



Llywodraeth Cymru
Welsh Government

Commission on Justice in Wales:

**Written Evidence submitted by the
Welsh Government**

Introduction

The Commission on Justice in Wales has been invited to consider the outstanding questions about policing, the justice system and the legal jurisdiction in Wales not properly addressed by the Wales Act 2017. The justice-related matters within its remit are issues of broad constitutional significance, as the fact that legislative competence and executive responsibilities for policing and justice in Wales are currently reserved to the UK institutions has considerable impact on the way Wales is governed. This evidence from the Welsh Government provides an initial assessment of that impact on the system of government in Wales, on inter-governmental relations, on Welsh law and ultimately on public services provided to the people of Wales.

Developing a coherent and stable system of government for Wales has been a long process, one which is not yet complete. What began as a very limited form of executive devolution in 1999 has evolved. We now have a fully fledged legislature, a separate government accountable to that legislature and to the people of Wales, and means to raise funding for public services and investment through taxes and borrowing. However, the devolution settlement remains limited by domestic and international comparison and is, largely as a result of that, highly complex. The Wales Act 2017 did not bring an end to this process as had been hoped – and, indeed, arguably it has added complexity. Longstanding issues have not been resolved, and in some respects problems have been further exacerbated.

Moving from a conferred to reserved powers model of devolution exposed fault lines in the devolution settlement, largely arising from the UK Government's expressed wish to "protect" the single legal jurisdiction of England and Wales. The rationale for this appeared to be, essentially, to seek to limit the extent to which there is divergence in the law that applies to England and to Wales. But the law

of England and of Wales has already diverged and will continue to diverge, as this is an inevitable consequence of the creation of a legislature for Wales. A fundamental characteristic of a legal jurisdiction - one uniform body of law – therefore no longer exists.

The existence of a single legal jurisdiction for England and Wales is often said to be the reason why policing and the justice system are (for the main part) not devolved to Wales. But there is no reason why these matters should not be devolved and there are compelling reasons why they should. Decisions about what should, or should not, be devolved to Wales should be based on establishing a coherent system of government for Wales which can improve the lives of people in Wales. They should not, as has been the case too often, be based on what has gone before. The absence of a legal jurisdiction for Wales is a quirk of events of nearly five hundred years ago, while the subject matter of the powers devolved to Wales are too heavily influenced by what was initially devolved to the Welsh Office some fifty years ago.

A common characteristic of decentralised government across the world is subsidiarity – the presumption that the central government of a state should only perform the tasks that cannot effectively be undertaken at a more local level. In consequence, this means that domestic matters such as the provision of public services are generally devolved. Policing and the justice system are no different. They are public services which are almost always devolved. Creating an artificial distinction between those public services that are devolved, and those that are not, puts up barriers to the joint working between government and local delivery agencies which is detrimental to effective public services.

This Written Evidence examines these matters further as follows:

Part 1 –relates to **the constitution and the law** and is concerned with the complexity of the devolution settlement, inter-governmental relations, the legal jurisdiction, access to justice and the legal sector in Wales.

Part 2 –relates to **policing and justice as public services** and is concerned with ensuring coherent delivery of public services. It outlines what the Welsh Government is currently doing to support justice services and the difficulties in doing so within a limited devolution settlement, and the opportunities that would arise were these matters to be devolved.

Part 1: The constitution and the law

Introduction

The Commission is considering issues that are fundamental both to the constitution and to the law. Unlike, for example, the case in Scotland, the process of devolving power to Wales has been unorthodox. It has been an ad hoc, piecemeal process that has been frequently criticised. There have been significant improvements since 1999, but in so far as justice, the legal jurisdiction and the law itself are concerned, Wales' constitutional arrangements remain highly unconventional, and are an outlier in global terms.

Legal jurisdiction

The single legal jurisdiction of England and Wales is a relic of history. It derives from Tudor times, specifically from the Laws in Wales Acts of 1535 and 1542. The purpose of these Acts was essentially to assimilate Wales into England for governmental purposes, and in doing so to seek to ensure political, administrative, linguistic and legal uniformity across England and Wales.

This uniformity has however in modern times ceased to exist. Administrative devolution, implying distinct governmental policy and administration for Wales, goes back at least as far as the creation of the Welsh Office in 1965. The creation of the National Assembly for Wales in 1999 democratised that devolution, and the National Assembly obtained full law making powers following the referendum in 2011. Wales has its own government, a distinct system of public administration and has recognised Welsh as an official language of equivalent status to English. Most fundamentally, Wales has its own political system, legislature and its own laws. However, a false notion of legal uniformity remains, in the guise of the only creation of those 16th century Acts that remains – the single legal jurisdiction of England and Wales.

But the “England and Wales” legal jurisdiction does not have the fundamental characteristics of a legal jurisdiction:

- “England and Wales” is not a coherent political and geographical territory – Wales has had a fully-fledged legislature since 2011 and the concept of “England and Wales” no longer exists for any other purpose;
- England and Wales does not have a homogenous body of law that extends throughout that territory – it is no longer sensible to speak of the law of England and Wales, as the law that applies to Wales continues to diverge from that in England and an increasing proportion of the law that applies to Wales is bilingual.

Notwithstanding the fact that the England and Wales legal jurisdiction is no longer fit for purpose, during the development of what became the Wales Act 2017 the UK Government – initially at least – sought to “protect” the jurisdiction. This was to be done by restricting the National Assembly's competence, presumably in an attempt to maintain, at least to some degree, a homogeneous body of law. But this body of law is already diverse in content, in application and in language. The Welsh Ministers have made approximately 4500 Statutory Instruments since 1999 and the National Assembly has to date enacted 56 pieces of primary legislation, many of which are lengthy and wide-ranging in content.

To give but one example, the National Assembly has been particularly active in legislating on environmental matters. Devolution has enabled the introduction, through a number of pieces of legislation, of a unique legislative framework for the environment, which delivers on international obligations and puts sustainable development and the environment at the heart of policy decisions in Wales. Further, to support an integrated approach to managing our environment, Natural Resources Wales

was created and provided with a new statutory purpose aligned to the legislative framework, to deliver well-being goals. Thus, the legislative framework for environmental matters for Wales now differs radically from that for England, yet both exist within the existing common legal jurisdiction, and this will considerably complicate matters when the consequences of Brexit for environmental issues come to be addressed.

