its influence is being felt at a legal as well as at a political level. Academics have for some time been discussing the issue of whether there is now a separate Welsh jurisdiction, and if not whether there should be one. This is, however, a predictably sterile debate at an academic level. The question of whether there is a separate jurisdiction of the law of Wales will depend on practicalities, some of which are touched on below. In particular, if the proliferation of parallel texts of legislation in its application to England and Wales separately continues at the present rate, what at present sounds like an insistence on sound legal understanding in asserting that there is no concept of extent to Wales or England will come to sound like mere pointless pedantry. Similarly, and equally importantly, if High Court judges sitting in Wales, and with knowledge of Welsh conditions and perhaps of the Welsh language, acquire the habit of expressly stipulating that particular decisions in relation to legislation reflect circumstances in Wales and may not be of equal application to England, or distinguish earlier English decisions on that ground alone, a Welsh jurisdiction will be emerging irrespective of whether it is thought desirable or appropriate at a political and theoretical level.

In this and other ways, one need not spend long in legal and legislative circles in Cardiff to realise that the realities of Welsh devolution are only beginning to emerge. Northern Ireland has had its own legislative arrangements for a number of decades, and Stormont was ready and waiting to pick up the baton of devolution and run with it. Scotland has not had quite the same recent history of separate legislative arrangements, although it certainly had some; but the devolution arrangements established a new institution with pretty much full Parliamentary powers from day one. In contrast, devolution in Wales has been and still is an incremental development, which makes it much less certain than in the other places what the final results of devolution will look like in a number of ways. That also makes Wales an exciting place to focus on in examining the emergence and development of new legislative powers.

This article discusses a few of the practical issues that arise in relation to the continuing development of Welsh legislation, from a legal information management perspective.

LEGISLATION OF THE NATIONAL ASSEMBLY

When the National Assembly for Wales was established by the Government of Wales Act 1998, it was something of a puzzling hybrid institution. Unlike the Scottish Parliament, it did not acquire the powers to pass legislation by the name of Acts. Indeed, it did not acquire powers to initiate legislation at all, in one sense; it was given certain powers previously vested in UK Ministers of the Crown to make secondary legislation under powers

expressly granted by Acts of Parliament. The early history of legislation in the Assembly was therefore the rather bizarre spectacle of an elected National Assembly exercising Executive legislative powers. This was bizarre both on the grounds of what it did not do – give what appeared to be a legislative body the legislative initiative within a specified area of competence – and also on the grounds of what it did do – appearing to confuse the distinction between the legislative role of a parliament and the administrative and executive roles of a Government.

This explains why a number of statutory instruments will be found which assert that they were made either by the National Assembly or by the Assembly in combination with one or more Ministers of the Crown.

The confusion attaching to this state of affairs was considerable; and as familiarity failed to dispel the confusion the system did not seem to become any more stable or likely to be permitted to continue for long.

Predictably, therefore, the Government for Wales Act 2006 altered the constitutional basis of legislation in Wales. Even now, however, for political reasons (some of which are not entirely clear now and may not have been entirely clear at the time) Wales was not permitted to pass in one step from the early hybrid arrangements to a system resembling those in Scotland and Northern Ireland. Instead, the 2006 Act provided in Part 3 for the Assembly to pass something called Measures, while Part 4 provided for it to pass something called Acts, each within a specified area of legislative competence. In order to avoid any temptation for things to be either normal or simple, therefore, a kind of instrument previously associated only with legislation of the Synod of the Church of England was assigned for the closest that the National Assembly was allowed to come in the first instance to primary legislation; while a local referendum, which for obvious reasons is almost never used as a trigger for legislative commencement, was to decide if and when the Assembly could stop passing Measures under Part 4 and start passing Acts under Part 4. The brief interregnum of Measures was ended with a successful referendum in 2011, as a result of which the National Assembly now passes Acts within its areas of competence.

The practical results of all this for managers of legal information are various. Most obviously, the legal information manager needs a basic understanding of this history of the Assembly's powers to be able to understand how and why he or she may be confronted with all or any of three different kinds of legislation purporting to be made by the Assembly itself: statutory instruments originating in the 1998–2006 era; Measures from the 2006–2011 year; and Acts since then. These different strata are likely to continue to have practical importance for some time; apart from the fact that legal information specialists are well-accustomed to the practical importance of being able to access legislation in the form in which it had effect at some given point years or decades ago, Measures in particular were passed in sufficient number and in areas of sufficient importance to make it likely that they will continue to have effect for a long time, despite no new ones being passed.

