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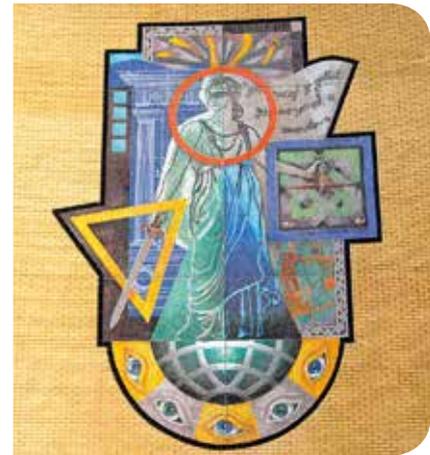
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Welsh Government

Consultation – Summary Report

A Separate Legal Jurisdiction for Wales

Date of issue: 04 December 2013



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Foreword

We would like to thank all the respondents for taking the time to consider the questions in the consultation on a separate legal jurisdiction for Wales, and for providing such comprehensive evidence. The responses greatly assisted the Welsh Government's policy development. We were also able to draw upon the valuable report of the Assembly's Constitutional and Legislative Affairs Committee published in December 2012.

The advantages and disadvantages of a separate legal jurisdiction were discussed at length in the responses to our consultation. Many of those in favour of establishing a separate jurisdiction acknowledge that, whilst this may not be an immediate prospect, there is a likelihood that it will occur at some stage in the future as the divergence between the law in Wales and England increases, and that preparatory steps are desirable now in order to facilitate this change. We agree with this view.

The Welsh Government's conclusions were set out in our evidence to the Commission on Devolution in Wales (the Silk Commission) in February of this year, and are summarised in paragraphs 16 -19 of that evidence. This makes clear that the case for establishing a separate legal jurisdiction is intimately related to the developing constitutional position of the UK, and Wales' place within it.

In our Silk evidence, the Welsh Government proposed the devolution of Policing, but not Criminal Justice and the Administration of Justice, although this is its longer-term objective. It follows that, in the absence of devolved responsibility for Criminal Justice, a move to a separate jurisdiction now would not be of benefit to the people of Wales.

The Welsh Government believes that we should prepare for a time when a separate legal jurisdiction may be necessary and beneficial. As part of that preparation, the Welsh Government will aim proactively to enhance the Welsh identity within the shared jurisdiction of England and Wales, and to develop the foundations on which any separate Welsh legal jurisdiction could be formed should a decision be taken to do so in the future. There are a number of useful preparatory steps that could ensure a smooth transition to a separate legal jurisdiction in the longer term, and these are set out in the Welsh Government's evidence to the Silk Commission.

We are making this summary of the consultation responses and our conclusions available in order to assist future research and debate on this important matter.

RT HON CARWYN JONES AM
First Minister of Wales

THEODORE HUCKLE QC
Counsel General

Purpose

The purpose of this document is to provide a summary of the consultation responses which informed the Welsh Government's position on a Separate Legal Jurisdiction as set out in its evidence to the Silk Commission in February 2013. The aim is to assist future research and debate.

Background

The people of Wales voted "yes" in the referendum on the powers of the National Assembly for Wales held in March 2011. As a consequence of that, in May 2011, the provisions of the Government of Wales Act 2006 that enable the Assembly to pass primary legislation (called Assembly Acts) in relation to all devolved subjects were brought into effect.

Amongst other things, this means that it is no longer necessary for the consent of the UK Parliament to first be obtained before the Assembly can legislate in relation to those devolved subjects. The Assembly now has the power to pass Assembly Acts which become law upon Her Majesty giving Royal Assent. Within its powers the Assembly may, by Act, do anything that an Act of the UK Parliament could do.

The UK Parliament is sovereign and retains power to legislate on any matter in Wales. There is, however, a convention that the UK Parliament will not normally legislate in relation to a devolved matter in Wales without the consent of the Assembly¹.

Because England and Wales is a single shared legal jurisdiction the laws made by the Assembly or by the UK Parliament still form part of the law of England and Wales, even if they are only intended to apply in Wales. Since devolution in 1997, and particularly as a consequence of the referendum in Wales on the Assembly's law-making powers, there has been much discussion about whether or not Wales should also be a separate legal jurisdiction.

On 7 October 2011 the First Minister of Wales made a written statement to the Assembly setting out the Welsh Government's intention to launch a public debate on this issue. The Counsel General launched the consultation on a separate legal jurisdiction through an oral statement to the Assembly on the 28 March 2012. The Counsel General stated that the submissions to this consultation would help inform the Welsh Government's evidence to the Silk Commission (the Commission on Devolution in Wales), on Part II of its terms of reference relating to the devolution settlement for Wales.

¹ Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee – June 2011.

The consultation document itself asked 29 individual questions which were designed to answer the broader themed questions of:

- What is meant by the term “separate legal jurisdiction”;
- whether there are any essential features for the existence of a separate legal jurisdiction and, if so, what they might be;
- what the consequences of having a separate Welsh legal jurisdiction might be; and
- what the potential advantages and disadvantages of a separate Welsh legal jurisdiction would be.