It is additionally worth noting that the laws of England and Wales diverge also in consequence of laws made only for England, and that the emergence of “English” laws (and English votes for English laws in Parliament) means that there is an equally compelling case for a separate (truly) English legal jurisdiction.

With one exception across the common law world, a legislature is always accompanied by a corresponding legal jurisdiction. Wales is that exception - an anomaly. Creating a Welsh legal jurisdiction would not be a radical change, it would merely be dealing properly with the implications of what has already occurred. It is something that should already have been done, and it would in a sense simply be consequential on the earlier establishment of legislative devolution for Wales. So, from the Welsh Government’s standpoint, the argument for a distinct legal jurisdiction for Wales is not based on an assertion of a need to secure “fairness” (in some sense) for Wales; rather it is concerned with a more efficient and effective form of governance for people in Wales.

Complexity of the devolution settlement

The existence of the single legal jurisdiction of England and Wales, and the associated reality that policing and justice are not devolved, is by far the single biggest remaining cause of complexity of the Welsh devolution settlement. The Government

of Wales Act 2006 (as amended by the Wales Act 2017) contains 44 pages of reservations and restrictions, while by contrast the Scotland Act (as enacted) contains 20 equivalent pages. The difference is nearly all in consequence of the jurisdiction, and reservation of policing and justice.

As well as the complexity (and in this respect the settlement is even more complicated after moving from the conferred to reserved model of demarcating power) this also has practical implications. Under the principle of subsidiarity most ‘domestic’ matters have been devolved to Scotland and Northern Ireland, meaning that their powers are far more self contained and the potential for conflict with that reserved to the UK Parliament far less. By contrast in Wales the line drawn between what is devolved and what is not runs right through ‘domestic’ subjects, causing confusion and complexity and hindering joined up working and good governance.

In its report on *“Achieving Political Decentralisation”*¹, the Institute for Government notes that the UK is one of the most centralised countries in the world and that **“Academics and think-tanks regularly argue that decentralisation could boost economic growth; better reflect differences in local identities and preferences; and allow more local variation and innovation in public services.”**

In that report the Institute considers how best to decentralise power and states that it has **“become clear...[that] policy design must take account of the real world practicalities of implementation”**, referring to a **“web of obstacles”** to effective decentralisation. The Institute also makes the case that a **“comprehensive set of powers”** must be devolved, referring in particular what it refers to as the **“big five”** local policy areas – policing, strategic planning, transport skills and housing .

¹ www.instituteforgovernment.org.uk/sites/default/files/publications/DecentralisationPaper%20-%20FINAL_0.pdf

The report also concludes that “**Thinking for new decentralisation reforms should not be constrained by the past**”, something that is particularly apt when cast in a Welsh context. Too often decisions taken about what should or should not be devolved to Wales has been based on what has gone before. Even today, despite all of the reform that has taken place since 1999, the subject matter of what is devolved is still largely the same as that devolved to the old Welsh Office.

The powers devolved to Wales should be coherent and comprehensive based on what is required to be an effective government improving the lives of the people it serves. They should not be based on what has happened in the past, or a desire to -protect UK institutions and structures.

More fundamentally, preserving our democracy and rule of law would be better served by a system of government under which responsibility for policing and justice was brought closer to the people. Applying the principle of subsidiarity would lead to better local awareness of issues and interest in outcomes, more flexibility and adaptability and greater legitimacy. The onus should be on the UK Government and Parliament to make the case for centralisation of policing and justice within the UK – a case that cannot realistically be made, not least because they are already devolved in Scotland and Northern Ireland, and to an extent even within some English city regions.

Accessibility of legislation and the rule of law

A fundamental tenet of there being one single jurisdiction for England and Wales is legal uniformity. A jurisdiction is based on the notion that the law is the same throughout its territory. This means that there is only one body of law for England and Wales. In consequence, there is no such thing, therefore, as “Welsh law” and (on that basis) there is strictly speaking no such thing as “English law” either.

This leads to practical problems which impact upon the complexity and accessibility of the law. Traditionally legislation in the UK has been divided by reference to its “extent”, a concept which is in turn based on the legal jurisdiction within which the legislation has effect. Indeed, one of the purposes of a jurisdiction is to signify difference in this way.

A law that extends to Scotland becomes part of Scots law, and a law that extends to Northern Ireland part of the law of Northern Ireland. An Act passed by the National Assembly, however, cannot extend to Wales but only to England **and** Wales. Similarly an Act of the UK Parliament intended, say, to affect only local authorities in England must again extend to both England and Wales. In consequence, establishing what law has **effect** in Wales, and what law has **effect** in England (as distinct from the territory to which it **extends**), can be a difficult process, even for lawyers.

This adds complexity to an already complex and sprawling statute book, something which is particularly problematic set in the context of wider issues around accessing justice. The Welsh Government recognises the importance of access to justice so that people are able to defend and realise their rights, and the potentially negative social, economic and health consequences where people are not able to do so. Reductions in the availability of legal aid, increased court and tribunal fees, the rise in self-represented litigants in court, and court closures and relocations all represent change to the justice system in the last eight years which is unprecedented. In consequence the Welsh Government is particularly conscious of the need to ensure full and ongoing awareness and understanding of Welsh law by those subject to it.

The ‘justice function’ within government

Lord Thomas, while Lord Chief Justice, expressed concern about the absence of what he referred to as a “justice function” for Wales:

“No one has really studied the problem of what has happened under the [Government of Wales] Act and there is no justice function that looks after Wales. By default the courts have put one in place, but there is not a justice function. The Welsh Government do not have justice as a competence and the Ministry of Justice has only just realised, despite our pressing it, that there is a problem.”

There is a clear disconnect within the constitution between making laws for Wales on the one hand (something that is, of course, devolved), and administering and enforcing them on the other (which is not devolved). Nowhere else, in the common law world at least, is a legislature and its executive not responsible for how its laws are implemented in practice by the police and through the courts. Welsh laws, like all others, create rights and responsibilities which may need to be enforced, create offences that often need to be prosecuted, and confer powers on the police.

Unlike any other system of government of which the Welsh Government is aware, these fundamental functions – inherent to a law making process – are the responsibility of others, specifically the UK Government’s Home Office and Ministry of Justice. This leads to confusion, a lack of transparency, blurred accountability for implementation and the potential for inter-governmental tension. Where a Welsh Act makes wholesale changes to the law, this may have a significant impact, for example, on the court system, which may need to change its practices in relation to Welsh cases and incur cost. This means that a Welsh Act might not be able to be effectively enforced unless appropriate arrangements have first been agreed with the Ministry of Justice, which has its own pressures,

timetable and priorities. This dependence of the Welsh Government on the UK Government to implement its legislation is anomalous and unsustainable in the long term.

