

Commission on Justice in Wales
Oral Evidence Session
15th November 2018

Present:	Commission members	Secretariat team
Rt Hon Carwyn Jones AM, First Minister Hugh Rawlings, Head of Constitutional Affairs Carys Evans, Principal Private Secretary	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Dr Nerys Llewelyn Jones Juliet Lyon CBE Professor Rick Rawlings Sir Wyn Williams	Andrew Felton, Secretary to the Commission Dave Gordon Chris James Rhys Thomas

Opening statement

- I would like to begin by setting the scene. The National Assembly was a corporate body twenty years ago with very few legislative powers. Primary powers were given in 2011 and it was then that divergence really began. The law is diverging quite rapidly in housing, planning and social services. Had we been able to produce our own Bills in 1999 it would have been difficult due to capacity. The Welsh Office often just rubber stamped English secondary legislation. We have limited revenue raising powers, but next year we will have responsibility to raise a third of Welsh income tax.
- The unusual situation is that we exist in a jurisdiction with two legislatures. We are the only legislature, as far as I know, that hasn't got its own jurisdiction. People don't understand the mechanism. It is very difficult for the public to understand. The edges are most jagged in justice in its delivery.
- I have 26 days left and I believe setting up this Commission is one of the most important acts I have made as First Minister. I suspect whoever my successor will be will have a very similar view to me as to the devolution of justice.

Question area: Implications of the growing divergence between the law applicable in Wales and the law applicable in England

- There are problems with one unified England and Wales jurisdiction. It causes confusion. I have seen counsel arguing the wrong law in front of judges in courts in Wales. We are the only legislature that can't enforce its own laws. We are entirely reliant on the Ministry of Justice's (MoJ's) timetable. We have a long running issue relating to the costs of implementing Welsh law. The MoJ asks us to pay to enforce our legislation. We refuse as it is not devolved.
- The creation of Welsh law is a fact. My concern is that it will not be fully understood across the professions.
- Jagged edge: The police work closely with us to try and avoid the jagged edge becoming too apparent. The police do engage with us. We are working with the police and the Crown Prosecution Service (CPS) about removing the defence of reasonable chastisement.
- The most glaring example of the jagged edge is prison rehabilitation. The Secretary of State for Justice launched a pilot for mental health, but none of the five areas were in Wales. We have the wholly unnecessary jagged edge as most mental health services are devolved. The Secretary of State for Justice often does not consult us on justice matters as justice is not devolved.
- Effectively we finance almost half of the police budget through the block grant. With devolution of policing there would be a consequential sum of money on a Barnett formula basis which could give us more money to administer justice. If policing was devolved they would receive funding through the Barnett formula.

Question area: Running a government without (1) devolved legislative competence in respect of justice (2) a separate law of Wales and (3) a separate court system in Wales

- We are not in control of the timetable to implement laws or of how to interpret and police the law. Executive and legislative competence is needed together. We need to obtain Minister of the Crown consent even in devolved areas. Brexit has bought this into issue. We need the ability to create

primary legislation and to properly enforce it.

- There is no law of Wales which creates a public perception problem. Understanding and knowledge of Welsh law is an issue for the government as people don't understand what the law is in Wales. It is clunky and people don't understand how a document says it changes the law of England and Wales, but in fact it doesn't. If the profession is not aware of a separate body of Welsh law this causes an issue for government.
- The lack of a separate system is not directly a problem. I don't advocate a separate court system and there is merit in sharing the court system. The Welsh Government could share responsibility with the UK Government and pay its share.
- There is an ongoing dispute about judicial training. The Welsh Government has to contribute to training judges in England and Wales even when most judges in the jurisdiction will not come across Welsh law.
- If justice was devolved there would need to be a Cabinet Secretary role. The role of the Counsel General will remain a non portfolio role and a similar role to the Attorney General as is stipulated in the Government of Wales Act. If justice was not devolved there would be no cause for a Cabinet level role to promote the legal sector in Wales. It could be at a junior Ministerial level. It is difficult to know what else that Minister would do. There may be an argument that somebody should be liaising with the legal sector but I am unsure what other role that person would have than lobbying the UK Government.

