

THEO HUCKLE QC, Counsel General for Wales 2011-16

Statement for Commission on Justice in Wales

1. I am Theodore David Huckle. I am a practising barrister. Other information about me is available at <https://www.doughtystreet.co.uk/barristers/profile/theo-huckle-qc>. I was born and brought up in Blaenavon. I went to West Mon School in Pontypool. For most of my career I practised solely from chambers in Cardiff. Since 2016 I have practised from Doughty Street Chambers in London whilst retaining a door tenancy in Cardiff. During the Fourth Assembly 2011-6 I was a member of the Welsh Government as Counsel General for Wales. I am the only occupier of that ministerial office to have been employed as a professional lawyer and not a member of the National Assembly for Wales (“the Assembly”). Although a member of the Labour Party since my early twenties, I was not a political activist and I approached the rôle very much as an independent legal advisor and advocate. I appeared for the Welsh Government in the Supreme Court in the Scottish case of *Axa v Lord Advocate*¹ and subsequently in the three “Welsh constitutional” references² under s.112 of the Government of Wales Act 2006, in the last of which I became the first Counsel General to make a reference to the Supreme Court of an Assembly Bill. I am currently a member of the board and trustee of Justice³ and a member of its current Working Party on “What is a Trial?”, due to report by the end of 2018. Justice is a charity which reports on and seeks to promote improvement in the justice system/s of the UK and it has made it's own submission to the Commission. The views I express here are my own and do not necessarily represent the views of Justice or any other organisation of which I am a member.

The terms of reference and ambit of this evidence

2. I bear in mind the Commission's terms of reference:

To review the operation of the justice system in Wales and set a long term vision for its future, with a view to:

- **promoting better outcomes in terms of access to justice, reducing crime and promoting rehabilitation;**
- **ensuring that the jurisdictional arrangements and legal education address and reflect the role of justice in the governance and prosperity of Wales as well as distinct issues that arise in Wales;**
- **promoting the strength and sustainability of the Welsh legal services sector and maximising its contribution to the prosperity of Wales.**

3. I seek primarily to address the jurisdictional and governance issues in the second bullet point.

1 [2011] UKSC 46 [2012] 1 AC 868

2 *Attorney General v National Assembly for Wales Commission (Byelaws Bill)* [2012] UKSC 53 [2013] 1 AC 792; *Attorney General for England and Wales v Counsel General for Wales (Attorney General for Northern Ireland intervening) (Agricultural Sector Bill)* [2014] UKSC 43; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill; Reference by the Counsel General for Wales (Asbestos Bill)* [2015] UKSC 3.

3 <https://justice.org.uk/about-us/our-people/our-governance/executive-board>

Consultation on Separate Jurisdiction

4. On 7 October 2011 the First Minister made a written statement to the Assembly setting out the Welsh Government's intention to launch a public debate on this issue. As Counsel General I launched the consultation on a separate legal jurisdiction through an oral statement to the Assembly on the 28 March 2012. The First Minister and I led jointly on the consultation, which coincided with the investigation undertaken simultaneously by the Constitutional and Legislative Affairs Committee leading to their report of December 2012, which made no concrete proposal. Based upon our consultation results, we gave evidence to the Silk Commission in February 2013, and published our Summary Report on 4 December 2013. It was still relatively early in the legislative programme of the Fourth Assembly using the new primary powers. At that time we took the view that, consistent with the existing step-by-step approach to devolution, at that stage policing should be devolved, but not criminal justice and the administration of justice, although those latter were certainly Welsh Government's longer-term objectives subject to appropriate funding transfers. Accordingly, in the absence of devolved responsibility for criminal justice, a move to a separate jurisdiction was not considered to be of immediate benefit to the people of Wales.
5. Subsequently the concept of a "distinct Welsh jurisdiction" was mooted and advanced, derived in part from a UCL/WGC Report in 2015 and included as part of the Welsh Government's counterproposal to the Wales Bill, the draft Government and Laws in Wales Bill⁴. A new "deferred powers" model was proposed by Welsh Government in that draft Bill intended to lead to full devolution of justice in due course though postponed for numbers of years.
6. With the benefit of experience of the intervening years, and in particular the "negotiations" leading to enactment of the Wales Act 2017, and the effect of the Act itself, I am of the view that this is an ideal time to review and reconsider the proper basis for devolution to Wales in an effective and coherent way. I would hope that there may finally be justified optimism that a democratically defensible, practical and effective devolution, stable for Wales, the other devolved nations and the UK as a whole, and thus reasonably "future proofed", can now be established. For reasons which I will seek to explain, it seems to me that this necessarily falls within the remit of the Commission in addressing its terms of reference.

The starting point – the benefits of devolution in Wales

7. It is often easier to reflect the negative, and, as in other submissions, some of my points here, perhaps most, focus on political and legal problems. However, overall I prefer to be positive, especially where that is demonstrably merited. My view is that, after an unsure start, devolution has been a huge success in and for Wales, and has broad democratic support within Wales, as the referendum in 2011 demonstrated. It has given the people of Wales a voice they lacked before, both

⁴ First published in March 2016.

internally as to local administration, and, more broadly, within the UK and also internationally.