The courts and the judiciary

Part of the “judicial function” referred to by the Lord Chief Justice is to manage the relationship between government and the courts and judiciary. Here there is again tension caused by the divide between what is devolved and what is not. Members of the judiciary have long been aware of the implications of the divergence in law. They have been conscious of the need to understand how the law is developing in Wales and to ensure that the correct law is applied where there is divergence. Lord Thomas instigated improvements in the relationship between the Welsh Government and the office of Lord Chief Justice, but difficulties remain in agreeing who should be responsible for matters such as training on new Welsh laws.

Also of significance here is that the single legal jurisdiction means, as a matter of theory at least, that a judge in Newcastle needs to know about the existence and content of say, the Renting Homes (Wales) Act 2016 (which contains wholesale reform of the law on residential tenancies, substantially differentiating the law applicable in Wales from that applicable in England), in the same way as does a judge in Newport. In practice efforts to train judges on developments in Welsh law focus on Welsh judges, but strictly speaking the single legal jurisdiction means there is no such thing as a “Welsh judge”.

Creating a Welsh legal jurisdiction would involve the creation of distinct Welsh courts and judges with expertise in the law of Wales. (It would also put beyond doubt - doubts which the Welsh Government does not share - that Wales should be represented as of right in the membership of the Supreme Court, as the separate jurisdictions of Scotland and

Northern Ireland are now). The development of a distinct Welsh judiciary need not mean, however, that the expertise and specialism of English judges could not be called upon where appropriate. At least in the short to medium term the majority of the law of Wales would be the same or similar to the law of England, and the fundamental principles of common law systems are unlikely ever to change.

One welcome aspect of the Wales Act 2017 was the creation of the new judicial office of President of Welsh Tribunals. At the point of devolution in 1999, the National Assembly (and subsequently the Welsh Government) became responsible, as a consequence of the transfer of functions, for the resourcing and administration of a heterogeneous group of tribunals, and the recently-appointed President of Welsh Tribunals will have particular responsibilities in respect of these. Further, the Welsh Government and the Law Commission are in the process of agreeing a new law reform project in respect of these tribunals, work on which is expected to begin in 2019.

The Welsh language

As indicated above, the England and Wales legal jurisdiction is based on the notion of uniformity. This in part involved a fiction of linguistic uniformity – a fiction because at the time of its creation very few of the people of Wales spoke any English, and as late as 1891 30% of the population spoke Welsh only. Linguistic uniformity remains a fiction today, both in so far as the practice of the court is concerned and in relation to the language of the law administered. Those appearing before the courts in Wales have, since the Welsh Courts Act 1942, rights to use the Welsh language, and the laws made by the Welsh Ministers and National Assembly are

bilingual. The English language and Welsh language texts of these laws have equal status and must be interpreted accordingly – this means that in any case of ambiguity of a provision of Welsh legislation **both** languages must be considered². This again, is something for which the single legal jurisdiction is ill-equipped.

Legal education

A Welsh legal jurisdiction once created, like numerous other legal jurisdictions across the world, would be based on the common law. While its laws would be different, they would not be fundamentally so in light of the common law principles upon which such a jurisdiction would be built. While there will be a need for bespoke Welsh legal education to take differences in law into account, the vast majority of what is taught will remain the same. We envisage, therefore, that those educated in Wales will be proficient in both English law and in Welsh law – as would those who practise in Wales.

The legal professions

The Welsh Government recognises the importance of the Welsh legal sector. A thriving legal sector brings important economic benefits and an accessible network of local legal practices is also vital if people are to be able to access justice effectively.

We are aware that some legal practitioners have expressed concern about the creation of a Welsh legal jurisdiction, questioning whether it could damage the legal sector in Wales. We understand that a Welsh jurisdiction would represent a significant change, but we do not believe that it involves a change to the fundamental legal landscape. Most importantly there is no reason for Welsh practitioners to be excluded from the English

² For a comprehensive assessment of this issue, see Chapter 12 of the Law Commission's Consultation Paper on the Form and Accessibility of the Law Applicable in Wales.

legal jurisdiction and English law, and vice versa. There is no intention to, and no need to, create unnecessary barriers.

Indeed, we consider there to be opportunities for larger Welsh firms as they will be able to market themselves as expert 'English' lawyers (as there will be little divergence in most areas of commercial law, either because there may be little need to change the law or because the areas are not devolved), who also have experience of the diverging law in Wales. Scotland and Northern Ireland have thriving legal sectors in similar circumstances and we see no reason why the Welsh legal sector should be different.

Part 2: Policing and justice as public services

Joined up policy making and delivery of public services

One of the most important reasons for devolving a coherent and comprehensive set of powers to any tier of government is the clear benefit of aligning policy-making, law-making and implementation – maximising the potential for delivery of coherent and effective public services. This is a complex and hugely important issue, particularly in relation to crime and justice – as recognised by the Home Office, *Safer Communities: The Local Delivery of Crime Prevention through the Partnership Approach*, Home Office, 1991 ('The Morgan report'). The Morgan Report coined the term 'community safety' and proposed a more 'holistic approach' to crime and disorder reduction that placed greater emphasis on prevention by focusing on the social, economic and environmental causal factors that result in criminality. It contained 19 recommendations, the fifth of which advocated that local authorities "... should have clear statutory responsibility for the development and stimulation of community safety and crime prevention programmes." This led to the Crime & Disorder Act 1998 which established statutory partnership working involving local authorities, police, fire, health and probation services to prevent and reduce crime, anti social behaviour, substance misuse and re-offending.

The executive powers of the Welsh Government are not however based on any assessment of what would be required for efficient and effective public administration. In 1999 the executive powers of the Secretary of State (as they had developed over a period of thirty or so years), were devolved (and those powers were subsequently converted into legislative competence for the Assembly). That process was driven primarily by political compromise and practicality rather than determining how a modern legislature and executive can best operate in order to serve the people. Achieving joined up working and services is challenging in itself, but is almost impossible when an incoherent allocation

of responsibility and accountability is drawn right through the services we might seek to join together.