More generally, how is legislation of the Assembly to be classified? As a matter of technicality, it is arguable that all legislation of the Assembly, including Acts and Measures, is not primary legislation but secondary legislation, based on the simple fact that it owes its authority to an Act of Parliament – the Government of Wales Act 2006 – and not, like Parliament, to the inherent powers of the institution. It would be a brave man or woman, however, who stood up in a public place in the streets of Edinburgh and described Acts of the Scottish Parliament as secondary legislation; and similar courage would be needed to stand too close to the edge of Cardiff Bay while making the same – technically impeccable – point about Acts of the National Assembly. As so often, moreover, pedantry in this case would be more a vice than a virtue: whatever technical accuracy may attach to the classification of Acts of the Assembly as secondary legislation, serves merely to obscure the political realities of the decision to describe that legislation as "Acts". Particularly when this designation has been handed out in grudging stages through a succession of provisions of Westminster legislation, it would be obtuse to ignore the significance of the term. The message is loud and clear – that legislation of the National Assembly is now to be treated in the same way as Acts of the Westminster Parliament, giving it for almost all practical purposes much more the feel and character of primary legislation than of secondary. While that message may be primarily a political one, it is to be expected that the courts will pay close attention to it in the course of construing the legislative intention of the 2006 Act, and according the resulting appropriate level of deference in applying and interpreting legislation of the National Assembly.

OTHER WELSH LEGISLATION

To make life more complicated, legal information managers have to cope with the fact that while the principal form of new legislation for Wales will be the Act of the Assembly, there is a range of kinds of new legislation that may have effect wholly or partly in relation to Wales, quite apart from the historic relics discussed above.

Most importantly, the devolution settlement as set out in the 2006 Act expressly preserves the powers of the Westminster Parliament to pass Acts in relation to Wales, even on matters in respect of which legislative competence has been devolved to the Assembly. Although a convention has emerged (the "Sewel Convention") according to which HM Government does not propose legislation on devolved matters to the Westminster Parliament without first obtaining the consent of the relevant devolved legislature, this is only a convention, and obviously not a very long-standing one at that, and it does not have the force of law.

The result of this is that there may be new Acts of Parliament that relate entirely to Wales (such as the

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Marriage (Wales) Act 2010); and there will be many Acts of Parliament in non-devolved areas, such as immigration or the criminal law, that apply wholly or partly to Wales; and there may be Acts of Parliament even dealing with devolved areas, that apply wholly or partly to Wales as discussed above. In some cases it will be clear from something in the text that the Act applies to Wales, but not necessarily; there may be nothing more than an express or even implied proposition about extent to England and Wales which, since as discussed above extent is a separate concept from application, in itself says nothing about whether or not the legislation has practical application to Wales.

And that is only primary legislation. When it comes to secondary legislation, various kinds of statutory instrument may have application to Wales, either specifically or as part of their general application. Instruments may still originate in Whitehall departments and apply wholly or partly to Wales; but an entirely new series of statutory instruments made by Welsh Ministers in Cardiff has now emerged, and if experience elsewhere is a reliable predictor, the new series is likely to proliferate.

PARALLEL TEXTS

Apart from the general complexity of legislation to which devolution has significantly added, there is a particular problem that was formerly confined to fiscal legislation, in which context it was relatively harmless, and that devolution has now seriously exacerbated.

In one sense there is never a real answer to the question of what the "text" of a particular legislative provision is at any one time, because the statute book as a text is nothing more than a convenient fiction and the state of the law always depends on a number of explicit and implicit modifications, glosses and variations depending on the precise application. But for most practical purposes, it is both possible and necessary to determine the text of a particular legislative provision at any given time and for any given purpose.

The problem of parallel texts arises where a particular provision "exists" – in the sense of having legal force – in more than form at one time, for different purposes. This was always common in tax legislation, with a particular provision being in force in different forms at the same time for the purpose of its application in respect of different tax years and accounting periods; and lawyers and accountants were well accustomed to this peculiarity.

Devolution, however, and Welsh devolution in particular, has introduced parallel texts to a much wider area of the "statute book", including many areas where it ought ideally to be possible for less experienced practitioners to read and apply the text with a reasonable degree of certainty. These parallel texts arise when the National Assembly amends the text of a piece of legislation that extends to England and Wales, because the amendments will extend only to Wales as a result of express limitations on the Assembly's legislative competence. But they also arise when the Westminster Parliament amends an England and Wales text in a devolved area, and there is no political will – as there generally is not – to impose the English amendments onto the law in Wales.