8. Whilst generalisation is always dangerous, I do believe that, especially since 2011, devolution has enabled the particular communitarian, tolerant and diverse disposition of people in Wales to be especially influential in ground-breaking socio-legal development, such as for the environment and wellbeing (generally, sustainable development is seen as a guiding principle underlying Assembly legislation and executive action, with specific examples such as carrier bag charging and planning reform), public health (organ donation, food hygiene ratings, tobacco restrictions, licensing of cosmetic procedures and prohibition of intimate piercing upon minors, public toilets, health impact assessments, minimum alcohol pricing), economic and social policy (social services and care, agricultural sector reform, byelaws reform, regulation of social landlords, landlord and tenant reform, restrictions on right to buy), and child protection (legislative and administrative adoption and application of the UNCRC⁵).
9. Rather than eye-catching or even, dare I say it, *sloganisng* creation of new criminal offences or regulatory regimes, and sometimes underestimated, or even dismissed by commentators of various kinds, in some ways the most important legacy may be the steps taken⁶ to introduce organisational and systemic change to the way public services are delivered both by Welsh Government and at local level, in order to promote appropriate collaboration between the various agencies, and proper application of principles of diversity and fairness. In some cases these latter are matters of established law (as a matter of pre-existing criminal law and eg. under the Equalities Act 2010 and its predecessors), but whose requirements are sometimes not fully adhered to, because of inertia in the ways of working, and failure fully to understand the implications of those legal requirements.
10. In many of these respects Wales can already be seen to be leading the way, although perhaps, not untypically, insufficient credit is sometimes given for its social and political innovation, both within Wales⁷ and outside.

The historical background of devolution

11. I agree with historical perspective set out in the Counsel General's June 2018 paper and more recent supplementary evidence, as to the pre-devolution history, the early history of Welsh devolution, and as to the creation of Welsh primary provisions by the Assembly since 2007 (and especially since 2011) and secondary legislation by the executive/legislature since 1999. I also agree that, despite (or even perhaps partly because of) the rapidity of devolutionary development in

⁵ In Dr Robert Jones's submission detailing issues of imprisonment of Welsh people, he notes an impressive reduction of 72% since 2010 of Welsh children held in custody.

⁶ eg. by the aspirationally-entitled Social Services and Well-being (Wales) Act 2014 and Wellbeing of Future Generations Act (Wales) 2015, and the perhaps controversially entitled Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act (2015).

⁷ The dispositional tendency to self-deprecation is in my view simultaneously both attractively modest and unproductive. We have many vulnerable tall poppies.

Wales, through the phases in 1999, 2007 and 2011 to Wales Act 2017 now, the settlement for Wales “remains limited by domestic and international comparison and is, largely as a result of that, highly complex”. The background to the 2017 Act is helpfully explored in some detail in Professor Rawlings's Public Law article⁸ early this year.

12. I attempted my own review of the history in my Sir William Dale lecture in 2015, annexed, in which I also set out my views on many of the themes I now address. The following year I followed this with a shorter piece for the Institute of Welsh Affairs⁹ which summarised and set out my developing position. Whilst some of the specific points are changed by the Wales Act 2017, the underlying problems of limited devolution and reservation of “the law” remain, and in my view the settlement ultimately remains democratically unstable.
13. Particularly important is the analysis of the origins of the fields/subjects of devolved power as deriving simply from transferred areas of executive power in the Welsh Office pre 1999, itself garnered in a piecemeal fashion over some 30 years. This may have provided some basis for the transfer of executive power from a pragmatic viewpoint, at least, but lacked a basis of principle, since this was not merely internal UK administrative reorganisation but rather *devolution*. That had democratic support and was to mean something. A new legislature and executive have been created and are intended, as now asserted expressly by statute¹⁰, to form a permanent part of the UK's constitution. In any event, it is tolerably clear that the early transfers of executive power provided precious little basis in logic for defining the ambit of legislative power from 2011.
14. The complexity of the supposedly “simpler” reserved powers model of devolution provided for by the Wales Act 2017's amendments to the Government of Wales Act 2006 seems to have worsened the complexity, certainly so far as concerns clarity of the constitutional arrangements, and the crucial questions of legislative competence: what the organs of devolved governance in Wales can and cannot do.
15. It was never appropriate to treat devolution as a political fudge intended to calm, with enhanced democratic rights more a matter of form than substance, the “restive” politically alienated citizens of some of the poorest areas of the UK, and those who did must now recognise¹¹ that the genie will not be put back into the bottle, though the “Westlothian” problems of democratic deficit for English voters outside the affluent south east rumble on, only partly assuaged by the tortuous “EVEL” and a piecemeal and, frankly, dubious “city state” approach for London and Manchester only.

8 “The strange reconstitution of Wales” 2018 PL 62

9 <http://www.iwa.wales/click/2016/04/why-wales-needs-its-own-legal-jurisdiction>

10 ie. in the Wales Act 2017 amendments adding s. A1(1) to the Government of Wales Act 2006.