There is much debate about how best to deliver public services, some of which is derived from differing values and priorities. There are difficult questions to be addressed, such as achieving efficiency savings, modernising digital services, providing better infrastructure and making best use of all public bodies and other delivery partners in any particular area. It is generally accepted, however, that coherent policy and integrated delivery leads not only to cost savings, for instance through reducing demand for services through prevention and early intervention, but also to improving services and outcomes for vulnerable people and communities – which should be at the heart of any public services system. This is an issue that has also been analysed by the Institute for Government in a study and series of reports. The Institute notes that the:

"...public service landscape is wide, varied and complex, with a mix of organisations from the public, private and voluntary sectors delivering a huge range of services which are rarely co-ordinated with each other. People find it difficult to navigate the system and access the support they need, particularly at crucial life transitions or when their needs are multiple and complex."

The complexity of the landscape and the range of public services provided can be illustrated by the figure at Annex 1. It is important to note also that "joining up" these services is itself a multi-dimensional issue. "Joining up" services for citizens can generally only be achieved if policy, and where necessary law and regulation, is joined up; where the activities of public and other bodies involved are joined up; and where resources are joined up.

Devolution is key to achieving joined-up services. As the Institute indicates, there is an assumption that "more devolution and joined up service delivery go hand in hand". The intention behind numerous activities currently promoted by the UK Government

in respect of England is to ensure that powers and resource are decentralised in order to boost economic development and make the provision of public services more efficient. Prime examples can be seen in the London and Manchester mayoral models currently being implemented by the Ministry of Justice this year which decentralise both the administration and the budgets for justice agencies within these cities in order to work toward a ‘whole system approach’ that will “facilitate a transformation in criminal justice outcomes... including a reduction in reoffending and repeat victimisation”³.

Public service delivery in Wales

The Welsh model of public service delivery, and the ways of working required by the Well-being of Future Generations Act (Wales) 2015, is designed to ensure a more joined up and sustainable approach focused around greater collaboration and service integration that encourages prevention, early intervention and ‘future proofing’. The guiding principles set out in the Welsh Government’s strategy *Prosperity for All*⁴ are prevention, partnership, and collaboration to secure better outcomes. The aim is to ensure common purpose in leadership and governance, with accountability to the National Assembly, to support effective and efficient delivery on the ground. Through the statutory Public Service Boards, there is joined up leadership empowered to focus on shared priorities and promote innovation at local level.

The intention, therefore, is clear – but there are significant barriers to achieving the new way of working envisaged in the Act.

Current devolution arrangements creating barriers

A prerequisite of any system of joined up working is to ensure that those implementing it have a “comprehensive set of powers”. In determining what is devolved within a Welsh context, the starting point is the legislative competence of the National Assembly and the executive powers of the Welsh Ministers. These powers are not comprehensive but are incoherent and are often illogical. For example, whereas the ambulance and fire services can be provided for, the Assembly cannot legislate to require that the police, probation or other criminal justice agencies should participate in the local Public Service Boards established by the Well-being of Future Generations Act, despite the central role they play in communities, because they are reserved authorities. (As against that, both the Police and Crime Commissioners and the police forces are, by virtue of the Welsh Language (Wales) Measure 2011, made subject to Welsh language standards specifying their obligations in relation to the use of Welsh in provision of their services; North Wales Police have been particularly innovative and committed to providing services in Welsh). More generally, most of the public services which contribute to preventing people from entering the criminal justice system and potentially being sent to prison, or to their rehabilitation after leaving prison, are devolved, but the criminal justice agencies including prisons themselves are not.

The ‘Peelian Principles’, founded by Sir Robert Peel’s Metropolitan Police Act 1829 that established modern British policing, state:

“To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.”

³ Working Towards Justice Devolution to London: Memorandum of Understanding between the Ministry of Justice, Mayor of London’s Office for Policing and Crime and London Councils.

⁴ www.gov.wales/docs/strategies/170919-prosperity-for-all-en.pdf

However, while policing and justice policy approaches are currently set by UK Government, many of the social, economic and environmental causal factors that result in criminality are more directly influenced by Welsh Government policy approaches. Wales Audit Office's *Community Safety in Wales* Report (2016) talks of the growing divergence of both policy and practice between the UK and Welsh Governments, with community safety 'partners' effectively caught in the middle. The report states:

"Based on the findings of this audit, the Auditor General has concluded that complex responsibilities make it difficult for public bodies to co-ordinate a strategic approach to community safety, which weakens collective leadership and accountability and undermines the potential to help people stay safe."

The Welsh Government's community safety review,⁵ conducted last year in response to the Auditor General's report, identifies a number of critical aspects of multi-agency partnership working in Wales that are seriously undermined by the current division of responsibilities, accountabilities and leadership, leading to poorer outcomes for Welsh citizens. These include:

- the inability of partnerships and individual partner agencies to base their activities and service planning on robust sharing, use and analysis of multi-agency data, research and evidence;
- barriers posed by competing prioritisation and shrinking public sector resources to support the 'mainstreaming' of integrated and collaborative service design and provision that focus on prevention and early intervention;
- failure to incentivise 'invest to save' approaches to public service delivery as a result of current budgeting structures and silos (e.g., investment in devolved youth justice approaches such as prevention and early intervention primarily yields

savings for non-devolved criminal justice budgets, investment in non-devolved policing approaches to violence prevention and early intervention yields savings for devolved health services);

- reduced opportunities for more sustainable and coherent 'place-based' and 'person-centred' public service budgeting, planning and commissioning that make greater sense and provide better outcomes to citizens and service users.

The National Assembly can create all manner of offences and make wide ranging changes to the criminal law, while having no say over the criminal justice system. In so far as the administration of justice as a whole is concerned, a number of tribunals are devolved, but no courts. This presents difficulties in engaging with those responsible for sentencing approaches that are proving to be ineffective in reducing reoffending; or, indeed, are contributing to perverse consequences such as children of women given inappropriate custodial sentences having to be taken into care.

Considering the figure of public services at Annex 1, the majority of these services are devolved but some are not. By contrast in Scotland and Northern Ireland they are nearly all devolved, and even English "city deals" are granted powers designed to be fit for the purpose of joining up services for the citizen, as identified above.