Question area: Funding and capacity of the Welsh Government and the National Assembly for Wales to take on additional responsibilities for justice if legislative competence and policy responsibility for justice were devolved

- Costs of devolving justice: £660 million is spent on policing, the Crown Prosecution Service (CPS), prisons and probation in Wales. We would negotiate with the UK Government and we would then expect an appropriate transfer of money. It would cost an additional £10 million to set up policy capacity within Welsh Government and this would need to be phased in. If there was a lead in time there would be plenty of time to take up this opportunity.
- Before 2007 we had no drafting capacity at all, but since 2011 we have been producing primary legislation and now we are a revenue body. We are used to taking on new functions that were not previously anticipated and making it work.
- Safeguarding funding: I can't give any guarantees because the financial situation is very tight. However, we have seen the effects of cuts in legal aid. If legal aid was devolved we could look at different structures. We would need to see what the Barnett consequential would be. We would not be able to plug every gap, but we don't want to take over a system that will see further cuts. We have a track record in priority areas of spending more per capita than in England. I can't give guarantees, but we would want to at least maintain funding.
- Penal policy: If justice was devolved we would look at penal policy. We would look at smaller prisons, alternatives to custody and, as Scotland and Northern Ireland do, we would pay for some prisoners such as Category A and women to be in England. This happens in health with people near England going to hospital in England and we pay for them. If we simply took over justice policy to continue as now there would be no point.
- There could be a shared judiciary even if there are fundamental differences in policy. The judges would need to be trained sufficiently like they are already in implementing divergence in civil law. In any event the vast majority of circuit judges are based in Wales and for the time being it is unlikely to be a problem.
- Policing could be devolved separately, but the rest of justice comes as a package. We can't devolve prisons and probation, but not penal policy.
- The independence of the judiciary would be maintained as it is in Scotland and Northern Ireland. We would need to look at how it is done in Scotland. The First Minister in Scotland appoints judges as a rubber stamping exercise. We would need to safeguard the independence of the judiciary and its budget. In Scotland, the nominations are made to the First Minister by the Lord Advocate. What is crucial is that the reality and impression of judicial independence is maintained.
- Legally there are no Ministers in the Welsh Government to maintain the independence of the Welsh tribunal members. There are plenty of ways in which judicial independence could be maintained. The

Cabinet Secretary responsible for planning deals with called in matters in planning – which is a quasi judicial role.

- Policy capacity would need to be developed over time as drafting and financial capacity had to be developed. We do not have a justice department, but we have a track record of creating that capacity when needed.
- It is difficult to know whether the National Assembly could properly scrutinise justice. 80 is the optimal number of Assembly members, but that is a debate to be had to ensure there are sufficient backbenchers to scrutinise the government. There are 12 government Ministers out of 60 members and that could be an issue with scrutiny.
- There is no need for the inspectorates to be devolved. Sea officers in Wales work closely with the UK Government's Department for Environment, Food and Rural Affairs. There is no need to create a prison inspectorate for a small number of prisons. The same is true with the nuclear inspectorate. We could buy in the expertise as we do with the planning inspectorate.

Question area: Building confidence and safeguarding the independence of the legal system, the police and prosecutors

- The infrastructure and expertise of HM Courts and Tribunals Service should be devolved to us and there is no reason why there shouldn't be the same level of confidence as in Northern Ireland and the Crown dependencies. I can't see what factors would cause confidence to slip. We would be able to tap into expertise that already exists.
- Wales is not that small when considering jurisdictions internationally, such as the Baltic states and Iceland. I can't see the size affecting independence of the legal system, the police and prosecutors. One example in maintaining independence would be to look at the protocol Northern Ireland developed in 2010 to ensure judicial independence. The Commission has a role to play on recommending how judicial independence could be maintained.
- Securing independence if judiciary is not devolved: There is no question that the operational work of the police would be impacted. There would have to be someone in Welsh Government such as the Counsel General to maintain the independence. The First Minister cannot remove the Counsel General.
- I don't argue in principle against a separate judicial system, but there are practical issues and merit in sharing with England.

Question area: Implications for Wales, the private sector, public sector and the third sector, of changing the current constitutional and jurisdictional arrangements

- Implications for the legal profession: The legal profession in Wales has not flourished as it should. Part of that reason is that Wales is not a separate jurisdiction. A separate jurisdiction can create a centre of expertise. Bristol and Leeds do very well without being at the heart of a jurisdiction, but the legal profession needs to look at how it is organised. The Northern Ireland bar library is a radical step that should be considered. There is no depth in barristers' chambers in South Wales. When I was Counsel General solicitors' firms would complain about the depth in Welsh chambers. They would therefore go to London and Bristol to chambers where there is the expertise and would be an appropriate second choice if the first choice was unavailable. Cardiff needs one set of chambers dealing with all civil work.
- A separate jurisdiction does not have to be the Scotland model. In Northern Ireland there is no barrier to practise. Welsh qualified barristers could still practise in England. Would English barristers still want to practise as much in Wales? That would create an opportunity for the Welsh bar. The Welsh bar and solicitors need to work together to develop a depth of expertise in Wales. It would be tragic if we had a separate jurisdiction that is serviced by English professions as is seen in the commercial court and the administrative court.
- A separate jurisdiction would not affect the public sector as the public sector already acts in areas where the law of Wales is a reality. The public sector does have accessibility to Welsh law and commentary, but I am not convinced the legal sector is in the same position.
- Businesses want access to English law. They would use a court system that they trust. The law would be different as it is now, but in company and commercial law there is no desire to devolve. Firms from London move to Northern Ireland as there is work there and as a common law jurisdiction it is an easy

place to work from. A separate system would not affect inward investment. They are interested in two things: stability and skills.