11 Assisted perhaps by the new A1.(1) *ibid*.

Limits to the Welsh settlement and how to overcome them

16. Aside from the problems of devolving power to the citizens of Manchester but not Liverpool, Burnley or Macclesfield, let alone the rural communities between, this approach also comes rapidly into conflict with the national devolution settlements. It is considered by many in Wales, and I am no exception, to be ridiculous that Manchester is to be trusted to have devolved policing, yet devolved Wales somehow not, even though most of the other agencies working together in criminal justice as well as the other areas in which the police are required to function, are already “devolved” in Wales. This is one aspect of issues about devolution that resonates with the public, who are clearly concerned about the *effectiveness* of community policing in its broadest sense, providing support, regulation and security in their communities. In Wales that effectiveness is surely reduced by the devolutionary control division between the police and those other agencies, leaving aside the resource inefficiencies of four chief constables reporting to governments in both Westminster and Cardiff Bay. As to the need for such dual reporting, or rather reporting within Wales, *QED*.
17. Moreover, the comparative point about Northern Ireland, Scotland and Manchester, does not detract from the more general point made by the Counsel General that devolution of policing is or ought to be considered a fundamental part of sensible decentralisation of public/government functions, ie. as a matter of *primary design* of a decentralised/devolved structure. That it is considered appropriate for devolution to Scotland, Northern Ireland and Manchester might suggest that some hold the same view. However, this is not simply a matter of efficient or effective administration, but also of the democratic credibility of devolution of *real political power*. That this was not done in the Welsh settlement is, in my view, a clear flaw, creating legal idiosyncrasy and administrative inconvenience and inefficiency, and this should be corrected without delay. Many people in Wales believe or assume that policing is devolved already. Why wouldn't it be?
18. Further, the mismatch between primary legislative power and lack of legislative and executive control of the judicial process is almost too obvious to restate. The oft heard observations about organic legal divergence, and reaching a point “at some future time” when jurisdictional separation/division will be appropriate is typical of lack of principle and “pragmatic” constitutional development which has its very obvious limitations. Who is it who is to decide when that separation is merited? Subject to my *caveat* below, I agree with Professor Tim Jones¹²:

... in the same way as a constitution - a legal jurisdiction must be declared, it will not simply appear.

At least, in my view, it would be foolish to allow divergence to drift in the hope of eventually reaching a point at which some strange (unlikely?) consensus developed that Wales was now (fit to be) a separate jurisdiction.

¹² Submission, 3 August 2018.

19. Professor Jones concludes:

... the practical arguments are second-order ones. The first order question is the constitutional one. The pragmatic resolution of practical issues would follow the determination of the constitutional question. There will always be arguments of the “not yet” variety, with no attempt to quantify how different the law would need to be to lead to a different conclusion. Does it have to be as different as Scotland? As Northern Ireland? As Jersey?

20. In his piece for the Irish Jurist last year, Professor R. Gwynedd Parry offered an interesting view as to the interrelationship between devolutionary structure in its 2017 form, and the question of a single jurisdiction¹³:

... the only overarching principle within the Wales Act 2017 in reality is that there is a single jurisdiction of England & Wales, and this state of affairs must continue at all costs. The Act is thus better understood as the product of an inhibition about the prospect of a separate Welsh jurisdiction coming into existence. It is this which explains the long list of reserved matters and other restraints on the legislative powers of the National Assembly for Wales compared with its counterparts in Scotland and Northern Ireland. And that is why the issue of a separate Welsh jurisdiction is central to the future of devolution in Wales. It is an unresolved issue which means that the Wales Act 2017 can only be yet another interim development in the long and arduous journey of Welsh devolution.

21. Rather than the “organic development” approach, I prefer planning upon the basis of careful analysis and agreed principle, and taking control of our destiny rather than hoping it will happen. Events have a habit of overtaking things. An example of this is the move to original primary legislative powers in 2011 following the March referendum, as (unusually) provided for directly within the Government of Wales Act 2006. When that Act was enacted, many (including the then Welsh Secretary, Peter Hain) thought that it would be many years, “at least a generation”, before those provisions would be triggered. Four years later it was done, and Part III of the Act was, for practical purposes, consigned to history.

22. My *caveat*, though, is that the declaration of a separate jurisdiction has, in itself, an entirely “theoretical” feel to it. Indeed, it may well be that whilst not using the word “jurisdiction” at all, the new s. A2 of the Government of Wales Act 2006 nearly does this declaratory job:

The law that applies in Wales includes a body of Welsh law made by the Assembly and the Welsh Ministers.

Of course, this declaration still permits of Welsh law being merely part of the law of England & Wales, so will require change to make Welsh law exclusive as a proper basis for a separated jurisdiction, even if for some considerable time continuing to rely heavily upon law created within a joint jurisdiction.

23. It is noticeable that in the example provided by the Government of Ireland Act 1920, what was established was a legislature for Northern Ireland and a court system for Northern Ireland (as well as each, respectively, for Southern Ireland). In each case

¹³ *Is breaking up hard to do? The case for a separate Welsh jurisdiction* (2017) IJ 61.

several provisions refer to the “jurisdiction” of either the parliament or the courts. It was neither considered necessary otherwise to declare that there was a (distinct) body of Northern Irish law, nor a “Northern Irish jurisdiction”, but no-one doubts that this is what was created. It is interesting that that Act considered “jurisdiction” to be something that legislative or judicial law-makers had, not the territory for which they make the law. It is perhaps only when one starts to speak of “a jurisdiction” that it becomes characterised as territorial in nature. As lawyers we commonly speak of “the jurisdiction of the court” and one court may have many jurisdictions, both as to areas of law and as to territorial areas. The Supreme Court is the supreme example.

24. It may be that the best way to look at this is that once you have established a subsidiary legislature and executive for a territory or region, and it (already) has a functioning court system, then what is required to “create” a separate jurisdiction is the political or executive act of handing over administrative control of that court system to the territory/region. A separated jurisdiction is inevitably created, whatever the declarations made about that or about the existence of a body of law, which will exist by dint of the exercise of the law-making powers, not because of the declaration.
25. I am of the view that, with relatively minor amendment to the s. A2 declaration, and the fact of legislative devolution as it stands, the practical action involved in establishing or recognising a separated jurisdiction is that of transferring justice powers and competence to Wales. As to legislative competence currently constituted by the Wales Act 2017, this requires the repeal of the bulk if not all of paragraph 8(1) of Schedule 7A to the Government of Wales Act 2006¹⁴. Indeed, that paragraph is headed “Single legal jurisdiction of England and Wales” as if to imply that without those reservations separation of jurisdiction will follow. It also, and perhaps primarily in the first instance, requires transfer of MOJ executive functions so that Wales gains administrative control of the courts operating within Wales. Administered and planned properly, there is no reason why this should be unacceptably disruptive to the functioning of the justice system in England (and that in Wales), even in the short term. The Judicature Act 1873 and the Courts Act 1971 were surely far more disruptive reforms.