Justice delivery in the Welsh context

The delivery of justice services in Wales is inextricably linked to devolved services, most notably health and social care, education, learning and skills, and housing. Reducing offending and re-offending, supporting victims and preventing crime depend on joint planning and delivery by the justice agencies, local authorities, health boards, housing associations, schools and further education colleges

⁵ Working Together for Safer Communities: A Welsh Government review of community safety partnership working in Wales (December 2017).

and third sector organisations. The inter-dependence of devolved and non-devolved organisations in the justice field is notable, for example in:

- the dependence of prison reform on devolved health, education, learning and skills and housing inputs, as well as the increasing pressures on social care from an ageing prison population;
- the major impact of the decisions of the courts on devolved services – particularly in family justice and the consequences of custodial sentences for offenders with parental/carer responsibilities;
- the examples of constructive engagement with the judiciary on social care issues for example through the Family Justice Network and the cross-party Advisory Committee; and
- the role of community safety partnership working in preventing and reducing criminality, and re-offending – particularly given the comparative scale of offenders at any given time being managed within the community rather than within prison or secure units (approximately 16,000 Welsh offenders under active management of which less than 5,000 are within a prison environment).

However, the devolution settlement is a barrier to effective reform both by the Welsh Government and by the UK Government acting in relation to Wales. Welsh initiatives can be frustrated by lack of power, budget control or by complexity and disruption created by reform and organisational change designed in Whitehall for England but which apply also to Wales. For example, recent changes in the England and Wales structures for youth justice and probation, were not fit for purpose in the Welsh context and represented missed or delayed opportunities to develop solutions that support integrated delivery in partnership with the Welsh Government and devolved bodies. In areas such as prisoner health and education, there is a lack of clarity of accountability that militates against good governance and improved outcomes. Similarly there

are examples of justice related initiatives that have been implemented by the UK Government in England only, because of the inter-dependency with services that are devolved in Wales; one example is the special family drug and alcohol courts which are designed to improve outcomes for children and families by providing an alternative way of working with parents involved in care proceedings who are experiencing substance misuse.

Opportunities for innovation and reform

The Welsh Government is taking action through legislation and delivery programmes on a wide range of issues impacting the justice system. These are summarised at Annex 2, but the ongoing collaborative work with the Youth Justice Board and Her Majesty's Prison and Probation Service (HMPPS) to develop distinct justice delivery blueprints for youth justice and women offenders perhaps merit further consideration by the Commission.

The Welsh public services model creates opportunities for continuous improvement and reform to promote more integrated working. Examples include:

- Our transformation of youth justice in Wales using a model based on treating young people within the system as children first and offenders second – recognising their rights and entitlements throughout. Initiatives such as the 'bureau/triage' approach to early intervention – funded by Welsh Government – has resulted in significant and sustained reductions in the number of First Time Entrants by diverting children away from criminality, while our ACEs informed Enhanced Case Management (ECM) approach to managing young people who repeatedly offend has demonstrated success in reducing reoffending rates among this cohort. These approaches will form the foundations of the new 'blueprints' development for both youth justice and women offenders.

- We have worked with HMPPS and other agencies to pilot a Women’s Pathfinder Project in Wales to ‘design and deliver a women-specific, integrated, multi-agency approach to working with women who come into contact with the criminal justice system’ and the initial evaluation focused on the early intervention, prevention and diversion has been highly encouraging with an estimated 87% of those engaged having no further proven re-offending post intervention.
- Our ground-breaking Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act has been instrumental in enhancing the prevention, protection and support for people affected by these issues, encouraging greater regional collaboration, improved multi-agency service planning and commissioning, and the establishment of Multi Agency Safeguarding Hubs (MASHs) such as those in Cwm Taf and Cardiff to identify risks, issues and vulnerability at an earlier stage in order to prevent more serious harm. Our approach to VAWDASV has also prompted a Wales-wide review of the Home Office’s Domestic Homicide Reviews (DHRs) which is designed to ensure better links with Welsh safeguarding arrangements, reduce duplication and costs and improve the effectiveness of services in preventing future tragedies.
- There is also a recognised link between access to justice and equality. Difficulties in accessing justice disproportionately affect groups with protected characteristics under the Equality Act. In that context the First Minister announced on 8 March 2018 (International Women’s Day) a wide-ranging review of Welsh Government’s gender and equality policy, to bring new impetus to our work in this area and “consider how we move gender to the forefront of all decision making”. The review is working closely with Chwarae Teg, the leading Welsh women’s charity, and other partners including the Wales Centre for Public Policy.

The first phase of the review will be completed by July 2018.

More generally, there are opportunities for more creative responses to the causes of offending, and the impact of penalties on individuals’ long term life chances. Through closer working between the judiciary, criminal justice agencies and devolved public services there are opportunities to create better alternatives to incarceration, that ensure justice while creating constructive pathways toward better outcomes for individuals, their children and wider communities.

Conclusion and the way ahead

This Written Evidence sets out in broad terms the Welsh Government's interaction with justice in the context of our constitutional settlement, and highlights what we believe are unresolved problems about justice and the jurisdiction in Wales. It demonstrates that we are currently active in supporting justice through innovative interventions across our portfolios. We believe that with broader powers we could do much more to support prevention and effective rehabilitation.

We will be keen to learn the Commission's views on these matters, and how we might build on current innovation and joint working to establish a more sustainable and effective delivery model for Wales.

The Welsh Government's overarching policy on the constitution was recently set out in the draft Government and Laws in Wales Bill, published in 2016. Specifically in relation to the matters to be addressed by the Commission our view is that:

- the arrangements for the administration of justice in Wales are out-dated and out of step with the transformation of Welsh governance since 1999;
- reservations and restrictions relating to policing and justice have a major detrimental impact on other devolved services: this can at times be mitigated by good inter-governmental working, but this is not a sustainable long term solution and accountability is unclear;
- there are significant opportunities to achieve better outcomes in relation to policing and justice with a more distinct Welsh delivery model;
- the Welsh Government has an active programme of legislation and delivery designed to promote a safe and secure Wales, driven by a focus on preventative action to break the offending cycle and provide constructive alternatives for individuals – this is, however, hindered by the devolution settlement;