The consultation came to an end on 19 June 2012. Sixty eight responses were received. The responses to the consultation fell into distinct themes, these are:

- The principle of a Separate Jurisdiction for Wales;
- The essential features of a Separate Jurisdiction;
- Defined territory;
- A body of law;
- The administration of justice / A separate courts system;
- The legal profession;
- The current devolution settlement;
- Further devolution of powers;
- The reserved powers model of devolution;
- International examples;
- Cost.

The principle of a Separate Jurisdiction for Wales

When discussing the general issue of a separate legal jurisdiction, the majority of respondents fell into two groups. The first discussed the general principles surrounding a separate jurisdiction and then discussed in detail the merits of various component parts e.g. a separate courts system, a separate legal profession. The other group appeared to view a separate jurisdiction as a complete package, that is to say, if Wales were to have a separate legal jurisdiction a number of features would follow automatically from that decision. In the main this centred on a separate courts system for Wales and the devolution of powers in relation to the administration of justice.

Overall there were mixed feelings about the general principle of a separate legal jurisdiction. Thirty nine respondents presented the arguments relating to a separate jurisdiction and identified issues that would need to be considered if a separate jurisdiction were deemed necessary, but they did not express a definitive view either way. Some respondents, mainly those involved in the legal profession, made clear that they would not express a view on whether or not Wales should have a separate legal jurisdiction because they saw it as a political rather than legal question.

Seventeen respondents were in favour of the principle of a separate jurisdiction mainly given the possibility of further divergence in the laws of England and Wales in the future. Many respondents felt that a unified jurisdiction simply wasn't sustainable given the extended legislative powers of the Assembly following the 2011 referendum. Others felt that a separate jurisdiction was a natural part of the progression of devolution, and that it was essential to the work the Welsh Government does in delivering services to the people of Wales.

Over half of respondents put forward arguments concerning the principle of a separate jurisdiction. One said that "Laws made in Wales, for Wales, should be decided by the people of Wales and ultimately by the National Assembly for Wales and the Welsh Government. Laws made in Wales, for Wales, should be part of the law of Wales only, and not remain part of the law of Wales and England." In the same vein, a respondent argued that: the citizens of Wales should have ready access to justice, be able to find out which law applies in their circumstances, be able to identify easily which elected representatives have power to change that law, and, be able to use English and Welsh in legal proceedings. They felt that a separate jurisdiction could have a positive impact on these goals. One respondent commented that if Jersey's jurisdiction can function, there is no reason why a Welsh jurisdiction would not work.

Other arguments centred on having parity with Scotland and Northern Ireland. That is to say, that as Wales has primary legislative powers, Wales should also have a separate jurisdiction as Scotland and Northern Ireland have. Some took this argument further and concluded that full parity with Scotland and Northern Ireland would mean full responsibility for the administration of justice and a separate courts system.

Twelve respondents argued against the principle of a separate jurisdiction. Of those that disagreed with the principle, the majority felt that it was unnecessary given the success the current joint jurisdiction has enjoyed for centuries, arguing also that the current devolution settlement was strong enough to deal successfully with any divergence in the laws of England and Wales. It was argued that there was no justification for additional expenditure in the current economic climate. Some felt that this was a political issue which should have been discussed during the referendum campaign in 2011.

Of those supporting the status quo, some felt that the change could damage the reputation of the England and Wales jurisdiction and the strength it has developed over centuries. One respondent felt that seeking parity with Scotland and Northern Ireland was an empty argument, that their jurisdictions were historically entrenched and therefore it would not be valid to use this argument to support Wales as a separate jurisdiction. Another respondent felt there was no evidence that the Scottish or Northern Irish courts could deliver a higher standard of justice. Another respondent felt that Wales is too small a country to require a separate legal jurisdiction, and that its creation might cause the best legal talent to move to England. The respondent also felt that a separate jurisdiction might act as a disincentive to investment in Wales.

Other respondents drew attention to the difficulties separate jurisdictions would cause for individual parts of the law e.g. commercial and charity law, and also to possible investment and complex business models and felt these issues were strong enough to object to the general principle of a separate jurisdiction.

Conclusion:

The Welsh Government's view is that the case for a separate legal jurisdiction is intimately related to the developing constitutional position of the UK, and Wales' place within it. It is about whether Wales should have its own courts system, operating alongside its already-existing legislature and executive. The Welsh Government has concluded that it would not be likely to be beneficial to the people of Wales to establish a separate legal jurisdiction for Wales now, without a reasonably full set of powers in relation to Justice. However, we should prepare for a time when a separate legal jurisdiction may be necessary and beneficial.

