

## COMMISSION ON JUSTICE IN WALES

### ORAL EVIDENCE ON LEGAL JURISDICTION AND GOVERNANCE

15<sup>TH</sup> MARCH 2019

#### MEMORANDUM BY HUW WILLIAMS, CHAIR – LEGAL WALES

1. This memorandum has been prepared in advance of the oral evidence session. It addresses the questions circulated beforehand by the secretariat and, in some respects, develops my written submission dated 15<sup>th</sup> July 2018.

#### **Question 1. Should there be someone in Welsh Government with responsibility for justice and policing?**

2. Justice and policing, while not originally devolved and are now since the Wales Act 2017 reserved, have nevertheless become increasingly intertwined with the exercise of functions that are within the ambit of the National Assembly and the Welsh Government. However, the allocation of responsibilities for the Welsh Government's engagement with justice and policing has had no settled place within the distribution of powers among the Welsh Ministers. For example, the "concordat" with the MoJ agreed last year was the responsibility of the then Welsh Minister for Communities, but following the recent reconstruction of the Government these responsibilities have now moved to the First Ministers.
3. Given the evolving picture, which continues to see the accretion of justice and policing related activities to the Welsh Government, there is a strong case for the establishment of a designated "Minister for Justice and Policing Affairs" role within the Welsh Government. However, this desirable step again raises the need to address the number of AM's to give the legislature the capacity to handle greater involvement in justice and policing while the statutory numerical restrictions on the number of Welsh Ministers is also a limiting factor.

#### **Question 2. Do you think there should be a law of England and a law of Wales, or a continuation of the law of England and Wales? How would you see the arrangements working?**

4. Under the distribution of functions under the Wales Act 2017, it seems to me to be more helpful now to think in terms of a two-tier structure. There are now laws that extend only in England (i.e. they are made by Parliament as the legislature for England as now recognised by the "EVEL" legislative procedure at Westminster); those that extend only to Wales and laws that the UK Parliament makes extending to Wales and England. The laws that extend to both countries could be characterised as equivalent, in a formal federal constitution, to the federal level of laws. It seems to me that this characterisation is helpful as a description of the situation that will remain certainly for so long as criminal and civil law remain reserved.
5. In effect, we now have in fact if not in a formal sense, within Wales, a Welsh jurisdiction co-existing with a jurisdiction of England and Wales extending over the reserved functions. Put another way, I think that by the inexorable process of legislation in Cardiff Bay and Westminster, but within the reserved powers model as it now exists we have jurisdictions of Wales, of England and of England and Wales.

6. This represents an evolution of my thinking from my original submission to the Commission.
7. Were criminal and civil law to cease being reserved then we would have a separate jurisdiction of Wales and the “law of the land” would be Welsh Law. This is a political question but the asymmetry of the treatment of Wales alongside Scotland and (assuming an eventual restoration of devolved administration) look increasingly unsustainable in the long term. However, to my mind there are two major issues that must be confronted:
  - 7.1 Will a separate jurisdiction lead to a clear improvement in administration of justice and state of the law in Wales to the benefit of the people.
  - 7.2 Will a legislature even at the level of 90 members, which was the upper limit suggested by the McAllister Committee, be sufficient to administer and legislate for the whole spectrum of criminal and civil law, policing and, one must assume, prisons and probation.
8. I also remain conscious of the difference between Wales now becoming a separate jurisdiction in comparison with the origins of the other jurisdictions within the UK beyond England and Wales. The other jurisdictions, like England and Wales, pre-date the modern state and the massive increase in the extent and complexity of statute law and the regulatory activities of the State. Separating Wales and England into separate jurisdictions while undoubtedly feasible will be nevertheless be complex and within the UK context a unique exercise for the modern UK state.<sup>1</sup> In my view, before doing so there needs to be a careful analysis of what will be real and practical benefits to the people of Wales.
9. A separate jurisdiction needs to command the respect and confidence of the people from the outset.

**Question 3. Do you think there should be a separate judiciary for Wales? How would you see the arrangements working?**

10. My views on the structure of the judiciary were set out in my original submission as at section 6.2 (b). I think that a permanent status for judges appointed to sit in Wales should be recognised. They should be appointed through a Wales recruitment competition within a Welsh arm of the Judicial Appointments Commission. Judges so appointed should, however, be “cross-ticketed” so that the opportunity of sitting throughout England and Wales is retained. I would regard this as an important feature in attracting the best candidates to apply for appointments in Wales and ensuring a broader and more diverse judicial pool of colleagues serving Wales than the statistics might require for an exclusively Welsh judiciary.

**Question 4. Do you think there should be a separate legal sector in Wales? How would you see the arrangements working?**

11. I am not sure that a “sector” as opposed to a jurisdiction and a regulatory system is a matter that can be legislated for. A Welsh legal sector to my mind is a business concept and it will develop if there is sufficient business to make

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<sup>1</sup> Although perhaps there are some parallels with the process of withdrawing the UK from the legal order of EU.

owning and operating a Welsh legal firm or joining Welsh chambers or focus on work generated by a Welsh jurisdiction is a commercially attractive proposition.