The Supreme Court

26. s27(8) of the Constitutional Reform Act's provides that:

In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the UK.

The interpretation s.60 provides that for these purposes:

“part of the UK” means England and Wales, Scotland or Northern Ireland...

¹⁴ The remainder of paragraph 8 would become unnecessary in consequence.

27. That there must be representation for Scotland and Northern Ireland is at least implied here, though the number of representatives is not set out. It is a matter of convention that there are two Scottish justices (ie. former judges in Scotland) and one from Northern Ireland, commonly (as now) the former Chief Justice.
28. The lack of formal representation for Wales on the Supreme Court panel is a continuing irritant in a time of devolution of primary legislative power to Wales, and given the series of Welsh constitutional cases during 2012-14. The fact that superb Welsh judges have been available to sit on the Welsh cases, and that we now have a Welsh member of the general E&W “part” of the panel, does not alter the constitutional deficit as we perceive it to be, compared with the positions of Scotland (two justices) and Northern Ireland (one justice).
29. Presumably, upon a separate jurisdiction for Wales being “established”, “part of the UK” in s.60 must be redefined accordingly so that a formal requirement of Welsh representation would follow. Even better, the representation of the devolved nations currently enumerated by convention should be changed to a clear statutory requirement in each case. For now I do not suggest that Wales should have more than one representative justice.

Public awareness and engagement

30. Lack of public understanding of laws made increasingly complex by increasing legislative activity in Westminster and Wales is now a given, and the cause of much disquiet in the legal and judicial communities. Sadly, not so much amongst some of our politicians, although to be fair, in the Welsh context, the Fourth Assembly was to be expected to be keen to exercise its new original primary legislative power. Indeed, the 2011 Welsh Government was actually criticised by opposition parties and politico-legal commentators for delay in bringing forward its first legislative programme. For a lawyer, there is a distressing irony in the steps taken by our legislators to create an increasingly complicated statute book, whilst simultaneously reducing access of the public to the lawyers required to interpret and advise on the legal maze, by reductions in legal aid and other measures to reduce legal costs in the system. One wonders whether those who drafted Article 6 of the ECHR really had in mind a system of free access to justice for litigants in person able to afford substantial court fees and with high level legal skills.
31. It is equally unsurprising that, in this maze, the citizen will concentrate on matters which affect his/her daily life and long term prospects and prosperity, rather than spending a great deal of time seeking to understand the constitutional impact, and boundaries, of devolution. For most people, therefore, these are arcane matters of little immediate interest, but in my view there are serious educational issues here, and not simply those of legal education identified in the terms of reference. It is important that citizens of Wales, indeed of the UK as a whole, understand the competencies and structures of governance generally, and of devolution in particular. It was clear to me when Counsel General during 2011-6, and still, that there is enormous confusion about these matters. I am still regularly asked about

the work I did “for the Assembly”. This is possibly principally a transitional problem¹⁵, but it remains a problem in my view. It is a matter both of legal education but also, more fundamentally, of general education about citizenship and national identities.

32. It seems uncontroversial to note that substantial divergence between the laws applicable to life in Wales, and the laws applicable to life in England, has already occurred, especially since 2011, and especially in specific areas of activity such as health and education. However, for those who still contend that the separation of jurisdictions is an organic development and that we will “know jurisdictional separation when we see it” as the divergence increases, there is a problem in clearly identifying the body of Welsh laws at all, s. A2 notwithstanding. The devolution technique of enabling two legislative bodies to pass law of equal status extending to the whole territory of, in this case, England and Wales, yet some of it applying only to one or other, means that the mixing up of the existing statute book is worsened again.
33. As Counsel General, I hoped to promote legislation to provide for systems to consolidate and codify the law now being made by the Assembly, consistent with discussions with the Law Commission¹⁶. I am glad to note that the Counsel General continues this work. I envisaged an arrangement of “chapters” corresponding to the devolved subject groups. All legislation on subjects with substantial and diverse legislative backgrounds from Westminster was, in any event, undertaken upon the basis that, wherever possible, those underlying provisions were “got in” and consolidated to reduce the amount of research (outside the instant Bill) required for the citizen (and even lawyer) to understand accurately the law now applicable in Wales. I believe this to be the ongoing drafting policy of First Legislative Counsel's department. However, that is a somewhat limited step, and proper codification is increasingly urgently needed now, not the least of reasons for which is accessibility to and understanding of those laws by the citizen. Whilst we can all recognise that codification is a long term project, it must be begun without further delay and proceed at pace and with substantial resource, simply to “keep on top of” the rapidly expanding body of law.
34. Moreover, the clearer the identification of “Welsh laws”, the more straightforward will be formal jurisdictional separation of whatever type is thought appropriate. Even in a reserved powers model, the former conferred competences provide a sensible list of subjects for appropriate code chapters.

15 And partly the confusion of poor nomenclature; we have now, thankfully, moved away from the dreadful “Welsh Assembly Government” and soon will have a Welsh “Parliament”.