The result is that for an increasing range of Acts, there is one text for Wales and another for England, with increasing scope for confusion as different layers of amendments, some with different extents, are piled on top of each other.

ACCESSIBILITY

The issues of parallel texts and sheer volume and complexity are difficult enough for legal information professionals who have access to commercially edited online versions of the statute book. Those routinely offer different versions for Wales and for England where the texts differ, and should be able to show how different combinations of amendments looked at any given time. The citizen who is not able or willing to subscribe to these services, which can be enormously expensive, is not so well provided with opportunities for discovering what Welsh legislation there is and how general legislation affects Wales in particular.

The free online site run by the Government – www.legislation.gov.uk – does not include the text even of all primary legislation in an up-to-date form, although regular assurances are given that this will be rectified in a near future that appears to be ever retreating. As for secondary legislation, much of which is of more importance to practitioners and citizens for everyday purposes than the parent Acts, little or none is shown in fully updated form.

The accessibility problem in relation to legislation in general is exacerbated by the exponential growth in recent years of reliance on quasi-legislation, including codes of conduct and practice, and guidance. These pose a particular challenge from a legal information management perspective because unlike statutory instruments they are not subject to a central system of registration, numbering and publication, but are simply published in whatever form seems best to the relevant Department. Although in recent months some attempts have been made to centralise, the result is still very hit and miss. Since statutory guidance end codes definitely form part of the overall law which businesses and individuals have to obey, there is no justification for their not being readily available and accessible, but the service is still highly unsatisfactory in that respect.

While this is a UK-wide problem, it is particularly challenging in relation to Wales, where there are now two layers of statutory and non-statutory guidance and codes that may have effect in relation to a particular piece of legislation. The relevant department in London may have produced guidance or a code having general effect in relation to England and Wales, while the relevant department in Cardiff may have done the same in relation to Wales alone. Since there is a central registry for

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neither, the legal information professional is left searching two haystacks in order to establish the absence of a needle in either, before being able to reassure the client that he or she is not missing anything that the courts may have regard to in applying the legislation in question.

BACKGROUND AND PARLIAMENTARY MATERIALS

It is now not only statutory codes and guidance to which the courts will have regard in applying and determining the meaning of legislative text. For many years, the range of material to which the courts are prepared to have regard has been expanding. Pepper v Hart (the decision by which the courts finally allowed themselves to have regard to Hansard in construing Acts), far from being a watershed as some predicted, can be seen as a mere pebble forming part of a general avalanche of new kinds of material which the courts will consider.

Even being told not to look at something has not stopped the courts from doing so: when official Explanatory Notes were first produced for Acts a few years ago, the standard rubric which has since been adopted by the devolved legislatures includes a warning that the Notes are not authoritative and have not been approved. Swept away by the increasing trend of grabbing hold of anything that might shed light on the legislative intention, however, the courts were deterred for almost no time at all before they concluded that, while not authoritative, the Notes were still part of the background context of the Act to which they could legitimately refer.

Since then, any possibly kind of document in the policy and legislative history seems to be regarded as fair game for parties seeking to finesse the interpretation of legislation by reference to its background and purpose; and as drafting of primary and secondary legislation becomes vaguer and looser all the time, there is more and more opportunity for finesse of that kind. To such an extent have the courts been prepared to go that we have now witnessed not just judicial discussion of the fact that a particular provision was amended at a particular stage in its parliamentary process – something that would have been difficult to imagine relatively few years ago – but we have even seen the fact that an amendment was not moved at a particular stage being referred to as a piece of solid evidence for establishing the legislative intent.

In many ways that all makes perfect sense; and many in the profession always thought it close to ridiculous that in the search for the legislative intent the courts barred themselves, as a result of a constitutional doctrine the force of which is not immediately apparent, from consulting Hansard, the one document whose specific purpose is to record precisely that.

From the point of view of legal information management, however, it has rendered almost impossible the task of identifying what amounts to relevant legal information in the context of legislative interpretation and application; and as for the job of accessing and collating all the potentially relevant data on a particular provision, it has become almost impossible for anyone to perform effectively. The result is that the search is inevitably of a hit-and-miss variety, with equality of arms issues arising where one party – most particularly the public service – has unlimited resources for research and document preparation, while the other may be on a tight budget for supporting the preparation for litigation.

Be that as it may, accessing and analysing governmental policy documents and parliamentary material has relatively suddenly become a key part of the task of the information professional.

