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Submission to the Commission for Justice in Wales for meeting on 21 March 2019 – from Elin Jones AM, Llywydd, National Assembly for Wales

The Llywydd's submission has been framed around the issues raised with officials as of likely interest to the Commission:

What the Assembly already does in relation to justice looked at in the broadest sense – for instance, including any work relevant to the Welsh legal advice and support sector

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, many of the services that are required to support offenders, ex-offenders and promote rehabilitation are devolved: housing, education and training, economic development and local government services. Exceptions would of course be benefits, including Job Centre services.

Up to now, Assembly officials have mainly carried out reactive work on criminal and civil justice matters (i.e. providing briefing to Committees or individual Assembly Members on request, or providing information on matters debated or to be debated). In the light of the state of the devolution settlement, we have not sought to provide proactive information to clarify the complex landscape that is justice, or to inform the public on particular justice issues other than those that might have arisen in the course of Committee work or related matters.

Examples of relevant current work by Assembly committees include:

- Health and social care provision in Welsh prisons – inquiry by the Health and Social Care Committee (consultation closes 14 May 2019)
- Mental health in policing and police custody – inquiry by the Health and Social Care Committee (consultation closes 15 March 2019)

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- Voting rights for prisoners – inquiry by the Equality, Local Government and Communities Committee (consultation closed – Committee considering evidence)

The Assembly is likely to be scrutinising a Welsh Government Bill on the removal of the defence of reasonable chastisement in cases of common assault. The fact that a Bill of this kind may be within the competence of the Assembly illustrates the unclear border between devolved and reserved matters in the Welsh devolution settlement.

Matters relevant to **criminal** justice have also been touched on in other Fifth Assembly inquiries such as:

- Everybody's Business: A report on suicide prevention in Wales, Health and Social Care Committee, December 2018
- Public Health (Minimum Price for Alcohol) (Wales) Bill: Committee Stage 1 Report , Health and social Care Committee, March 2018
- Life on the streets: preventing and tackling rough sleeping in Wales, Equalities, Local Government and Communities Committee, April 2018
- Mind Over Matter: The Emotional and Mental Health of Children and Young People in Wales Children, Young People and Education Committee, April 2018

Interaction between the Assembly and the Welsh legal advice and support sector is most likely either via individual Assembly Members or when organisations from the sector provide evidence to Assembly committee inquiries – either proactive written evidence, or oral evidence at the invitation of the committee, or both.

As a legislature, the Assembly has no powers to give grants (except in one strictly limited case concerning raising public awareness and understanding of the electoral system in Wales). Therefore, the Assembly would not be able directly to support third-sector legal advice/support organisations, such as Law Centres or Citizens' Advice Bureaux. However, as the Assembly has to approve the Welsh Government's budget annually, it does have a role in deciding which sectors the Welsh Ministers support, and to what extent.

How the current "justice infrastructure" interacts with the Assembly, particularly any powers of appointment, reporting requirements or other lines of accountability, and how the Assembly deals with these

The court service and the tribunal service themselves are reserved from the Assembly's legislative competence in Schedule 7A to the Government of Wales Act 2006. The Assembly cannot legislate on how courts or tribunals should be composed, on how judge or tribunal chairs and members should be appointed or remunerated, or on types of proceedings or rules of procedure. The exception is tribunals which count as "devolved tribunals", i.e. tribunals which deal exclusively with devolved matters and whose functions are exercisable only in relation to Wales, [or where those functions are within Assembly competence despite extending beyond the borders of Wales](#). (There is also further limited competence in relation to appeals).

This category is different from the category of "devolved Welsh authorities" for the purposes of Schedule 7B to the Act, which imposes lesser restrictions on Assembly competence over tribunals.