16 Initially under the chairmanship of Lord Lloyd Jones from 2013 when we commissioned the Law Commission's work, though the report 366 “Form and Accessibility of the Law Applicable in Wales” was published in 2016 after my term as Counsel General had ended and when Sir David Bean had taken over as chair. It made a number of recommendations as to codification. Lord Lloyd Jones returned to the theme in his recent speech, speaking with Commissioner Paines and the Counsel General, and in which he cited from Lord Thomas's speech to the Legal Wales Conference on 11 October 2013.

35. We are without a Queen's Printer for Wales, and although in itself this can be dismissed as a relatively minor administrative matter, in practice it matters a lot, taken with the limited resources available to Welsh Government and the Assembly to provide access to their statutory provisions and explanatory commentary upon them. Welsh Government has worked hard to provide some resources, and when I was in post we established the Law Wales Cyfraith Cymru resource¹⁷, but primary responsibility for dissemination and commentary upon the law is not a devolved matter and does not carry its own budget in Wales. Likewise judicial training.
36. I am conscious that this *lacuna* between legislative power and publication responsibility has, quite understandably, been a cause of frustration to our judiciary (including our Welsh presiding judges and the more senior judiciary), but as often with justice issues, its resources are, as it were, squeezed between the *Scylla* of Health and the *Charybdis* of Education. The harsh economic reality of the block grant is well demonstrated in that we needed to establish Law Wales in conjunction with the commercial provider, *Westlaw*, and have been dependent on the poorly resourced and still seriously out of date *legislation.gov.uk* website. These may be considered general complaints affecting also the laws promulgated by Westminster, to be deprecated generally perhaps, but the point is that in devolution *we are doing something different here* in constitutional terms, and the need to have public understanding of and access to (information about) the laws created is surely enhanced. The application of vastly superior resources to the comparable post-colonial legislative frameworks in Australia and New Zealand¹⁸, and elsewhere in the Commonwealth, rather puts us in the shade in this respect.

The nature of devolution to Wales and implications for the Union

37. As Counsel General myself, I was always concerned about the devolutionary asymmetry, which some people appeared to think was a strength meeting arrangements with different national circumstances in Wales, Scotland and Northern Ireland respectively. On the contrary, in my view, it is calculated to undermine the democratic legitimacy of devolution and the public's understanding of it, and in particular of the law-making powers of, and laws created by, the devolved legislatures and executives. It seems to me democratically unsound and destabilising to treat different categories of citizens differently under the law. In the end it is surely unacceptably discriminatory. The idea that in order to preserve the sanctity of the E&W jurisdiction, devolution to Wales should, even in 1999 when it was to be executive devolution only, "follow the Scotland Act 1978 model", a model then not considered democratically sufficient for our Scottish brethren who had moved on to the Scotland Act 1998, seems to me now *quaint* to say the least.

17 This is a very useful portal, though not the most easy to find for the uninitiated, and it is, of course, subject to the ongoing resource constraints and dependent upon the willingness of voluntary contributors inside and outside Welsh Government. I note that currently it does not appear to have caught up with the Wales Act 2017: <http://law.gov.wales/constitution-government/devolution/gowa-06/?lang=en#/constitution-government/devolution/gowa-06/?tab=overview&lang=en>.

18 As Counsel General I undertook with the First Legislative Counsel a hugely instructive visit to Sydney and Wellington to gain understanding of how those jurisdictions have developed their legal structures accordingly since political - and complete judicial - independence.

Divisive is another word. In the context of a change to full primary legislative powers under the subsequent models of Welsh devolution, it becomes unsustainable.

38. British political and constitutional pragmatism and incrementalism is inherently short termist (tied especially to the 5 year Parliamentary term, not a long time in a modern life) and fails to deal with social and cultural change creating pressure damaging to social cohesion and democratic support. The current period of domestic and global political turbulence should serve to caution against this approach. The common law step-by-step approach to legal development does not work very well when one is supposed to be designing a whole constitutional system. This is illustrated well by the majority of the Supreme Court in the *Asbestos Diseases*¹⁹ (Wales) Bill reference treating Wales's National Assembly, it's primary legislative body for devolved matters, as little more than a glorified county council.
39. I also consider it to have been a fallacy that a move to a reserved powers model of legislative competence was the answer to all our problems. This was a legal change when the problems were essentially ones of political will. My view always was that although the burden of proof might be shifted somewhat, the scope for turf war at the boundary would not be altered, and that what Wales was intended/permitted to be able to do was always a matter of political will and likely controversy, perhaps not greatly assisted by having governments of different political hue in Cardiff and Westminster since 2010. Indeed, the change to a reserved powers model in fact enabled Westminster to seek to retrieve some of the "lost ground" it perceived in the reasoning of the Supreme Court in the *Agricultural Sector reference*²⁰ in particular. It is not easy to judge whether the horror stories of preparation of the Wales Bill by Westminster departments, and thus ministers, being separately asked to consider and advise on what powers and legislative competency "ought" to be devolved to Wales were true, but they serve perhaps to demonstrate, or at least warn, of a serious and unhelpful lack of trust in current political relationships between Westminster and Cardiff. It was our summary that Westminster was seeking to "reserve the law" in some important respects *from a primary legislative body*, and, despite the warnings of Parliamentary Counsel in 1998²¹, and albeit reminiscent of the irony of King Canute, the attempt was in some cases successful, even if, we may wager, only temporarily.
40. The conceptual importance of the reserved powers model, of course, is that, properly applied, it formalises a *general* devolution of legislative power subject only to *limited* reservation of truly "UK matters" such as border control and defence. Having a long list of reserved matters, including matters which really need not be reserved, is not what was intended, at least not by those in Wales calling for the change. There is, however, a danger for the Commission in focussing on