Definition of legal jurisdiction and its essential features

The Welsh Government received several views on this matter. A number of respondents provided outline definitions of what was meant by the term “legal jurisdiction”. Although many emphasised that it was difficult to provide a definitive explanation, specific features of a jurisdiction were identified; namely, that it applied to a defined territory, that there was a body of native law, that it contained legal institutions and had a courts system. A number of respondents argued that a separate courts system was not an essential feature of a separate jurisdiction.

Most respondents did not deal directly with identifying the essential features of a separate jurisdiction. Some made passing comments relating to the need for a separate body of law, others felt that a separate courts system and/or full responsibility for the administration of justice, were essential features of a separate legal jurisdiction.

Some respondents did deal directly with what they saw as essential features of a separate jurisdiction. One respondent stated that the creation of locally applicable law is an essential feature of a separate jurisdiction, although this would need to reach a certain point before a separate jurisdiction was essential. Another respondent stated that a body of law may be distinct over the territory to which it applies, irrespective of whether the law is different in substance from other legal jurisdictions, and that this is an essential feature of a separate jurisdiction.

One respondent outlined all the features they felt were essential to a separate jurisdiction particularly in the instance of Wales. These were:

an administrative procedure to decide on the jurisdiction of cases, that courts in the rest of the UK would declare forum non conveniens (a court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case) to cases concerning Wales; a new court to consider challenges to the laws of Wales; the additional educational need for some of those involved in the legal profession to be conversant in Welsh law and International law as it applies here, together with provisions for those wishing to write law within the confines of the current settlement; a prospectus statement from FE, HE and vocational law courses on their relevance to the Curriculum Cymreig; bilingual resources; libraries of Welsh law; a Welsh Lord Chief Justice; the need for Wales to be represented on the UK Supreme Court.

Another respondent also provided a detailed account of the features of a separate jurisdiction. The features identified were: distinctive territory; distinctive law; distinctive legal system; and rules about conflict of law (relationships to other jurisdictions). The respondent also stated that the key feature of a separate jurisdiction lies in the rules governing the relationship to other legal systems. If the courts of England and Scotland were to regard Welsh law as foreign, that would mean that there was a Welsh jurisdiction.

Most respondents did state that a separate body of law was essential. Two said that a distinct body of law was not essential to a separate legal jurisdiction, but agreed that it is highly probable that a distinct body of law would exist within that jurisdiction, and that planning for the separation of the jurisdictions should take place before the laws of England and Wales diverge too much.

Conclusion:

The Welsh Government considers the key features of a separate jurisdiction are a defined territory with a distinct body of law, and distinct institutional machinery including a legislature, courts and judiciary. The Welsh Government is already undertaking a programme of tribunal reform and as part of that is implementing recommendations made by the Welsh Committee of the Administrative Justice and Tribunals Council in its Review on Tribunals operating in Wales. Our long term aim is to develop a coherent system of tribunals in Wales to hear appeals on all matters falling within devolved areas.

A number of useful preparatory steps, properly reflecting the realities of devolution and developing legal divergence, can be taken which could help to ensure a smoother transition to a separate legal jurisdiction in the longer term. These include:

- **achieving a more clearly identifiable Welsh identity in the higher courts: the Welsh Government has, for example, argued for a Welsh member of the Supreme Court.**
- **establishing an office of the Court of Appeal in Wales as soon as possible, and a formal commitment given to hold hearings of appeals in Welsh cases in Wales wherever possible. Consideration should also be given to the establishment of a Welsh Division of the Court of Appeal, from which would be drawn the judges expected to sit in Welsh appeals cases.**
- **establishing an office for Wales of other divisions of the High Court alongside that already existing for the Administrative Court.**

Defined Geographical Territory

Around three quarters of respondents agreed that a jurisdiction should apply to a specific geographical area, and that the definition of a “defined territory for Wales” that is described in Section 158 of the Government of Wales Act 2006 was the most appropriate definition for this exercise. Respondents agreed that Wales should be defined by its land area and the territorial waters that include the sea adjacent to Wales out as far as the seaward boundary of the territorial sea. These respondents did not specify if they thought that this definition should also include the Welsh Zone.

One respondent commented that although it would be difficult to have a separate Welsh jurisdiction without there being something identifiable as “Wales”, the precise boundaries of Wales could alter over time and this would not mean a separate Welsh jurisdiction would cease to exist.

Another respondent agreed that one aspect of a separate jurisdiction was its defined geographical territory; however they also stated that there are a number of jurisdictions that use either domicile or habitual residence to define its application. If Wales is to be a separate jurisdiction, then rules for determining domicile and rules for establishing habitual residence between England and Wales would need to be established.

One respondent believed that Wales is “too small a country” to have a separate legal jurisdiction bearing in mind the “inter-connectedness between Wales and England”.

Conclusion:

The Welsh Government considers a defined territory to be a key feature of a separate legal jurisdiction. Such a definition of Wales should include the sea adjacent to Wales out as far as the seaward boundary of the territorial sea and the Welsh Zone (as defined in Section 158 of the Government of Wales Act 2006 when read in conjunction with an Order in Council called The Welsh Zone (Boundaries and Transfer of Functions) Order 2010/760).