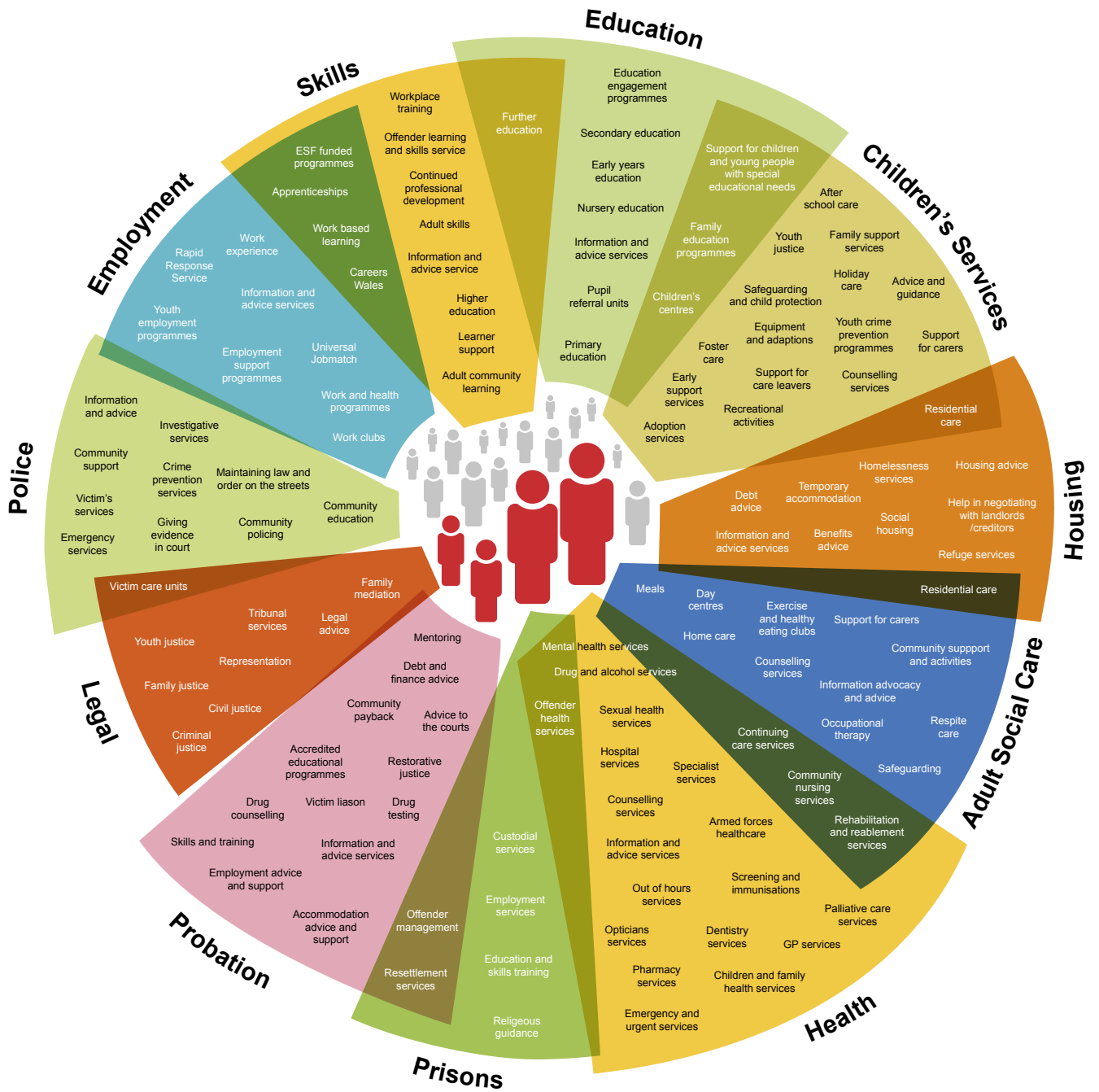
- access to justice is a major concern – the Welsh Government runs a number of programmes designed to provide preventative advice and support, but these cannot compensate for effective and affordable access to the courts;
- legal services provide vital support for the economy, and will remain a priority sector in their own right under Welsh Government's economic strategy – we believe that creating a Welsh legal jurisdiction and devolving the justice system will not be detrimental to the sector and should indeed provide new opportunities that will benefit the sector.

The former Secretary of State for Wales, Stephen Crabb MP, when launching what became the Wales Act 2017 argued that:

“...the story of Welsh devolution has long been one of fixes, fudges and political expediency. Of falling short, and thinking short-term. We need to end the process of constantly tinkering with the devolution settlement. Let's get devolution right. For the longer-term.”

The Welsh Government agrees. But the Wales Act 2017 was another fudge. There is a void in Wales's constitutional arrangements that must be filled in order to get devolution right for the long term. A Welsh legal jurisdiction should be created and policing and justice related matters should be devolved. It is time to complete the devolution process, end the talk about the constitution, and create a stable and coherent system of government for Wales, one which allows efficient and effective delivery of services to people in Wales, who deserve nothing less.

Annex



What the Welsh Government is currently doing to support better justice outcomes

Recognising that poverty has a major impact on individuals' life chances, the much wider programme of activity covered in *Prosperity for All* is relevant, but the examples we offer below are those areas which most directly relate to the justice system.

Violence against women

In April 2015, the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Bill received Royal Assent and became an Act. Working within the constraints of devolved competence, the legislation aims to improve prevention, protection and support for people affected by violence against women, domestic abuse and sexual violence.

The Act requires the Welsh Ministers to prepare and publish a strategy which contributes to the delivery of the Act's aims; in November 2016 we published our National Strategy on Violence against Women, Domestic Abuse and Sexual Violence 2016 – 2021. The strategy focuses on matters for which Welsh Government has responsibility, but it recognises the need to work collaboratively with other public sector partners (devolved and non-devolved) and with the UK Government, whose Ending Violence Against Women and Girls Strategy 2016-2020' sets out a number of actions which are applicable to Wales. This collaboration is all the more important with the UK Government publishing its consultation on a Domestic Abuse Bill on 8 March, which proposes to establish a Commissioner for Domestic Abuse with an England and Wales remit. It will be important to work through the relationship between the proposed Commissioner and Welsh Ministers' National Advisors on Violence Against Women, Gender Based Violence, Domestic Abuse and Sexual Violence.

Better outcomes for children and young people

The Welsh Government works closely with the Youth Justice Board Cymru (YJB Cymru) and jointly developed the Children and Young People First strategy in 2014 to improve services for young people from Wales in, or at risk of, becoming involved in the youth justice system. It is based on the principle that children and young people within the youth justice system should be treated as children first and offenders second. We work closely with YJB Cymru and youth justice services across Wales to monitor performance and offer improvement support where required.