¹⁹ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill; Reference by the Counsel General for Wales* [2015] UKSC 3

²⁰ *Attorney General for England and Wales v Counsel General for Wales (Attorney General for Northern Ireland intervening)* [2014] UKSC 43

²¹ Joint Memorandum 2005, cited in the Counsel General's supplementary evidence at p2 paragraph 7.

recommendations for administrative reorganisation in the justice context which maintain, and reinforce, a “subject focussed” approach to devolution. The overview of what devolution is supposed to be about, this *generality* of power transfer, must not be lost when considering the ongoing roles of all three branches of government, the judiciary (and by extension the justice system) included. It is for this reason that, respectfully of course, I do not wholly agree with Professor Bush's emphasis on the benefits of pragmatic incremental tribunal development²², desirable in itself as that may be. and notwithstanding that with the appointment of the new President, and with the further Law Commission report due next year, I do anticipate hugely beneficial progress in relation to the organisation and reach of Welsh Tribunals. We agree about the ultimate aim, of course, but in my view the longer Wales is permitted to fall behind in the devolution process, the less likely it becomes that that aim is ever achieved. In my view the Commission needs to be clear about this.

41. I find the development of the points about decentralised/devolved *subsidiarity* in the Counsel General's papers to be interesting, and of course this is an important theme of the draft Government and Laws in Wales Bill. In principle I agree with an approach which casts the burden of proof, as it were, of those suggesting that matters cannot or should not be devolved, upon those persons. I would, however, say that, in the end, whatever analysis of the divide, or nomenclature, is adopted does not alter the essential political questions of which areas of socio-economic activity should be the subject of legal devolution, to be controlled by the devolved agencies rather than centrally. As I said in my 2015 lecture, the issue is really about where you draw the line rather than how it is drawn, thus the political rather than technical drafting question. However, the “mindset” of subsidiarity, namely that what can be devolved without undermining or damaging the integrity of the union, and how it works as a whole, *ought to be*, would be a good starting point of principle, even if it retains value judgments as to what “ought to be” or what is “good reason” for not devolving. Certainly there are many areas currently not devolved to Wales of which it is demonstrably true that they are appropriate to be devolved, by virtue of the simple fact that they are already devolved to Scotland and or Northern Ireland, including, crucially, both justice and policing. Again, *QED*.
42. From my perspective I struggle to understand why it is necessary to postpone this to 2026²³ or at all. Political will is, after all, a very strong following wind. As a matter of principle, it is right that the democratic position of the people in Wales be given parity with that of those in the other devolved nations, and it is not right that that be delayed. The facts that it may be difficult to do administratively, and that there are difficult negotiations to be had in respect of devolutionary funding/transfers to cover the additional costs, do not in my view alter the matter of principle²⁴. After

22 Submission, June 2018 https://beta.gov.wales/sites/default/files/publications/2018-06/submission-commission-justice-wales-professor-keith-bush-qc_0.pdf

23 As proposed for “deferred matters” in the draft Government and Laws in Wales Bill published by the Welsh Government in response to the Wales Bill.

24 I note in his submission Professor Bush helpfully reviews comparative data on costs, and concludes “There could hardly be a less opportune time for the devolution of the services in question.” I agree both that we cannot permit underfunding of new Welsh arrangements such as to condemn them to failure or mediocrity, and that politics is the art of the possible, but on the other hand if funding difficulties are permitted to be a bar to progress then

four failed attempts to get devolution right, it is surely time to start with principle rather than discredited pragmatic gradualism.

43. Reorganisational and funding challenges do not appear to have deterred the even more substantial changes in train for exiting the EU within but two or three years of a referendum, not eight years. Indeed, at a time when we are to leave the comfort of that union, and the constitutional integrity of the UK union is itself under renewed pressure, there is increased urgency about principled devolution review in my view. Despite obvious technical issues, the essential administrative and funding systems needed for effective devolution are already in place and benefit from valuable experience of the civil service and related agencies gained since 1999.
44. The current context of EU withdrawal highlights the implications for the union, and the inevitable problem of trying to consider devolution to Wales in isolation. Lord Owen urges consideration of a federalist structure for the UK. As part of a review of devolution on the 20th anniversary of the Welsh referendum vote²⁵, he said:

I have previously proposed that an all-party convention should be held on the establishment of a Federal UK Council, modelled on the German Bundesrat. Running our exit from the EU in tandem with the creation of a federal UK is both feasible and proper. Postponing this discussion risks missing a moment in history when the British people are well aware that our unity is in jeopardy and yet most want it to be maintained.

45. I am attracted to the federalist idea, which could of course be adopted in a form appropriate to British sensibilities, but am not yet persuaded. Whatever the proper constitutional structure for the UK reflecting properly the needs and aspirations of all of its people, from whichever of its constituent nations, it must be non-discriminatory and clearly fair to all. Lord Owen is, however, also pointing out the urgency. It is well-known that the First Minister Carwyn Jones AM was the first leader to call for a constitutional convention in order that the next steps in devolution can be fully considered and properly resolved. This would now need to take into account all of these issues about our democracy within the union against the background of our changing position in the world. It will not surprise the reader to find, and I am already on record as to this, that I am in full agreement that such a convention is called for, and, I think, needed more now than ever.
46. In the same 20-year review, Lord Elystan Morgan illustrated my concerns about the sense of unfairness that devolutionary asymmetry creates, and the lack of trust that provokes:

I am rapidly coming to the conclusion that Wales is being short changed in regards to devolution. This assertion firstly rests on the willingness of Her Majesty's Government to contemplate nearly 200 reservations in the Wales Act 2017, most of which are so trivial as to give the lie to any sincerity concerning a reserved constitution.

nothing much will ever get done, and we require *vision* and *leadership* to make things happen.