Body of Law

Nearly all respondents felt that a distinct body of law was an essential feature of a separate legal jurisdiction. The majority of these respondents felt that, at present, Welsh law has not diverged enough from English law to merit a separate jurisdiction. These respondents argued that Welsh law was likely to diverge further from English law, and that it would be a good idea to implement a separate jurisdiction proactively. One said that “development of a separate jurisdiction would be a prudent step to take as early as possible in the context of that ever increasing body of law.”

Others felt that it was almost impossible to specify in advance when a body of law is distinct enough to necessitate a separate jurisdiction. A small number of respondents said that the body of law would be distinct enough to warrant a separate jurisdiction when the people of Wales consider it distinct enough. This opinion was not widely shared. One respondent stated that any distinction in the laws of England and Wales was enough, and that it made no difference if this was statute law or common law. For example, Northern Ireland is a common law jurisdiction, and has its own legislative Assembly. Two respondents pointed out that divergence in the law would happen between England and Wales, but that this could be a result of the UK Parliament implementing England-only laws, as well as the National Assembly implementing Wales-only laws.

A couple of respondents drew attention to the current arrangements for the Administrative Court in Wales. They stated that since the opening of the Administrative Court in Wales, planning and environment decisions that are subject to judicial review are generally heard in Wales. To some extent this gives legal professionals in this field a feeling that they are already operating within a separate jurisdiction. Four respondents made the same point in relation to Tribunals in Wales, pointing out that in this respect there was already a functioning separate jurisdiction in certain aspects of Welsh law.

The majority of respondents felt that if there were a separate jurisdiction for Wales, it could function within the existing common law system. While acknowledging that the common law would be affected over time, the majority felt that Wales could continue to be part of a common law jurisdiction much in the same way that Northern Ireland is. Even though it is likely that over time the common law would diverge, this would be a very slow-moving development, and the likelihood of a dramatic divergence from English common law would be limited.

One respondent stated that the common law would continue to develop unless codified, abolished, or replaced by statute of the National Assembly. This would apply in exactly the same way as when Parliament legislates in a matter of law previously governed by the common law e.g. the Occupiers Liability Act 1984, which had previously been governed by the common law regarding injury to trespassers. Another respondent stated that the common law system remains the foundation of many Commonwealth countries,

adapted by legislation to meet the needs of different communities, and there is no reason this should not be the same for Wales.

Another respondent said that the current legislative powers of the Assembly already carry with them the possibility of altering the detail of the common law (in so far as it applies to Wales). Express reservations excluding the common law from the legislative competence of the Assembly would be very difficult. In the event of a separate jurisdiction, Welsh judges could develop common law through interpretation, but Wales would continue to be a common law jurisdiction.

One group of respondents returned to the question of charity law in the common law context, believing that a separation of the jurisdictions could result in a lack of coherence in the common law system for charities and result in uncertainty for the charitable sector in England and Wales. The development of charity law is derived from multiple layers of judicial decision-making, the continuity of which would, they said, inevitably be affected by the creation of a separate jurisdiction.

All respondents that dealt with statute law felt that law extending only within the Welsh legal jurisdiction would be recognised as law in other jurisdictions. Three respondents argued that the Supreme Court should act as a dispute settlement body if need should arise. Some felt that this was a matter of necessity, and that such statute law should be judicially noticed in the other jurisdictions of the UK. Two respondents also stated that statute law that only extends to a separate Welsh jurisdiction should be subject to civil and criminal proceedings. One respondent drew attention to the statement made by Professor Gerry Maher QC who said that the solutions to the issues raised around the application of statute law could be resolved by adapting existing rules which apply to the current joint jurisdiction. One respondent felt that Welsh law should be recognised in the other jurisdictions within the UK but recognised as foreign law. As a result whether it was recognised as enforceable would depend upon the circumstances.

Some claimed that a body of law is only distinct enough when it enables the people and the judiciary to address all social and economic interactions within the jurisdiction, without any reliance upon the law of another jurisdiction save for international law or as an autonomous member of an international union such as the EU. Other respondents felt that although devolution may have given the Welsh Government and Assembly more power to legislate, it was difficult to see that any effective change would be made to criminal, property, inheritance and commercial law in the future. Similarly some respondents could not see the point of a separate jurisdiction based on the body of law alone as it would be likely that the majority of Welsh law would incorporate the vast majority of UK law anyway. Some claimed that, despite the result of the 2011 referendum result and the Assembly's primary legislative making powers, Westminster legislation and the joint common law would continue to dominate.

Conclusion:

The Welsh Government considers a sufficiently distinct body of law to be a key feature of a separate legal jurisdiction. A distinct body of law is emerging from both primary and secondary legislation. In the Welsh Government's view, the increased divergence in law between England and Wales should not be the sole factor that dictates when a separate legal jurisdiction should be created.

The Welsh Government acknowledges the point made that any future separate legal jurisdiction would still operate within the common law and any new jurisdiction would still be a common law jurisdiction.