Section 59 of the Wales Act 2017 created, for the first time, a statutory concept of "the Welsh tribunals". These tribunals are:

- the Agricultural Land Tribunal for Wales
- the Mental Health Review Tribunal for Wales
- rent assessment committees under Schedule 10 to the Rent Act 1977 (which include leasehold valuation tribunals and residential property tribunals)
- the Special Educational Needs Tribunal for Wales
- tribunals under Schedule 3 to the Education Act 2005 (dealing with registration of schools inspectors in Wales)
- tribunals drawn from the Adjudication Panel for Wales (dealing with alleged breaches of local government standards of conduct)
- the Welsh Language Tribunal.

All of these tribunals are "devolved Welsh tribunals" for the purposes of Schedule 7B to the Government of Wales Act 2006. They all deal with matters essentially within devolved competence. The other common thread between them is that the Welsh Ministers fund them. Their rules of procedure are set, and their members appointed, in a variety of ways. In several cases, the Lord Chancellor has the relevant powers. Others involve a greater or lesser role for Welsh Ministers.

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The Assembly has no current role in appointing the members of any of these tribunals or setting their rules of procedure. The Welsh tribunals do not have a duty to report to the Assembly.

The Assembly does have an indirect role in funding the Welsh tribunals, as it has to agree the Welsh Government's annual budget, out of which the tribunals' funding comes.

The Assembly has no role in relation to the composition, rules etc of other tribunals in Wales (i.e. tribunals funded by the UK Government) or of courts sitting in Wales.

The Wales Act 2017 created an office of President of the Welsh Tribunals. The President is (normally) appointed by the Lord Chief Justice of England and Wales, after consultation with the Welsh Ministers. She or he has a statutory responsibility to represent the views of members of the Welsh tribunals to the Welsh Ministers "and other members of the National Assembly for Wales", but no duty to lay reports before the Assembly as a body. Funding for the office is provided by the Welsh Ministers.

How would the Assembly Commission respond to the likely demands if any or all of the following were devolved: policing, the Court service, all tribunals operating in Wales, sentencing, prison policy and the prison service, probation and the probation service and financial support for legal proceedings (legal aid)?

and

What estimated resources – legal and other – would be needed to hold the Welsh Government to account on policy in these areas.

Clearly, the resources needed would be significant, both in terms of Member and official time and knowledge/experience.

The Assembly Commission would seek to input into any process involving the Welsh and UK Governments to explore the implementation of any recommendations the Commission may make. At that stage, the Assembly Commissioners would need to consider the impact on the Assembly and its committees, to carry out work to estimate the resources required, and to look at different possible models, in conjunction with any possible inquiries on the subject being undertaken by Assembly committees.

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Any legislation required to devolve new powers to the Assembly would be subject to scrutiny in the Assembly either through its committees, plenary or both. This would apply potentially to both UK and Assembly legislation.

Committee and plenary scrutiny

The key mechanism whereby the Assembly scrutinises the actions and proposals of the Welsh Government and, where relevant, other actors such as Welsh public bodies and the UK Government, is through its committees. Committees hold in-depth inquiries into whatever matters they choose, over whatever time-scale they choose. They collect evidence in a variety of ways; normally this will include an open consultation and specially-commissioned expert and sectoral evidence; it may also involve a variety of methods for seeking the views of as representative a section of the interested public as possible.

Committees report on their findings and conclusions to the Assembly and publish their reports. Frequently, the reports lead to debates in the Assembly. The Welsh Government has committed to respond to all Assembly committee reports.

Pre- and post-legislative scrutiny, which consider the context and need for legislation, and whether the legislation is achieving its aims, respectively, are dealt with in the same way as policy inquiries. Formal legislative scrutiny of Bills works in a similar way, although the timetable for that is set by the Business Committee, rather than being at individual committees' discretion. Formal legislative scrutiny also includes specific stages for the consideration of amendments.

Financial scrutiny of legislation, budgets and taxation are carried out in a similar way by the Assembly's Finance Committee.

Scrutiny also takes place in Plenary, for example via questions to Ministers, including emergency and topical questions. Other methods which may elicit Government responses, or more information about Government views or action are debates proposed by individual Members or by different parties, and motions or amendments to motions tabled by individual Members.