In addition, we co-chair youth justice strategy and practice meetings with YJB Cymru – such as the Wales Youth Justice Advisory Panel and Strategic Implementation Board – in a partnership approach which seeks to mitigate the issues and challenges of implementing non-devolved youth justice policy within an increasingly devolved context. This includes supporting the YJB to develop and evaluate uniquely Welsh approaches to youth justice such as Enhanced Case Management, a trauma-informed model based on our growing understanding of Adverse Childhood Experiences (ACEs), particularly with regard to how such experiences can significantly increase a young person's likelihood of entering into the criminal justice system. We are also aware of the impact of the cyclical inter-generational nature of ACEs, in that where parents have experienced ACEs, their children are more likely to experience ACEs too. There are also clearly evidenced links between the youth justice and the Looked After Children (LAC) systems, with a higher proportion of LACs becoming young offenders. Reducing the incidence and impact of ACEs is a key priority for Welsh Government, and we seek to take an 'ACE-informed' approach across policy areas. However, our inability to control aspects of the criminal justice system can hamper this work, for example in relation to children in secure accommodation, and the impact of the incarceration of parents.

Prior to his appointment as the Chair of the Youth Justice Board for England and Wales, Charlie Taylor conducted a review of the youth justice system which was published in December 2016. The review made 36 recommendations for the UK and Welsh Governments, relevant inspectorates, local authorities and other bodies. However, many of the recommendations will require a different approach for Wales, not least due to the already effective joint working which exists between YJB Cymru and Welsh Government. Furthermore, legislation such as the Well-being of Future Generations (Wales) Act requires a different approach to ensure the delivery of a youth justice system that is fit for purpose and provides the required focus and support to young people in Wales.

The Welsh Government and UK Government have therefore agreed to develop a distinctive approach to youth justice in Wales. To achieve this, Welsh Government has commissioned YJB Cymru to carry out a review of youth justice service provision, building on the approach taken by the review conducted by Charlie Taylor. It is anticipated that work will commence at pace to review the entire youth justice approach in Wales, from prevention and early intervention mechanisms, community based restorative justice, the existing youth secure estate within Wales, and resettlement provision and services. For example, the current Young Offenders Institution located within an adult prison environment at HMP Parc is not deemed as an appropriate environment to address children's needs.

Support for Looked After Children and Care Leavers

The Welsh Government has established the Improving Outcomes for Children Ministerial Advisory Group which aims to reduce the number of children coming into care, improve outcomes for children who are in care and better support care leavers. This cross-government, cross-sector group is

accountable to the Minister for Children and Social Care and has a wide-reaching work programme, including funding for the Reflect project which supports mothers who have already had children taken into the care system, to help reduce the risk of further children being taken into care in the future.

The Ministerial Advisory Group monitors delivery of the Welsh Government Action Plan developed in response to the *Laming Review*, which made a comprehensive set of recommendations to transform the life chances of children in care by protecting them from unnecessary involvement in the criminal justice system. The Ministerial Advisory Group has also integrated the issues raised in the *Laming Review* into their work programme.

In addition funding has been provided to introduce an 'active offer' of advocacy to children and 'young people who become looked after, including young people within the secure estate.

The Gwent Missing Children Hub brings together police officers, social workers, health workers and education representatives to respond to children who go missing from home or care. They work together in a coordinated way to share information and assess the risks to which these young people may be vulnerable.

Family Justice

In Wales the Welsh Family Justice Network brings together the key players within the family justice system providing a local community of understanding and common purpose to improve services and outcomes for children and families in Wales. The children and families who interface with the family justice system are often amongst the most vulnerable in our society. However, whilst family justice is not devolved, the services supporting these children and families are devolved e.g. Cafcass Cymru and local authorities. Family justice policy makers, therefore, need to prioritise engagement with Welsh Government and Welsh-

based operational stakeholders when considering policy reforms or changes to ensure there is an appreciation of the increasingly divergent Welsh context, but also to ensure any proposed changes are appropriate and likely to work in Wales.

Adult offending

Although criminal justice itself (including the actions of the courts, the sentencing arrangements for offenders, the management of those offenders in custody and their rehabilitation in the community) is non-devolved, most of the services that are required to manage offenders, ex-offenders and promote rehabilitation are devolved. Prisons are the responsibility of the Ministry of Justice, but the provision in public prisons of health services and education are the responsibility of Welsh Ministers. Moreover, many of the services that support offenders in the community – housing, health, education and skills and social care, are devolved. The importance of these services in reducing offending and re-offending, and the need for alignment and integration with criminal justice services is of course widely recognised. However, significant policy decisions are often made by UK Government without meaningful engagement with Welsh Government, with the result that the solutions they identify are based on the English public sector landscape, and may not be appropriate or workable in the Welsh context. Equally, as identified earlier, the current UK Government policy approach is focused on trying to manage more offenders outside of the prison estate, which has financial and other resource implications for Welsh Government and requires the full engagement and co-operation of devolved public services.

The UK Government has highlighted the need for increased mental health support for those people in the adult criminal justice system, the need for increased access to substance misuse support and the need for more appropriate accommodation on release from prison. These reflect identified priorities

within the Welsh Government's *Prosperity for All* strategy and would predominantly fall to devolved services to provide.

HMPPS is currently wrestling with a number of significant challenges with the adult criminal justice system in Wales as it stands, including:

- the poor provision within some of the public prisons in Wales;
- a lack of access to appropriate diversion interventions that would prevent people going into custody;
- an increasing number of women being sent to prison for summary offences, often on short sentences with multiplier impacts on their families and children;
- the increasing risk of reoffending due to a lack of appropriate support for people on their transition from custody to community provision.

Welsh Government has worked with HMPPS in Wales to produce a 'Framework to support positive change for those at risk offending in Wales', which seeks to address the identified challenges around reducing re-offending based on the different circumstances that exist in Wales. The framework identifies six key areas for action:

- reducing the number of women in the criminal justice system;
- challenging domestic abuse perpetrators; holding them to account for their actions;
- improving provision for ex-armed services personnel engaged with the criminal justice system;
- providing support for young adults/care leavers;
- supporting offenders' families following sentencing; and
- prioritising the needs of Black, Asian and Minority Ethnic groups.