25 "Towards Federalism and Beyond..." <http://www.iwa.wales/click/2018/01/brexit-wales-act-2017-changing-union>

47. As Professor Maher²⁶ implies, the technical difficulties may be rather overstated. Where there is a political will... Indeed, if I depart in any significant way from the approach of the Counsel General in the supplementary evidence, it is that I consider that the outstanding questions and hindrances to effective devolution remain, and always will remain, ones of political will, rather than practical or technical legal difficulty. The lawyers – especially the excellent public lawyers in the Welsh Government's Legal Services and First Legislative Counsel's departments - can and will make happen whatever the people support and the politicians (therefore) agree should happen.
48. In respect of both constitutional arrangements generally, and jurisdiction, there is no reason to reject flexibility and innovation in favour of dogma, a point usefully developed by Professor Richard Percival in his analysis of jurisdictional options for Public Law in 2017²⁷. The joy of devolution – indeed its very purpose? - is that, subject my point about equalisation of rights and avoiding discriminatory asymmetry, it gives us the opportunity to *do things differently*.

Welsh language

49. Bilingualism is an important aspect of devolution in Wales. I recall an interesting debate with my Welsh Government lawyers as to whether in law there were any “official” languages in the UK other than Welsh and English in Wales as provided for by the Welsh Language act 1993, Welsh Language (Wales) Measure 2011 and the National Assembly for Wales (Official Languages) Act 2012. The Westminster Parliament has, it appears, never felt it necessary to declare English to be its official language, so it was left to the Assembly to do so, alongside and in legal parity with Welsh.
50. It is clear that more work needs to be done to ensure that bilingual administration of justice in Wales is effective at every level. One might think that a justice devolved to Wales, which has the principal interest here, might be operated in a way most likely to be supportive of the requirements of linguistic parity.

Judiciary and Legal Profession

51. In my 2015 lecture, at p19 I summarised my position, which has not changed:

...there appears to be no reason at all why – at least initially – the distinct jurisdictions of England and Wales could not share the same judiciary as they currently do. This is only an extension of the long established reality that the House of Lords, now the Supreme Court, in each case sitting as a committee of the Privy Council, may act as the highest court of appeal for many jurisdictions outside the jurisdictions of the UK. ... It also deals with the regularly raised objection to a separate jurisdiction, namely that it implies separate regulation of the legal professions from England. Let me reassure again that Welsh Government has no intention to make it more difficult for Welsh lawyers (a) to be attracted to practise in Wales or (b) to practise throughout England and Wales, or for that matter for English lawyers to practise in Wales.

²⁶ Para 71 of the Counsel General's supplementary evidence.

²⁷ “How to do things with jurisdictions: Wales and the jurisdiction question” 2017 PL 249

52. I note that the draft Government and Laws in Wales Bill proposed similar arrangements. Further examples of “judicial sharing” are analysed by Professor Percival in the 2015 article referred to above. There are clearly technical issues to address, as he points out when considering one of the options²⁸:

The trans-jurisdictional organisation model, however, would present sponsorship/governance problems. It would be unrealistic to expect the UK Government, acting for the English jurisdiction with 94.6 per cent of the joint population, to have no greater voice in the governance of the new institution than Wales. Setting up governance arrangements to reflect such circumstances would be a novel undertaking; but not an impossible one.

53. It is perhaps self-evident that the equalisation/mutual recognition/cross qualification of professional status for the different parts of the UK is not the technical challenge presented by that process across the 28 (>27) members of the EU. Moreover, practice crossover between England & Wales and Northern Ireland especially, already works well with limited formality. As in other issues, we should not “tilt at windmills”.
54. Likewise, the history of legal partition in Ireland and the development of Northern Ireland as a separated legal jurisdiction within the UK, reviewed by Professor R. Gwynedd Parry²⁹, provides cause for optimism that institutional, educational and professional developments arising from separation of formal jurisdiction can be managed successfully for Wales without causing schism from the established institutions and traditions of legal training in England & Wales. Moreover, as Professor Parry points out, development can indeed be gradual once the act of political will to establish a separate jurisdiction is acted upon³⁰:

... not all the essential elements must be in place from the outset.

In relation to the professional issues, he summarises³¹:

The Northern Ireland model also shows that creating a new jurisdiction does not lead to a complete divorce from the former jurisdiction or splendid isolation in terms of the administration of justice. Free movement is a key feature in the relationship between the lawyers of Northern Ireland and those of England and Wales, and any member of the profession in Northern Ireland can, for example, apply to practise in England and Wales with only a few hurdles to cross. The creation of a Welsh jurisdiction should, therefore, not deprive members of the legal profession in Wales of opportunities to work in England, or vice-versa, provided there is professional competence on both sides.

55. Finally on this aspect, I have always been entirely optimistic that jurisdictional separation provides an excellent basis for positive marketing and business development differentiation for Welsh (Wales-based) lawyers able to offer expertise across the adjoining jurisdictions. There are many dual qualified Scottish lawyers

²⁸ *Ibid.* 2017 PL at 265-6.

