

COMMISSION ON JUSTICE IN WALES

Response to the Call for Evidence from Professor Thomas Glyn Watkin

1. I am grateful to the Commission for the invitation to make a written submission in relation to its work. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.
2. The Commission's remit is broad, and the questions provided to assist in preparing submissions cover a wide range of issues. This submission will focus mainly on the impact of devolution upon the justice system in Wales, together with the relationship of that issue to the extent to which legal education reflects the law in Wales and more generally awareness of and accessibility to Welsh law.
3. Although the National Assembly and the Welsh Government make laws which cannot generally apply otherwise than in relation to Wales, all of the laws made by them extend to England and Wales in the sense that they form part of law of England and Wales as a single law district. In the wake of legislative devolution, the law of England and Wales consists of three bodies of law – those which apply in both England and Wales, those which apply only in Wales, and those which apply only in England. From the point of view of the citizen, however, this tripartite distinction is less important than the simpler divide between laws which apply in England and laws which apply in Wales. On many issues, those two bodies may be the same, but on each occasion that the Assembly or the Welsh Ministers legislate for Wales and, importantly, on each occasion that Parliament or UK Ministers legislate for England only, the divergence between the two bodies increases.
4. This submission will argue that in order to ensure and increase awareness of the new legal reality which exists in England and Wales following Welsh devolution, the distinction which now exists between the law which applies in England and the law which applies in Wales requires formal recognition. In terms of its laws, Wales is no longer the same as England; one can no longer say "For Wales, see England". However, in the absence of sufficient formal recognition, in many quarters the approach remains "For Wales, see England but..." or "For Wales, see England other than...".
5. Awareness of the legal divergence which is occurring, and ready accessibility to information as to what that divergence means for the citizen, requires recognition of Wales' distinct legal identity. That identity is obscured if it is presented as being a partial exception to the legal identity of England. Citizens in England who wish to know what the law is in England on a particular topic are likely to be able to access it in terms of what the law is in England; their Welsh counterparts who wish to know what the law is in Wales are likely to have to access it in terms of what the law is in England and how the law in Wales differs from it.
6. The absence of formal recognition of a Welsh legal identity leads to bodies which serve the single legal jurisdiction of England and Wales approaching their remits in terms of the needs of England, either ignoring the distinct needs of Wales or else dealing with them as an exception which needs to be accommodated with as little inconvenience as possible within the structures devised for England. An instance of this is the manner in which the Solicitors Regulation Authority has recently developed a new Solicitors Qualifying Examination, addressing the distinct needs of Wales and of the Welsh language only towards the end of the process after representations had been made concerning the issue to the Legal Services Board.
7. The absence of formal recognition of a Welsh legal identity also militates against the development of a distinct legal literature for Wales and perhaps consequently against the

development of distinct provision in legal education to meet the needs of Wales. An example of this is the paucity of space accorded to Welsh devolution in textbooks dealing with the English Legal System or Constitutional Law. Although it is too soon to assess the coverage of the current devolution settlement by the literature, a survey of textbooks carried out a few years after the introduction of the last settlement revealed but little attention paid to Welsh devolution, and that of somewhat doubtful quality. The following table records the coverage accorded to Welsh devolution in eight texts, all of which were recommended reading for first-year Public law students in one or other of the Welsh law schools:

<i>Text</i>	<i>Published</i>	<i>Length pp.</i>	<i>Pp on Devolution</i>	<i>Pp on Wales</i>
A	2013	550	20	3
B	2013	700	16	3-4
C	2013	870	<i>passim</i>	½
D	2012	530	25	5
E	2011	770	10	2
F	2011	833	67	8
G	2011	290	10	1
H	2011	420	25	6

8. The following is a selection of errors or inaccuracies in statements about Wales and Welsh devolution in the first five of those texts.
- a. “The largest of these principalities passed into English rule in 1084 (Statute of Wales)”.
 - b. “Wales was conquered by the English in 1282 and from 1284 Wales was subject to English law.”
 - c. “a separate Welsh Assembly was abolished in 1689”.
 - d. “any decision to implement this part of the Act [Part 4 and Schedule 7] is a matter for the distant future.” (Supp. 2008) [A referendum to permit the change was already Welsh Government policy]
 - e. “Pt 4 of the 2006 Act came into force in May 2011, giving the National Assembly legislative powers in the form of ‘Acts of the Assembly’ within the ‘subjects’ set out in Sch.7. These subjects are... [the headings not the subjects follow]”.
 - f. “there is to be a Welsh Assembly Government or Llywodraeth Cynwiliad Cymru”.
 - g. “Not all of the subjects have exceptions... Others, however, do.” [The exceptions applied to all of the subjects]
 - h. “Legislation must take effect exclusively within Wales...”
 - i. “the powers of the Assembly are subject to... restrictions limiting the creation of criminal offences”. [True pre-2011; not so at the time of publication]
 - j. “Section 114 empowers the Secretary of State to veto an Assembly Act (*sic*) on public interest grounds”

9. Wales' distinct legal identity is not solely a consequence of legislative devolution. One of the consequences of that devolution has been the development of a body of law which is enacted or made bilingually. Even before devolution, however, Wales enjoyed a distinct legal identity in that the Welsh Language Acts had promoted the language equality principle whereby in the conduct of public business and in the administration of justice in Wales the English and Welsh languages were to be treated on the basis of equality. From the point of view of the administration of justice, the key element here is the words 'in Wales' for they recognize a distinction between the two nations. That distinction, however, is not reflected in the structure of the legal system. Instead, the use of Welsh is dealt with as an exception, with the result that its use remains exceptional.
10. The distinct legal identity of contemporary Wales consists of three interrelated components: some of its laws are different from those in England; some of those laws are expressed bilingually, and the administration of justice generally (not solely in relation to the divergent laws) is subject to the language equality principle. Formal recognition of Wales' distinct legal identity should translate those differences into institutional distinctions. Complete separation of the laws of England from those of Wales, as proposed in the Welsh Government's draft Laws in Wales Bill in 2016, is not necessary and would introduce additional, needless complication between the legal regimes of the two nations. However, Wales and England could be served by distinct courts within the one legal system, each with exclusive jurisdiction over the laws which are specific to the nation in question, each sharing jurisdiction over the laws which are common to both, and both served by a mechanism to obtain authoritative rulings on points of law within the jurisdiction of the other without need for recourse to conflict of law rules. Cases which could involve the use of the Welsh language by litigants or witnesses should routinely be dealt with by the Welsh courts.
11. A formal recognition of Wales' distinct legal identity is needed to move away from a situation in which Welsh arrangements are seen as deviations from an English norm to one where Wales is recognized as being distinct. Until that occurs, the current scant attention given in legal writing and legal education to Wales' legal situation is likely to continue, and it has already continued for far too long.

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