The Administration of Justice

The question of the administration of justice and a separate courts system as a result of a separate legal jurisdiction in Wales caused a strong divergence of opinion. The majority of respondents either supported some measure of devolution, or felt it was inevitable while causing some concerns. Those that disagreed with the principle of a separate courts system felt that Wales would not be able to provide the appropriate infrastructure (i.e. the buildings needed to support the administration of justice) or the Judiciary.

A large number of respondents felt that a unified court system operating within two separate jurisdictions was unwise and unsustainable. Some felt that a legislative body without a separate or distinct court system was like a “cart without a horse”. One respondent felt that a Welsh Court is required to restrict other citizens of the UK taking advantage of Welsh laws under the Human Rights Act and reciprocally Welsh residents taking advantage of other laws in the UK. Another respondent felt that the more laws are made in Wales by the National Assembly, applicable only to Wales, the less compatible a Welsh jurisdiction would be with a unified judiciary and court system. Some agreed to a lesser extent, stating that the separation of responsibilities for the administration of justice is essential to the successful creation of a separate jurisdiction, and that any arrangements for the administration of justice should be based on what is best for the people of Wales.

One respondent felt that one of the benefits of a separate jurisdiction for Wales would be the possibility of a separate judicial review process which would take further the recent developments in regionalising the Administrative Court. They saw a clear need for: at least some cases to be heard in Wales, all cases concerning Welsh law to be heard in a court which has facilities for the Welsh language, and to encourage greater use of judicial review in Wales.

One respondent took this argument further by stating that there are sound reasons for courts in Wales to have exclusive jurisdiction over those laws which apply only in Wales, regardless of who made them, and should also have exclusive competence over cases involving the body of law which applies in both England and Wales but which, in accordance with defined principles, ought ordinarily be heard in Wales. They argued that there is no need to distinguish between the bodies of law e.g. criminal or civil etc. From this perspective, only courts in Wales would have jurisdiction over cases to be tried under the laws applicable to Wales.

Many of the respondents who favoured the status quo focused their comments on the possibility of a separate courts system. In general these respondents felt that a separate courts system would be detrimental to the overall administration of justice. Some felt that the existing courts system is effective and efficient and that it constitutes one of the bulwarks of the liberty of the citizen. The High Court, The Court of Appeal and Supreme Court provide a depth and breadth of expertise that a High Court in Wales could not match. Some respondents felt that it was possible for a court to be cross-jurisdictional and that the judiciary would apply the laws and procedures in

force in the jurisdiction that they are engaged in. One group of respondents felt that the various courts within the current jurisdiction already provide an acknowledgement of the changed constitutional position of Wales following devolution, and that there is no need for a separate courts system. Another respondent stated that the existing unified jurisdiction is a fundamental part of the union between England and Wales and its separation would result in Wales having inferior arrangements.

In terms of the structure of any courts system in Wales, there were a number of different opinions as to how it could look. Some felt that all courts should be devolved save for the highest level – the Supreme Court. This would put Wales in the same position as the other constituent parts of the UK. Many respondents called for Welsh representation on the Supreme Court, whether or not Wales had a separate jurisdiction. Others felt that, although there should be a certain level of devolution in relation to the courts system, the Court of Appeal and High Court should remain in England and have a cross-jurisdictional remit. Another respondent stated that if the Assembly took legislative competence over the criminal law, there would need to be a Welsh Supreme Court and an entirely separate system of courts both civil and criminal. This respondent was alone in suggesting that Wales should have a separate Supreme Court. Nevertheless, one group of respondents did say that a separate Welsh jurisdiction would not necessitate a separate Court of Appeal as long as court of Appeal sittings in Wales were strengthened.

On a more practical level, questions were raised about the infrastructure for the administration of justice in Wales. Some pointed out that there are no women's or high security prisons in Wales, and no prison facilities in North Wales. Some said that if Wales did have responsibility for the administration of justice, supporting bodies such as the Judicial Appointments Commission, a judicial disciplinary procedure, an offender management and probation service etc. would need to be established to support it. Others argued that if Wales were to seek the devolution of the administration of justice, that policing would need to be devolved in order to fully support this.

Others raised issues relating to language and the accessibility of justice. Some felt that if Welsh cases were heard in Wales, this would allow the Welsh language to be used, and would improve the service to Welsh speakers. Others pointed out that there is a general feeling that the legal aid budget is not being administered fairly in Wales and that if the legal aid budget for Wales were administered by a Welsh body this would be to the benefit of the public in Wales.

Some members of the legal profession said that there would be scope for improvements to be made to the judicial structures in Wales to deal with issues and pressures arising from devolution, and to ensure proper liaison between the judiciary and the National Assembly and Welsh Government. In the same vein it was argued that those who administer justice through tribunals in Wales should be given, and be seen to be given, independence of office and independence in judicial decision making. This would need to continue if Wales was a separate legal jurisdiction, and full consideration

would need to be given to the support and administrative needs of tribunals in Wales.

