

**PROTOCOL BETWEEN
(1) THE WELSH MINISTERS AND
(2) THE LAW COMMISSION**

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INTRODUCTION

We are pleased to present this protocol, agreed between the Welsh Ministers and the Law Commission for England and Wales and laid before the National Assembly for Wales, on how we should work together on law reform projects.

The Wales Act 2014 amended the Law Commissions Act 1965 to take account of Welsh devolution. It inserted a new section 3D which provides the statutory basis for making this protocol. It also inserted a new section 3C which requires the Welsh Ministers to report annually on the implementation of Law Commission proposals relating to devolved Welsh matters and it inserted paragraph (ea) in section 3(1) to enable the Law Commission to accept law reform projects referred to it by the Welsh Ministers.

In accordance with section 3D(4) of the Law Commissions Act 1965 this protocol has been approved by the Lord Chancellor.

SCOPE

1. The Law Commission of England and Wales (“the Commission”) is the statutory independent body created by the Law Commissions Act 1965. Its role is to keep under review the law of England and Wales with a view to its systematic development and reform.
2. The Commission may undertake a law reform project relating to Welsh devolved matters (as defined by section 3D(8) of the Wales Act 2014) either by including it in a programme of law reform adopted in accordance with the relevant provisions of section 3(1)(b) and (c) of the Law Commissions Act 1965 or by accepting the project on a reference from the Welsh Ministers under section 3(1)(ea) of that Act.
3. This protocol sets out the Welsh Ministers’ and the Commission’s approach to the Commission’s law reform work relating to Welsh devolved matters. It covers the various stages of a project (before the Commission takes the project on; at the outset of the project; during the currency of the project; and after the project). It applies to projects set out in the Commission’s regular programmes of law reform, and to projects which arise out of individual referrals made to the Commission.
4. The protocol applies only to projects which the Commission takes on after the date on which the protocol has been agreed, although the Welsh Ministers and the Commission have agreed to take it into account, so far as practicable, in relation to projects which are ongoing as at that date.

FORMAL CONTACT POINTS

5. The formal contact points for the purposes of this agreement are:
 - (1) for the Law Commission, the Chief Executive; and
 - (2) for the Welsh Government, the Director of Constitutional Affairs.

BEFORE TAKING ON A PROJECT

6. Where the Welsh Ministers ask the Commission to take on a new project, either in a regular programme of law reform or as a referral, they must:
 - (1) explain why the law in that area is unsatisfactory and the potential benefits that would flow from reform;

- (2) commit to providing sufficient Welsh Government staff to liaise with the Commission during the currency of the project (normally, a policy lead, a lawyer and an economist);
 - (3) give an undertaking that there is a serious intention by the Welsh Ministers to take forward law reform in this area (if applicable in the case of the particular project);
 - (4) provide views on what they consider to be the most appropriate form of output for the project (for example, policy recommendations, a draft bill, draft guidance), the likely method of implementation and any risks associated with that method of implementation which might lead to non-implementation or significantly delayed implementation (for example, difficulties in obtaining legislative time if the method of implementation is legislation), insofar as is possible at this stage; and
 - (5) provide funding to meet the expenses of the project, in accordance with section 5(4) of the Law Commissions Act 1965.
7. In deciding whether to recommend a project concerning Welsh devolved matters to the Lord Chancellor for inclusion in any programme of law reform and in deciding whether or not to accept a referral of an ad hoc project, the Commission will take into account:
- (1) the extent to which the law in that area is unsatisfactory, and the potential benefits that would flow from reform (including the Welsh Ministers' views on these matters (under paragraph 6 above));
 - (2) whether the Commission is the most suitable body to conduct a review in that area of the law in view of its independent and non-political nature;
 - (3) whether the Commissioners and staff have or have access to the relevant experience, or could commission services from those with relevant experience;
 - (4) the information provided by the Welsh Ministers (under paragraph 6 above), including whether sufficient funding is available;
 - (5) the priority that should attach to the project when compared with other ongoing or potential projects, including both projects concerning Welsh devolved matters and other projects;

- (6) whether there is a Scottish or Northern Irish dimension to the project that would need the involvement of the Scottish and/or Northern Ireland Law Commissions.

OUTSET OF A PROJECT

8. At the outset of a project, the Welsh Ministers and the Commission will agree:
 - (1) the terms of reference for the project, including the proposed output;
 - (2) appropriate review points at which the Commission will consult with the Welsh Ministers on the progress of the project;
 - (3) the overall timescale for the project.
9. At the outset of a project, Welsh Government officials (to include, unless otherwise agreed, a nominated policy lead, a lawyer and an economist) and the Commission will agree a programme of regular communication, to include meetings which will normally be at least every quarter while the project is live.

DURING THE CURRENCY OF A PROJECT

10. Welsh Government officials and the Commission will maintain the programme of communication agreed at the outset of the project, subject to any agreed changes.
11. The Commission will communicate promptly and openly with the officials about the progress of the project. Officials will also communicate promptly and openly with the Commission about wider policy developments and changes in priorities that may affect implementation, on the mutual understanding that the confidentiality of information will be respected (subject to any applicable legal obligations).
12. The Commission will keep the progress of the project under review and may decide, in discussion with the relevant department, to change one or more elements of the project or to discontinue the project.
13. The Welsh Ministers may not require the Commission to stop working on an ongoing project but in deciding whether, and if so how, to continue with the project at the review points, the Commission will take full account of the Welsh Ministers' views and all relevant factors affecting the prospects for implementation.

14. The Commission will prepare an impact assessment (which will comply with the government guidance on impact assessments) of the proposed reform to accompany a final report.
15. Welsh Government officials will assist the Commission in drawing up the impact assessment, including by providing information (where available) and by commenting on the impact assessment in draft. Where possible, the impact assessment will be jointly agreed.
16. Welsh Government officials and the Commission will assess any issues related to the legislative competence of the National Assembly for Wales that may arise during the project and bring them to the attention of the other party as soon as possible.

AFTER THE PROJECT

17. The Welsh Ministers will provide an interim response to a report to the Commission as soon as possible and in any event within six months of publication of the report unless otherwise agreed with the Commission.
18. The Welsh Ministers will provide a full response to the Commission as soon as possible after delivery of the interim response and in any event within one year of publication of the report unless otherwise agreed with the Commission. The response will set out which recommendations the Welsh Ministers accept, reject or intend to implement in modified form. If applicable, the Welsh Ministers will also provide the timescale for implementation.
19. If the Welsh Ministers are minded either to reject or substantially modify any significant recommendations, they will first give the Commission the opportunity to discuss and comment on their reasons before finalising the decision.
20. The Welsh Ministers will then send their final response to the Chairman of the Commission.
21. If the Welsh Ministers intend to implement recommendations, the Commission and the Welsh Government will agree what additional support (if any) the Commission will provide to Welsh Government to assist implementation and whether additional funding is necessary for this purpose.

The role of the Welsh Government in other Law Reform Projects

22. Some law reform projects undertaken by the Commission may cover both significant devolved Welsh matters and significant non-devolved matters (whether affecting England only or England and Wales). In such cases:

- (1) this protocol applies (with any necessary modifications) in relation to the part of the Commission's project that relates to Welsh devolved matters in the same way as it applies to a project relating only to Welsh devolved matters; and
- (2) the protocol between the Lord Chancellor and the Law Commission under section 3B of the Law Commissions Act applies to the part relating to non-devolved matters.

C.Jones

David Lloyd Jones

First Minister of Wales, on behalf
of the Welsh Ministers

Chairman of the Law Commission
of England and Wales

2nd July 2015