Female offenders

There are no female prisons in Wales and therefore any Welsh women who are given a custodial sentence are required to serve their sentence in English prisons, far away from their families. This places a greater level of complexity for the woman, her family and the support services and rehabilitation arrangements required. In developing a distinct justice delivery 'blueprint' for women offenders we will look to the lessons learned from the transformation in our approach to youth justice in Wales and focus on establishing a 'whole system' and trauma-informed approach that provides community-based prevention, diversion and early intervention, alongside the provision of secure accommodation within community-based women's centres with appropriate services for those who have more significant criminogenic needs.

Many women are given summary sentences for offences that in many cases would not result in imprisonment for men. Aside from the most serious of crimes, women tend to receive short term sentences which can have the greatest impact on the women and their families, not least as typically, women are the primary carers for their children. Short term sentences can have long term impacts, in many cases leading to the woman losing their tenancy and may result in their children being taken into residential care, hence requiring support from devolved services and risking exposure to further ACEs for the children of offenders.

The Welsh Government has worked with HMPPS and other agencies to pilot a Women's Pathfinder Project in Wales to 'design and deliver a women-specific, integrated, multi-agency approach to working with women who come into contact with the criminal justice system'.

The MoJ is currently considering a separate Female Offending Strategy as part of UK Government justice reform and, given that many of the key services which will be required to underpin a successful

strategy are devolved, it is clear a different approach will be required in Wales, hence the imperative to establish a distinct blueprint for justice delivery in this area.

Links with the Welsh police forces and Police & Crime Commissioners

Although overall responsibility for policing policy and funding sits with the Home Office, the introduction of directly elected Police & Crime Commissioners (PCCs) in 2012 has created a hybrid devolved/non-devolved policy approach whereby PCCs are able to operate more flexibly within the overarching framework set by UK Government. The four current PCCs have unanimously stated their support for devolution of policing and the Welsh forces have invested in a joint Deputy Chief Constable position to, in part, shape an agreed vision for a fully devolved approach. This has enabled the Welsh Government to establish a closer and more effective relationship with the police and PCCs, who see themselves as very much operating in a 'devolved' way and – although still accountable within the broad framework set by the Home Office – forces are increasingly looking to Welsh Government for strategic direction. This is not surprising given that more than three quarters of demand for police services is related to vulnerability, rather than crime, with direct links to devolved services.

The Welsh Government holds regular meetings with the four PCCs and Chief Constables, including the all-Wales Deputy, to ensure that the implementation of policing policy in Wales accords as closely as possible with cross-cutting areas of devolved responsibility. In addition, Welsh Government currently provides the four Welsh forces with £16m towards the cost of providing additional Community Support Officers to support neighbourhood policing.

This harmonious approach is, however, comparatively fragile as it remains subject to the vagaries of politics and the potential for the 4 Welsh PCCs due to be

elected in 2020 adopting a very different stance that could once again create stark policy differences with the Welsh Government.

The Police Scotland and Police Service of Northern Ireland (PSNI) models clearly demonstrate the ‘interoperability’ of devolved forces working in close co-operation with non-devolved agencies on issues such as serious & organised crime and terrorism – retaining enough in common to undertake joint operations and cross-border collaboration while remaining distinct policing services that better reflect the needs of their communities.

Education, learning and skills

HMPPS is responsible for the commissioning of learning and skills provision and library services for offenders in all Welsh prisons. Since 2009, functions under section 47 of the Prison Act 1952 in relation to education, training and libraries were transferred (as far as exercisable in relation to Wales) to Welsh Ministers.

These powers relate to education and learning and have to be exercised within the context of the regime for prisoners and offenders in the community, set down by the MOJ, and operational delivery through HMPPS. The powers provide the Welsh Government with an opportunity to improve further the quality and relevance of offender learning in the context of Welsh Government priorities. The Welsh Government delivers and funds the learning and skills provision in the adult prisons in Wales through a joint Memorandum of Understanding with HMPPS. The Welsh Government has an agreement with HMPPS for the delivery of education and learning in Welsh public prisons.

HMPPS is currently undertaking a review of learning in Welsh prisons which will consider the impact of the current system and make recommendations to enhance the outcomes for prisoners on release. They have procured external consultants to undertake the review which they will oversee.

They will be consulting with key stakeholders as part of the review and will publish their findings later in 2018.

Through joint working with Welsh Government there are opportunities to strengthen rehabilitation by addressing specific barriers to employment, through aligning education, learning and skill development programmes and providing a continuum of support for prisoners on release. Current interventions include working with the Community Rehabilitation Companies and other key stakeholders during a prisoner’s resettlement phase to provide a seamless transition on release.

Further interventions aim to provide a more modern, employment focused approach to skills training in prisons. This will include better integration with the broadest range of agencies that support prisoners pre and post release, working more closely with employers, and facilitating better use of Labour Market Intelligence to better focus interventions on real jobs.

Prison healthcare

The overall responsibility for the development of prison healthcare in the public sector prisons in Wales rests with the Welsh Government. Accountability for the planning of health services for prisoners is held by NHS Wales, but this responsibility can only be exercised in partnership with HMPPS. The principal aim of the partnership between the Welsh Government and HMPPS is to provide access to the same quality and range of health care services as the general public receives from the NHS in Wales. At a local level, Prison Health Partnership Boards, jointly chaired by LHBs and the Governors of the prisons, have responsibility for the governance of prison health services.

Welsh Government and Local Health Boards are working collaboratively with HMPPS to develop a set of shared priorities for prison health in Wales.

The priorities will reflect that improving health and wellbeing in prisons is a shared responsibility.

Housing

The Renting Homes (Wales) Act 2016, based closely on Law Commission recommendations, will make it simpler and easier to rent a home, replacing various and complex pieces of existing legislation with one clear legal framework. This builds on the Housing (Wales) Act 2014, which among other things introduced mandatory registration and licensing for private landlords and strengthened the prevention of homelessness.

In addition, under the 2014 Act, prisoners no longer have automatic priority need status. Instead, the Welsh Government has developed a number of distinct approaches to support those most at risk of homelessness. This includes the **National Pathway for Homelessness Services for Children, Young People and Adults in the Secure Estate**. This is a multi-strand framework for joint working to help prevent prisoners becoming homeless on release.

In October 2017, the UK Government announced it would be consulting on establishing a specialist housing court. The Welsh Government, in principle, supports such a development. In view of the fact the Residential Property Tribunal for Wales is already devolved, this should be seen as an opportunity to review more widely the devolution settlement in this area. The Commission's views on the scope to broaden and strengthen the role of the Welsh Tribunals in respect of housing, and more widely, in administrative justice in Wales, would be welcome.