In relation to legislation of the National Assembly, this task is made a little easier than it might be by the modern way in which the Assembly is organised and its proceedings recorded and published. In particular, much of the scrutiny of Bills in the Assembly takes place in departmental Committees, who generally produce a report on the Bill. These reports are unlike anything found in connection with the scrutiny of Bills in Westminster, and they are mines of genuinely helpful information.

A particular feature of the reports is that they both summarise and generally transcribe evidence given by departmental officials on the policy of parts of the Bill in response to questioning of the Committee. In Westminster, the closest one comes to having verbatim accounts of policy expressed by officials who have developed the policy and thoroughly understand it is when they sit just out of reach of Ministers in Committee, hastily scribbling notes in response to Opposition questions while they are being asked, and having them thrust at the Minister who may or may not have time to read them out and may or may not do so accurately. In Cardiff, on the other hand, officials are sat sensibly around the Committee table and quizzed about aspects of the policy, with the result that the Committee reports are generally of an exceedingly high quality and well-worth reading in order to establish background and context of the legislation.

Incidentally, this results in a much more even-handed approach, since in the last few years Public Bill Committees in Westminster have permitted themselves to take oral evidence from interested pressure groups in relation to a Bill, but continue to deny themselves the benefit of interrogating departmental officials directly. In Cardiff, Committees get the benefit of all perspectives direct and with the opportunity to probe and challenge.

In general, too, the National Assembly papers forming part of the legislative record are superior in quality and quantity to those routinely found in Westminster. In addition to the standard form Explanatory Notes, different memoranda and written statements are produced in relation to each Bill, and they are all grouped neatly together for access on the Bill's page on the National Assembly website.

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So although one may have reservations about the quantity of background materials that have recently assumed such importance in relation to statutory interpretation and application, it is at least true in relation to Welsh legislation that as a rule it is both of high quality and reasonably accessible.

DUAL-LANGUAGE ISSUES

Finally, an article on legal information management issues in relation to devolved legislation would not be complete without mentioning that information professionals now have to be not merely archivists, but linguists as well.

Every piece of paper in relation to Welsh policy making and legislation is sent to the official translation units for the production of an official translation into Welsh; and there is increasing realisation in legal circles that since the translation is yet another piece of evidence as to the legislative intention that could be critical in the application or interpretation of a provision, the knowledge management services in relation to Welsh legislation need at least to contemplate the possibility of being able to provide analysis of the translation.

This is not merely a daunting prospect but one which is obviously impossible to attain within the normal resources of a knowledge management service. Worse still, there is a capricious element introduced into the system, with a consequent equality of arms issue, in that services whose staff happen to include one or more Welsh-speakers will be at a significant advantage. In Wales, it may not be difficult to arrange the routine inclusion of a Welsh-speaking resource; but for managers outside Wales this is not going to be something which most services will be able to accommodate as a matter of routine, and it is likely to become something of a chance opportunity.

CONCLUSION

The challenges of providing a complete and effective legal information service in relation to Welsh legislation are immense, as discussed above.

Devolution may have been a liberating and exciting event for the people of Wales, but it is a bewildering addition to what are already the almost insuperable difficulties of the legal information professional, as the volume of legislation continues to increase, coupled with increasing complexity of policy, increasingly loose or inexact drafting, and rapidly accelerating demands for background and explanatory material of all kinds.

Every time the courts utter sensible warnings about the need for restraint in the number and relevance of explanatory materials adduced for statutory interpretation, they quickly go on to ignore their own warnings and encourage the continued proliferation of evidence of all kinds. This is a UK-wide problem, but with particular linguistic and other problems in relation to Welsh legislation.

Sooner or later, one cannot help wondering when the bubble will burst in one way or another; perhaps by the courts finding a way to prevent the enforcement and application of legislation that is not made freely accessible to the citizen in its updated form; or by refusing to look at the piles of Governmental policy material that is adduced in support of arguments on both sides of an issue of statutory interpretation. Until that time, however, legal information professionals will simply have to keep struggling to catch up.

Biography

Daniel Greenberg was a legal adviser in the Lord Chancellor's Department from 1988 to 1991, when he joined the Office of the Parliamentary Counsel where he served until 2010. Since leaving the civil service in 2010 he combines a private practice as a Parliamentary lawyer at Berwin Leighton Paisner LLP, with a position in the Office of Speaker's Counsel in the House of Commons, and with various editorial and academic activities, including editing Westlaw UK Annotated Statutes, Craies on Legislation, Stroud's Judicial Dictionary, Jowitt's Dictionary of English Law, the Statute Law Review, and serving as Visiting Professor of Legislation in the University of Derby and an Associate Research Fellow in the Institute of Advanced Legal Studies.

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