One respondent commented that any change to the administration of justice in Wales would need to be properly funded and resourced within a constitutional framework which maintains the independence of the judiciary. Another respondent stated that judges operating within a legal jurisdiction should be those who operate largely within the body of law which prevails in that jurisdiction, and if Wales had a separate jurisdiction it would therefore follow that it would need a separate courts system and judiciary.

Others took the view that it would be possible to either share a judiciary or move incrementally towards a separate judiciary. One respondent felt that further transfer of the administration of justice would have major consequences for the organisation of the judiciary sitting in Wales, and that it might be possible to have a single judiciary for England and Wales with separate Ministries of Justice. Conversely, it might be possible to have a separate Welsh judiciary working with an English based Ministry of Justice.

On the application of the law, nearly all respondents that dealt with the issue agreed that if Wales was a separate jurisdiction then its laws would be recognised as law across the UK and that other jurisdictions should take its laws into account. Some said that if Welsh laws were recognised across the UK they should be judicially noticed and subject to civil proceedings in other jurisdictions. Others said that agreements would need to be made between the jurisdictions, but on the whole there were no cross-jurisdictional issues. Scotland was cited a number of times in this regard and it was agreed that Welsh law should be seen in the same light.

A number of respondents discussed what the “administration of justice” actually meant. Many felt that general legislative competence over the criminal law would need to follow if the administration of justice were devolved. Three respondents made comments relating directly to the implications for criminal justice. These included a comment that there was a need to bring criminal justice closer to the community in Wales, that the criminal courts should form part of any separate jurisdiction, and that as Wales can make criminal law, it is a matter of democratic legitimacy that, as the body of law diverges, Wales should administer that body of law. Another respondent claimed that Wales would benefit from a service that is reasonably accessible wherever you live in Wales, and which is available either through English or Welsh. The current court system, while suitable for England, is not suitable for Wales and there are accessibility issues especially in rural Wales. A system that is tailor made to Wales’ requirements would be welcome.

Although the majority of respondents considered the practical implications of devolving the administration of justice and establishing a separate courts system for Wales, some felt that in principle it was not possible for Wales to have a separate courts system. From a charity law perspective it was stated that a unified courts system was essential, otherwise there would be confusion, as charity law and regulation is not devolved. There is a concern

that a separate legal jurisdiction for Wales could have a negative impact on the jurisdiction of the High Court of England and Wales (and the Court of Appeal) in relation to this area.

Other responses focused on the existing unified jurisdiction saying that it is a fundamental part of the union between England and Wales. And that its separation would result in Wales having an inferior arrangement. Another respondent questioned whether Wales had the calibre of Judges to sit on the equivalent of a Welsh High Court and Court of Appeal.

Conclusion:

The Welsh Government has decided not to seek powers now in relation to Criminal Justice and the Administration of Justice in Wales, although this is its longer-term objective. If the Welsh Ministers and the Assembly do not have powers in relation to Criminal Justice, crucial aspects of a separate jurisdiction would still be the responsibility of the Ministry of Justice.

The Welsh Government has concluded that such a move now would not be of benefit to the people of Wales. The Welsh Government does consider, however, that we should prepare for a time when a separate legal jurisdiction may be necessary and beneficial. As part of that preparation, the Welsh Government will aim to enhance the Welsh identity within the joint jurisdiction of England and Wales and to develop the foundations on which any separate Welsh legal jurisdiction could be formed should a decision be taken to do so in the future.

The Legal Profession

Of all the issues raised by respondents, this is the topic where most people raised concerns about the implications of a possible separate legal jurisdiction.

One respondent felt that there would be no need to separate the legal professions, bodies and regulators. Another respondent said that England and Wales could stay unified in the case of a separate legal jurisdiction because they share a common law tradition. However, most respondents felt that separation was inevitable and an essential feature of separate legal jurisdiction, but that this would have minimal effect on the legal profession initially because the Common Law of England and Wales would apply until further common law is developed by the judiciary in Wales. Therefore, initially the legal practices will not be distinct from England. In this case it was felt that the current legal education and training system should be maintained. As Welsh and English laws diverge, there will be an increased need for Welsh legal education and training. One respondent felt that sufficient time must be given to enable people to prepare for a new jurisdiction and that five years would be a reasonable amount of time.

Some respondents saw a separate legal jurisdiction as a positive move for the legal profession in Wales. Some stated that under the current system Wales is marginalised and the legal profession is “London-centric”. If Wales were to become a separate jurisdiction this would allow Welsh lawyers to stand out and may attract business to Wales. This would also result in a better service for the people of Wales, in areas such as language, and “the possibility to have a more joined up approach between policy, implementation, workforce development and service provision”. This respondent believes that this will eventually lead to more legal practices being set up in Wales. It was also stated by one respondent that new jobs and career structures could be established through a separate jurisdiction with more opportunities for young people to work in fields and levels previously unavailable in Wales.