- The third sector already exists in a world where Wales is very separate e.g. in health.

Question area: Retaining talent in the legal sector and the justice system in Wales

- The laws are already changing, but I take the perception point of students worried about a separate Welsh jurisdiction. Universities need to be centres of excellence and be portable across the common law jurisdictions. Northern Ireland has succeeded and we will also need to succeed.
- We need to make sure that the courses available in Wales are seen to be of good quality. It is in the interest of our universities to be competitive. I have no problem with students going to study outside Wales, but I want to see them returning. A policy of only funding students going to Welsh universities would not necessarily retain talent. We can't say if you study law you have to return to practise in Wales as there are not enough jobs. The legal sector in Wales needs to be attractive.
- Wales would be more attractive to returnees if there was a separate jurisdiction as in Belfast and Edinburgh. These places are seen as a base. Cardiff is currently seen as a Western edge of a large jurisdiction. If you are qualified in England there is no reason why you can't practise in Wales as happens in Northern Ireland. We need to be seen as open and not seen as building a wall around Wales. After devolution, work came to Wales as there was a separate government. We need to do the same with law.
- There is no reason why as law firms in Scotland export work and use English law that it can't work in Wales. There is no reason why law firms in Wales can't practise in England. The solicitors' firms in Wales need to be bigger or large firms will come in and Welsh firms turned into branch offices. Welsh firms need to look for work in England and beyond. There are huge opportunities around the world. The Brexit draft withdrawal agreement recognises the mutual recognition of qualifications. The profession needs to think how to be international. There is no reason why a firm in Cardiff can't become an international brand.
- The age old trend about seeing London as the place to practise is partly driven by the fact that we are not a jurisdiction. There needs to be a concerted effort on a legal brand in Wales as Leeds and Bristol have done. There needs to be active co-operation with the professions. Specialisation is now the order of the day. The days of common law practices are coming to an end.

Question area: Diversity and equality

- The Welsh Government could put in place measures to improve diversity. We have a good track record of making the civil service more diverse.
- We could work with the professions to encourage them to promote diversity within the judiciary. Unless we have the policy power what we can do is very limited.
- We can't legislate in contravention of the European Convention on Human Rights and other international treaties that the UK Government has signed up to and we would not want to.
- A Human Rights Act for Wales could move things further, but what we can do without legislative competence is limited.
- We are still engaging with the Is Wales Fairer report. We will look at the report carefully and there will be some areas where things are not fair, e.g. litigants in person which are not sustainable in the long term.

Question area: Timetable for devolution

- I think policing can be separated from the rest of the criminal justice system, but nothing else. If we had powers over offender management that would have an impact on penal policy. The entire system of justice from where the police pass the case on to the CPS onwards has a direct effect on what comes after.

Question area: Legal sector

- I want to emphasise that we need to develop the legal sector in Wales. This can't be done without expertise in the area. There is no point in our becoming a jurisdiction if we don't deliver something which is good enough. This must be seen as an opportunity to develop the sector.

Question area: Asymmetric devolution

- Asymmetric devolution post Brexit: The issue of the constitutional development of the UK is difficult because of the size of England. As powers return due to Brexit there is a possibility that the edge could become more jagged if justice is not devolved. Wales is the only country in the UK without legislative responsibility for the justice system as the UK Government is in reality the English Government. Asymmetrical devolution is going out of fashion and the only place in Europe where it is still in existence is Spain. Justice is the biggest area where there is a fundamental difference between Wales and Scotland and Northern Ireland.

Question area: Response of UK Government and Labour group in National Assembly

- Westminster will not accept recommendations which are not in line with its thinking. If it is the Commission's conclusion that justice should be devolved it will be influential. The UK Government will not engage in conversation with us on the devolution of justice. An independent commission would carry more weight and Westminster will consider the weight of independent evidence.
- All candidates for the First Minister role are in agreement that justice should be devolved. This is the view of the Labour group in the National Assembly. My colleagues share the same views as me.