Constraints on committee arrangements and capacity

Although the Assembly has always been able to determine its committee system (apart from the mandatory establishment of an Audit Committee), since the amendments to the Welsh devolution settlement in April 2018, the Assembly now has complete discretion as to how

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committees are composed. This gives the Assembly control over the establishment of committees and the mechanisms to scrutinise new areas of devolved powers.

The main constraint on the Assembly's ability to carry out in-depth scrutiny of all current or future areas of Welsh Government action and proposals is the small number of Assembly Members, and the even smaller number of those not holding a parliamentary office, forming part of the Welsh Government or holding a Welsh Government role.

Once the Presiding Officers and members of the Welsh Government are excluded, assuming the First Minister chooses to fill all 14 potential Welsh Government positions, only 44 Members are left to undertake the Assembly's scrutiny functions. Currently there are 14 Assembly Committees. Most sit every week of Assembly terms, but some sit fortnightly. Committee sizes vary between four and eight Members, apart from the Committee for the Scrutiny of the First Minister, which is made up of the Deputy Presiding Officer and the Chairs of the other Assembly Committees, and which sits once a term.

Impact on committees of the devolution of new powers

Devolution of additional powers would require consideration by a future Assembly as to the priorities which should be the focus of committee scrutiny. In turn this requires consideration of the number of committees it establishes, having regard both to the breadth of the policy remit and the available number of Members able to sit on those committees.

The Scottish Parliament has a large Justice Committee. That Committee has a sub-committee devoted to Policing; the sub-committee has seven Members (i.e. only one less than a typical full policy scrutiny Committee within the Assembly).

The Westminster Parliament has only one Justice Committee. However, the House of Commons forms committees to examine individual Bills, including Bills on any of the subjects listed above. Criminal justice-related Bills are a frequent part of the Westminster diet. A rough assessment of UK Parliamentary Acts since 1999 suggests that there has been at least one Bill every two years which would be wholly or partly within current Assembly competence if all the topics listed above for possible devolution were in fact devolved but the current reservations concerning sexual offences and particularly serious offences against the person were retained. If those reservations were also to be lifted, those numbers would go up significantly.

In the current Assembly system, all such Bills would fall to a Justice Committee, rather than being examined by separate Bill Committees. That estimate obviously ignores potential different

policy aims that the Welsh Government might seek to achieve via the criminal law and criminal justice systems.

On the basis of the experience of the Scottish Parliament, it is likely that devolution of all the areas listed above might require the formation of more than one committee to facilitate in-depth scrutiny.

Members' capacity and the Expert Panel's Recommendations

The burdens that Members carry, and the implications for good scrutiny, are discussed in depth in the report of the independent Expert Panel on Assembly Electoral Reform, *A Parliament that Works for Wales* (December 2017). This showed that, as at July 2017, excluding the Business Committee and the Committee for the Scrutiny of the First Minister, 12% of Assembly Members had 3 committees to attend each, while 42% had two. The equivalent numbers in the Scottish Parliament were 4% and 29%. When compared with the House of Commons, the proportions would be even further apart: at Westminster, not all MPs will be members of even one Select Committee, never mind more than one..

It must be remembered that, in addition to "normal" work for each committee they sit on, Members may be chairing one committee, or leading their political group, or acting as spokesperson for that group on a policy area, or fulfilling more than one of these roles. They also have Plenary to attend, their important constituency/regional work to deal with, and their roles as party members, campaigners and employers to fulfil.

The Expert Panel on Assembly Reform noted the following in its report:

08.20. In 2004, the Richard Commission recommended that Members should sit on just one major subject committee in order to develop subject expertise and facilitate better scrutiny. This sensible aim was also raised with us in evidence from Lord Lisvane, who suggested that:

...being a member of more than one committee dilutes the effort and knowledge, and reduces effectiveness.