The impact of a separate jurisdiction on the legal profession did raise concerns for many respondents. One described the impact that this would have on the solicitor’s profession as “devastating” resulting in few solicitors able to deal exclusively in Welsh law, fewer trainees as it would not be attractive to students of law, and it could result in there not being enough practitioners of “Welsh only” law. Some felt that the best legal talent would leave Wales for England, and that clients would suffer from a lack of expertise in Welsh legal practises. Others felt that establishing a separate regulatory authority and the teaching of Welsh law and legal practice would be costly, and would not benefit Welsh clients, lawyers or the legal system in general.

Many felt that the similarities in English and Welsh law would allow for the continued ease of traffic across the border, and that any obstacles to barristers and solicitors working in both countries should be minimised where possible. Some respondents felt that there were serious issues around competition from the client’s perspective. At present the public in Wales (and

beyond) can choose any solicitor or barrister in England and Wales. Creating a separate jurisdiction and legal profession would have the potential to harm both choice and competition, to the detriment of the client. One respondent suggested that there is an insufficient population in Wales to sustain a sufficient number of lawyers, which would again reduce choice for the people of Wales. Some stated that a system similar to that of Northern Ireland should be replicated for lawyers that want to practise in England and/or Wales.

From an education perspective, there were many points of view as to whether a separate jurisdiction would have a positive or negative effect. Some felt that currently Wales loses a number of high calibre students to England, either to study or to practise law. If Wales were a separate jurisdiction, it would stimulate interest amongst young people in topics such as the laws of Wales and politics and have a positive impact on the school curriculum as a whole encouraging the brightest Welsh students to study and practise law in their home country and stopping what one respondent described as the “brain drain” of the legal profession in Wales which often sees students moving to England to seek higher paid jobs. It was pointed out that modules on Welsh law would need to be developed, and that a supporting infrastructure of Welsh legal education would need to be established. Some suggested that a Council for Legal Education in Wales should be established as a vehicle to plan, regulate and support the development of Welsh legal education and scholarship. This body would need to include representatives of the Bar, the Law Society and the Judiciary as well as the Law Schools in Wales. There was a suggestion that there should be joint training for judges in England and Wales.

There were concerns that Universities in Wales would suffer if there was a separate legal jurisdiction because English students would be deterred from coming to Wales. Scotland was cited as an example of a country which does not attract many law students from England or Wales who want to practice outside Scotland because of the difference between the legal systems. It was also felt that there would be an impact on legal education and training because courses in Wales-only legal qualifications would be burdensome for providers and offer limited opportunities for students. However, there was recognition that Welsh institutions currently offer modules on specialities such as the constitution of Wales. There would be a need for CPD training relating to Welsh Law as well as textbooks and resources which deal solely with Welsh law that may not be commercially viable.

Some felt that if solicitors were required to practise in both jurisdictions there must be separate training. There were concerns about the cost of training and maintaining a separate legal profession, as well as the cost implications of regulating a separate Welsh legal system. Measures suggested by respondents included allowing those who retain a qualification in practicing in England and Wales to retain the qualification indefinitely and that once the body of Welsh Law becomes so great a competency certificate in “the law applying to Wales” should be introduced. It was felt by some respondents that introducing a separate regulatory board would represent further cost for Welsh lawyers and their clients as they could face double regulatory costs if they chose to practise in both English and Welsh Law.

Some respondents felt that the existing educational arrangements in England and Wales are of the highest order and enable legal practitioners to deal with legislation and legal matters whether they originate in Westminster, Cardiff or Europe, but this would not be the case if Wales were a separate legal jurisdiction as the educational structures could not be replicated. It was also suggested that the current system enables access to specialisations in England, but that these are not available in Wales therefore choices for lawyers would be limited.

A number of respondents felt that the Bar of England and Wales is essential to the maintenance of the highest standard of legal administration and that this could not be replicated on a Wales only level. Canada was cited as an example where separate legal jurisdictions each with their own legal regulatory body are subject to an over-arching national body and that this may be possible with England and Wales.

It was also felt that a separate legal jurisdiction could bring justice closer to the people of Wales, would add efficiency and prompt disposal of work, development of expertise among the legal professions in Wales.

Conclusion:

The Welsh Government is not convinced of the case for a separate legal profession in Wales. There should continue to be unified legal professions able to work in both jurisdictions.

The Reserved Powers Model of Devolution

Legislative competence is currently devolved to Wales under a conferral model. The Assembly has only the competence that has been conferred on it expressly by Parliament. This means that the Assembly can legislate only about the subjects listed in Schedule 7 to the Government of Wales Act 2006 (and those subjects are qualified by the Exceptions, which have the effect of limiting the Assembly's ability to legislate on the subjects in Schedule 7). In contrast, legislative competence in Scotland is based on a reserved powers model. This means that the Scottish Parliament can legislate about any matter, provided that that matter has not been expressly reserved from its competence.