12. It is quite possible that adjustments to public funding of legal services in Wales in future (perhaps if publicly funded legal aid and advice was devolved) and the local needs for family, private client, crime and local small business could lead to firms with business models based on serving a Welsh client base.
13. At the other end of the spectrum, however, we have seen how the larger Welsh based firms have already been absorbed in the majority of instances into firms headquartered outside Wales. Furthermore, all the commercial law firms of any size either operate on a cross-border basis with office in England or seek to serve English clients by exploiting the cheaper cost base in Wales. I cover this in greater detail in my submission. A similar trend is observable in Scotland where many of the major Scots commercial law firms have now merged into UK and international law firms.

**Question 5. What impact do you think a separate legal system in Wales would have on the regulation of the professions and legal practice across England and Wales?**

14. I consider this from the standpoint of a practicing solicitor. It should not be assumed that a single regulatory framework would be suitable to oversee and represent practitioners across separate Welsh and English jurisdictions. In the short term the reservation of criminal and civil law suggests maintaining the present overarching regulatory and representational framework. Were the position to change then a number of factors come into play and would require very careful consideration:
  - 14.1 The small size of the solicitors' branch in Wales relative to the number of solicitors on the Roll.
  - 14.2 The fact that over my professional career I have seen the transition away from a largely self-regulating profession responsible for discipline and training standards and where practitioners assumed positions of responsibility voluntarily as part and parcel of their obligation to their profession. While this model had its problems, it is nevertheless a fact that we have now moved to a position where, in the eyes of the vast majority of solicitors, regulation is something that is now done to them, at their cost, mainly by a new class of professional regulators.
  - 14.3 Accordingly, the profession in Wales could be faced with a significant increase in the costs of representation and regulation if Welsh bodies equivalent to the Law Society (i.e. a representative body with optional membership) and the SRA (i.e. a statutory regulator funded by a compulsory levy) and the Solicitors' Compensation Fund, needed to be created.
  - 14.4 If entry into the profession in Wales entailed significant additional costs as a result of the establishment of a Welsh jurisdiction, then it is to be anticipated that those solicitors based in England and doing no Welsh work will object to subsidising the regulatory costs of Welsh practitioners.
  - 14.5 The ease with which practitioners would be able to qualify in both Wales and England would be critical. However, the history of the SRA's attitude to calls for

the SQE to be available in Welsh and provided within Wales suggests a current lack of interest and understanding of Welsh circumstances and needs.

- 14.6 The probability that many Welsh practitioners will still see being qualified in England as a stronger “brand” and offering wider career options. This is bound to affect the interest in and vitality of a separate legal profession in Wales. This suggests to my mind that becoming qualified in Wales as well as England and vice versa will need to be made virtually seamless and inexpensive.

**Question 6. How could Wales be better represented within current justice and policing bodies.**

15. The principle of a “reserved” Welsh seat on England and Wales justice and policing bodies should be accepted as a generally applicable principle.
16. As I suggested in my original submission, there should be a much clearer ministerial responsibility within the UK Government if a jurisdiction of England and Wales is to be maintained for Welsh legal and policing affairs. A Minister of State level appointment shared between the Ministry of Justice and the Home Office with specific responsibility for Welsh legal affairs as their principal role would be a good solution.

**Question 7. Do you think any current justice and policing bodies should be set up on a Wales basis? Within a smaller jurisdiction how do you think the independence of the police, prosecution and the judiciary should be protected?**

17. My original submission made the suggestion that the Welsh Government should be willing to take on the budgets for the running a Welsh Courts service and legal aid in Wales. Indeed, I think that demonstrating that these services can be provided better by administering them in Wales in a way that meets Welsh circumstances is an essential element on the road to a separate jurisdiction that is seen to bring advantages over the current arrangements and thus has the prospect of commanding respect and confidence in the eyes of the public
18. In terms of policing, there is a legitimate debate to be had, I consider, about whether the Police and Crime Commissioner system is well adapted to Welsh circumstances. A Wales Police Authority modelled on the British Transport Police Board or Police Scotland is a possibility as is an Authority model with an elected membership or a mixture of nominated and elected positions.
19. I have no specialist knowledge of policing, but the current variations between the operational footprints of the police and emergency services seems anomalous to an outside observer. Arguments about local knowledge seem unconvincing when it is apparently possible to run an Ambulance Service on an all Wales basis but policing still requires four separate constabularies.
20. In terms of independence and the separation of powers the examples of the other UK and common law jurisdictions would need to be examined for best practice. However, there are a number of overarching and generally accepted principles:
- 20.1 Transparency of appointment procedures based on competition and merit.

- 20.2 In the case of policing, the maintenance of the separation between the administration of the service and operational policing.
- 20.3 A chief public prosecutor appointed for a fixed term with security of tenure comparable to judicial office.
- 20.4 Ministerial oversight that enshrines specific duties additional to those of other Ministers to maintain and secure resources to ensure, the Rule of Law.
- 21. There is a second order question as to whether if a decision was taken to devolve justice and policing, the initial primary legislation should be passed at Westminster before the reservation of the legislative powers to Parliament was removed enabling amending and future legislation be made by the National Assembly/Senedd.

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