08.21. We discussed the issue with two leading parliamentary experts—Lord Norton and Greg Power (a specialist who has worked with parliaments and political institutions in more than 30 countries). Both agreed that it would be reasonable to apply the following principles to committee membership:

- i. Committee members should generally sit on no more than two committees;*
- ii. Committee chairs should sit only on their own committee (unless harnessing their particular policy expertise, for example, to enhance financial scrutiny or the scrutiny of the First Minister).*

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The Panel endorsed this recommendation and it was an important factor underlying its recommendation that the Assembly should increase in size to at least 80, and preferably closer to 90, Members.

The process of reforming the Assembly, including an expansion in the number of its Members, as recommended by the Expert Panel would, therefore, be key to facilitating proper scrutiny of the use of such significant further devolved powers as policing, the court service, all tribunals operating in Wales, sentencing, prison policy and the prison service, probation and the probation service and financial support for legal proceedings (legal aid).

Staff Resources to support scrutiny

In terms of officials, a typical Assembly Committee on a policy area will be supported more or less full-time by a team of four clerks: the Clerk, the Second Clerk, the Deputy Clerk and a Committee Support Officer. On the Research Service side, a committee of this kind will be occupying one or more senior or more junior researchers for a significant part of their time, depending on how many inquiries or pieces of legislation the Committee is dealing with in parallel, and what precise areas of policy they concern. The Committee will also be supported part-time by at least one lawyer, communications professional and translator.

All these professionals form an “integrated team” to support the Committee, but the Assembly Commission seeks to work in a flexible and agile manner, so that at times additional support is pulled in from each of these Service areas, as needed, and all the officials (except normally the Clerks) will also work on other matters in any given week or even day.

As mentioned above, once devolution of new powers are agreed, the Assembly Commissioners would need to consider the impact on the Assembly and its committees, to carry out work to estimate the resources required and determine how best to meet those new demands whether through re-prioritisation of existing resources, reviewing the level of support it provides to Members or seeking additional resources.

Access to information and Welsh expertise

In terms of the availability of information to support scrutiny of policy development and implementation, the Assembly Research Service reports great difficulty in obtaining Wales-only data from the UK Ministry of Justice and Home Office. However, recently, the Wales Governance

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Centre at Cardiff University has led the way in publishing specific data for Wales on criminal justice for the first time. Thus, information that could support policy development and scrutiny is starting to become available. The further development of research and statistical resources in this area of policy is something that both Welsh Government and the Assembly would have to address, whether via recruitment, training or the use of external expertise, for instance within the academic community.

In terms of the availability of relevant witnesses for Assembly Committees, the Assembly Research Service notes that many of the organisations that represent the views and interests of offenders and ex-offenders are not Wales-based. New contacts and relationships with organisations of this kind would need to be formed and maintained, in the same way as the Committee Service does with a large range of representative organisations across the range of current Assembly competence areas.

Conclusion

The devolution of justice powers to Wales will create a significant level of additional activity for the Assembly from a scrutiny perspective – both in terms of policy and legislative work. The way in which the Assembly undertakes that additional activity will be influenced not only by the demands resulting from the devolution of justice powers, but also by the Assembly's capacity to respond to those demands. A key factor in this will be whether the recommendation of the Expert Panel that the size of the Assembly should be increased is implemented.

The Assembly Commission has a statutory duty to provide ..."the property, staff and services required for the Assembly's purposes." It is not possible at this point to estimate the degree of additional support the Commission would need to provide for Assembly Members to carry out this additional work. That will very much depend on, among other things, the way and the degree to which the Welsh Government uses those powers and over what time-frame. The Assembly's response to scrutiny of those powers will also depend on the number of Members, committee appetites/priorities and the wider political context at the time.

The Assembly has faced almost constant change since its establishment in 1999 when we were one corporate body with the Welsh Government. Acts passed in 2006, 2011, 2014 and 2016

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have changed both the governance arrangements and the powers of the Assembly. In addition to our formal separation from Welsh Government in 2007 we gained powers to make primary legislation and more recently powers over taxation, including revision to income tax rates.

The 60 Members, their staff and the Commission's staff have approached these changes with their impact on the lives of people in Wales at the forefront of their minds and we have adapted to those changes. We will take the same approach to any new powers that may be devolved on justice arrangements.