Not all respondents addressed this issue in their evidence but of those who did, the majority thought that if Wales moved towards a reserved powers model of devolution a separate jurisdiction would be either desirable or essential. Some felt that at present the conferred powers model suited the needs of Wales, but if Welsh laws diverged further from English laws there would be a strong argument for moving towards a reserved powers model. One respondent suggested that a move to a reserved model would make a separate legal jurisdiction "inevitable".

In discussing the issue, the majority of respondents were in favour of moving to a reserved power model stating that due to the Assembly's legislative powers having been extended it makes sense to think about changing the model of devolution. Some felt that a reserved powers model would be easier to administer and would suit the needs of Wales better as it begins to legislate differently from England.

Very few respondents felt that the conferred powers model of devolution would meet the needs of Wales in future although more felt that at present there was little need to change.

Conclusion:

The Welsh Government believes it is important to achieve a long term devolution settlement that is both simpler and clearer than the present arrangements, and which enables decisions affecting Wales to be taken in Wales. Moving to a reserved powers model of devolution would clarify accountability, and reduce the likelihood of conflict between the UK and Welsh Governments.

International Examples

A few respondents drew attention to international examples of separate jurisdictions. The Canadian system was the most popular example as it is a decentralised legal system in which the federal provinces of Canada are responsible for the administration of justice, but competence for criminal law is reserved by the Canadian government. This seemed to offer a possibility for a future Welsh jurisdiction which some felt could act as “roadmap” for Wales to follow.

Some respondents felt that there would be no need to differentiate between the common law of England and the common law of Wales as long as the legal system in Wales was developed along the same lines as that of Australia, Canada and New Zealand. One respondent argued that a separate jurisdiction would not affect the common law, citing the example of Canada which has numerous legal jurisdictions.

Other examples given by one respondent were Slovenia, Slovakia and the Czech Republic. Slovenia was suggested as an example of justice administered in a small country, and Slovakia and the Czech Republic as an example of how two nations separated their legal jurisdictions.

Although some of the arguments using international examples were sketchy, respondents felt that the sheer number of different types of jurisdictions across the world gave merit to the argument for a separate Welsh jurisdiction and also offered possible alternatives to the “all or nothing” option.

Some respondents were positive that if Wales were a separate jurisdiction it could simply be integrated within the traditional rules of private international law.

Conclusion:

The Welsh Government agrees that much can be learnt from other existing jurisdictions and that consideration will need to be given to this before any future move to a separate jurisdiction.

Cost

Around a third of respondents referred to the potential cost of establishing a separate legal jurisdiction, or the potential economic impact. Some felt that cost should not be a barrier to establishing a separate jurisdiction; others felt that the cost would not be justified. A number of respondents expressed concern about the potential cost, and thought that a detailed assessment should be made before making a decision. Some respondents also referred to the likely economic impact of a separate jurisdiction.

Three respondents thought that cost should not be a barrier to the creation of a separate jurisdiction, or that the potential benefits would outweigh the costs, at least in the longer term. One felt that even though there would be obvious cost implications, they would be worthwhile for the evolution of a system of devolved governance, and as the next step to further the political and legal divergence that already exists between England and Wales.

Three respondents felt that the cost was definitely not justified. One said that it would not be appropriate to spend money on this at a time of financial difficulty.

Six respondents said that the cost of establishing a separate jurisdiction should be assessed, allowing the potential benefits to be weighed against the cost, before a decision is made. Others raised concerns about specific aspects of a separate jurisdiction which may lead to additional cost, for example, if a separate legal profession were established, leading to increased cost of training and maintaining the profession in Wales, and increased cost of regulatory structures; the cost of replicating higher judicial offices, to create a totally separate judiciary for Wales; and potential issues for the Land Registry and Charity Commission.

Respondents questioned where the money to fund a separate jurisdiction would come from, and noted that sufficient funding would be needed to establish the new jurisdiction, as well as for the ongoing running costs. One asked who would be responsible for the justice budget - the Welsh Government or the Judiciary.

In addition to the direct costs of establishing a separate jurisdiction, six respondents highlighted the potential economic impact, and the need to take account of this in assessing the risks and benefits. Three respondents thought there would, at least potentially, be a negative economic impact, another thought that increased complexity could deter business investment in Wales, and another highlighted the risk of an impact on economic growth because of having to comply with different regulatory frameworks. It was argued that the current legal system in England and Wales gives a competitive advantage over other countries, and encourages investment, so that a separate jurisdiction might serve as a disincentive to investment in Wales.

Two respondents believed that there would be a positive economic impact. They referred to potential savings for litigants because matters would be dealt

with locally (rather than travelling to London), and court income would be retained in Wales. It was also argued that jobs would be created, new career structures would be established and it would assist the further development of expertise of the legal profession in Wales.

Conclusion: The Welsh Government considers that any future proposals to move to a separate jurisdiction must be carefully costed. We consider that any transfer of responsibility to the Welsh Government should be accompanied by full budgetary transfers, with independent scrutiny to ensure fairness.