²⁹ (2017) IJ 61, 78 ff.

³⁰ *Ibid.* at 82.

³¹ *Ibid.*

practising across the English border who make full use of this natural positioning advantage. I see no reason for the professions in Wales to fear separation of the jurisdiction, and they would be wise to embrace it. Especially for those who practise in very “localised” fields such as criminal law and family law I would not anticipate any significant change immediately, perhaps not for a considerable time yet, and further change and divergence, both as to substantive and procedural law, will inevitably be incremental and driven by changes the legislatures and respective rules committees consider required to reflect such alterations as the separation requires over time. Any lawyer who has practised through the upheavals of the last 20 years or so knows we should indeed have little to fear: we are used to it. Moreover, as well as these individual effects on practice, there ought to be an opportunity for Wales to position itself as a legal market with multiple forms of legal expertise, including expertise in the internationally and commercially important “English Law”, but also offering something more.

What price the common law?

56. There seems to be no evidence to support the fears sometimes expressed that jurisdictional separation predicts for wholesale change in the basis of law, fears which in part may have underscored the extremely conservative approach of the Wales Act 2017 to reserved matters. When we consider the post-colonial experience of the likes of Canada, New Zealand and Australia, we do not see departure from the common law system, and there should be every expectation that Welsh Law would develop using the same essential ground-rules and alongside English, Scottish and Northern Irish Laws, enriched by their lead in some cases and support in others, or by helpful analysis where views differ, just as can easily occur now between different divisions of the High Court or of the Court of Appeal, or even successive panels of the Supreme Court, as well as between courts in the separate jurisdictions in E&W, Scotland and NI. Moreover, the essence of the common law system is cautious, progressive, but perhaps stochastic, progression; this inevitably provides a check on any feared post separation tendency for excessive, over-ambitious or over-rapid divergence in the application of legal principles, and the basis upon which the law works and justice is done in Wales.

Conclusions

57. I have sought to address issues of both the proper structures of devolution, in particular legislative competence, and the question of a potential jurisdictional separation. These are inevitably interlinked considerations but I think they do require to be considered separately. I regard the idea that, as the exercise of legislative competence progresses and legal divergence increases, we will get to a stage where we recognise that there is *de facto* a separate jurisdiction in Wales, or a stage where that separation is such that a separate jurisdiction ought then to be declared/created, as in appropriately reactive and inherently uncertain, qualitatively, quantitatively and chronologically. There is an obvious missing “plank” of which effective devolution requires the support. This is a matter of political and legal principle, not just a matter of responding in a piecemeal and “pragmatic” way

to the political drivers day to day, or even year to year. The system requires to be sufficiently well designed and robust to deal effectively with those very drivers.

58. Therefore, it seems to me that the crux of what is now required to give democratic logic and effectiveness to the Welsh devolution settlement is not just the perhaps “theoretical” declaration that there be a separate Welsh jurisdiction but rather what should flow from it, the entirely practical handover of control of justice functions as a proper companion to subsidiarity-based legislative and executive competence, accompanied by appropriate legislative competence to make change as required to substantive and procedural aspects of the legal system. There must be no reservation, save for truly “UK matters” not predicated upon the (thus demonstrably false) assumption that the England and Wales jurisdiction “should” remain unified.
59. In summary, if justice is properly devolved, then jurisdiction is devolved, or rather separated. That there is a separate jurisdiction does not alter the questions of what areas of legislative and executive power are properly reserved to Westminster, as is clear in particular from the Scottish experience reaching back *hundreds* of years, not just the 20 years of devolution. Separation of jurisdiction in Wales does not imply devolution of those matters which should be reserved to the centre, but rather promotes practical and effective devolution in accordance with the principle of subsidiarity, and in a way consistent with other forms of devolution in the UK.
60. It is only when this is achieved that practical and effective design and management of a modern and fully effective justice system for Wales will follow. At the moment the justice system shared with England is trying its best to administer two bodies of law, supposedly integrated but often in conflict, with critical lack of resources, and it is a thankless task.
61. Accordingly, I do support declaration of a separated legal jurisdiction for Wales, distinct from that of England, but only as part of, and to make clear, the process of devolution of all justice functions and required associated legislative competencies.
62. The asymmetrical devolution arrangements should be removed so that citizens' democratic rights do not vary markedly between the nations and the legal and constitutional stability of the UK is maintained and improved at a time when that will be more important than ever with our removal from the EU. The ambit of the Welsh settlement should be revisited and greatly enhanced to align with the competence devolved to Scotland and Northern Ireland and to produce a stabilising similarity of settlements, upon the basis of principled and consistent devolution of all governmental power which does not need to be exercised centrally. The answer to the question what that is should be capable of answer in the same or very similar way for each of the devolution settlements. The different approaches in the separate devolution settlements are necessarily divisive and calculated to destabilise the union.

63. I invite the Commission, whose specific remit is to consider the *long-term* and provide *vision*, to resist simply addressing “domestic” Welsh Justice system issues, when success in achieving the high quality justice system which the people in Wales are entitled to expect depends upon getting the constitutional fundamentals right. I invite the Commission to offer a clear voice on those broader constitutional issues as a necessary precursor to that success.

64. Finally, to conclude by demonstrating, I hope, that I recognise that the practical and day-to-day, though hopefully not mundane, are also important, I invite the Commission to recommend early steps to codify the body of law applicable in Wales by reference to an appropriate list of devolved areas/spheres of social, cultural and economic activity, and that there should be a Queen's Printer for Wales.

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11 September 2018