

## Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

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Lleoliad:  
Ystafell Bwyllgora 2 – Y Senedd

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Dyddiad:  
Dydd Llun, 5 Mawrth 2012

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Amser:  
14:30

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Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



I gael rhagor o wybodaeth, cysylltwch a:

**Steve George**  
Clerc y Pwyllgor  
029 2089 8242  
[CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

**Olga Lewis**  
Diprwy Glerc  
020 2089 8154

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### Agenda

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1. Cyflwyniad, ymddiheuriadau, dirprwyon a datganiadau o fuddiant
2. Offerynnau nad ydynt yn cynnwys unrhyw faterion i'w codi o dan Reol Sefydlog 21.2 neu 21.3

Offerynnau'r Weithdrefn Penderfyniad Negyddol

**CLA96 – Rheoliadau Tribiwnlys Anghenion Addysgol Arbennig Cymru 2012**  
Y weithdrefn negyddol. Fe'u gwnaed ar 8 Chwefror 2012. Fe'u gosodwyd ar 13 Chwefror 2012. Yn dod i rym ar 6 Mawrth 2012.

**CLA97 – Rheoliadau Mesur Addysg (Cymru) 2009 (Treialu) 2012**  
Y Weithdrefn Negyddol. Fe'u gwnaed ar 8 Chwefror 2012. Fe'u gosodwyd ar 13 Chwefror 2012. Yn dod i rym ar 6 Mawrth 2012.

**CLA98 – Rheoliadau Ardrethu Annomestig (Taliadau Gohiriedig) (Cymru) 2012**  
Y Weithdrefn Negyddol. Fe'u gwnaed ar 20 Chwefror 2012. Fe'u gosodwyd ar 23 Chwefror 2012. Yn dod i rym ar 16 Mawrth 2012.

**CLA99 – Rheoliadau Ardrethu Annomestig (Hysbysiadau Galw am Dalu) (Cymru) (Diwygio) 2012**

Y Weithdrefn Negyddol. Fe'u gwnaed ar 20 Chwefror 2012. Fe'u gosodwyd ar 23 Chwefror 2012. Yn dod i rym ar 16 Mawrth 2012.

**CLA100 – Gorchymyn Ardrethu Annomestig (Rhyddhad Ardrethi i Fusnesau Bach) (Cymru) (Diwygio) 2012**

Y Weithdrefn Negyddol. Fe'i gwnaed ar 20 Chwefror 2012. Fe'i gosodwyd ar 23 Chwefror 2012. Yn dod i rym ar 16 Mawrth 2012.

Offerynnau'r weithdrefn penderfyniad cadarnhaol

Dim

**3. Offerynnau sy'n cynnwys materion i'w codi gyda'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3**

Offerynnau'r weithdrefn penderfyniad negyddol

Dim

Offerynnau'r weithdrefn penderfyniad cadarnhaol

Dim

**4. Ymchwiliadau'r Pwyllgor: Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru (Tudalennau 1 – 357)**  
**Papurau i'w nodi:**

**CLA(4)-05-12(p1)** – Tystiolaeth a gafwyd mewn ymateb i'r galwad am dystiolaeth ysgrifenedig

**Yr Athro John Williams, Adran y Gyfraith a Throsedddeg, Prifysgol Aberystwyth**  
(Tudalennau 358 – 361)

Yr Athro John Williams, Athro'r Gyfraith, Adran y Gyfraith a Throsedddeg, Prifysgol Aberystwyth

**Papurau:**

**CLA(4)-05-12(p2)** – Cyflwyniad gan yr Athro Williams (Saesneg yn unig)

**5. Gohebiaeth y Pwyllgor**

**Canllawiau Llywodraeth Cymru ar y Dewis o Weithdrefn Penderfyniad  
Cadarnhaol neu Negyddol mewn Is-ddeddfwriaeth (Tudalennau 362 – 368)**

**Papurau:**

**CLA(4)-03-12 (p4)** – Llythyr at y Cadeirydd gan y Cwnsler Cyffredinol, dyddiedig 24 Ionawr 2012 (Saesneg yn unig)

**CLA(4)-03-12 (p4)** – Atodiad (Saesneg yn unig)

**CLA(4)-05-12 (p3)** – Llythyr gan y Cadeirydd at y Cwnsler Cyffredinol, dyddiedig 16 Chwefror 2012 (Saesneg yn unig)

**CLA(4)-05-12 (p4)** – Ymateb y Cwnsler Cyffredinol, dyddiedig 28 Chwefror 2012 (Saesneg yn unig)

## **6. Dyddiad y cyfarfod nesaf**

12 Mawrth 2012

**Papurau i'w nodi:**

**CLA(4)-04-12-** Adroddiad o'r cyfarfod a gynhaliwyd ar 6 Chwefror 2012

## **Trawsgrifiad**

Gweld [trawsgrifiad o'r cyfarfod](#).

## **7. Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer yr eitemau a ganlyn:**

Caiff Pwyllgor benderfynu gwahardd y cyhoedd o gyfarfod neu unrhyw ran o gyfarfod:

(vi) lle mae'r Pwyllgor yn cyd-drafod casgliadau neu argymhellion adroddiad y mae'n bwriadu ei gyhoeddi.

## **8. Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru – Trafod y dystiolaeth lafar a gafwyd gan yr Athro John Williams**

## **9. Ymchwiliad i roi pwerau i Weinidogion Cymru yn Neddfau'r DU: ystyried yr adroddiad drafft (Tudalennau 369 – 413)**

**CLA(4)-05-12(p5)** – Adroddiad drafft (Saesneg yn unig)

## **10. Bil Is-ddeddfau Llywodraeth Leol (Cymru): ystyried yr adroddiad drafft (Tudalennau 414 – 437)**

**CLA(4)-05-12(p6)** – Adroddiad drafft

**CLA(4)-05-12(p7)** – Gwybodaeth ychwanegol gan y Gweinidog Llywodraeth Leol a Chymunedau

## **11. Opsiynau ar gyfer cynnal cyfarfodydd y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol mewn slotiau amgen**

**Cynulliad Cenedlaethol Cymru**  
Y Pwyllgor Materion Cyfansoddiadol  
a Deddfwriaethol

Ymchwiliad i sefydlu awdurdodaeth  
ar wahân i Gymru

Ymatebion i'r ymgynghoriad

Mawrth 2012



# **Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol**

## **Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru**

### **Ymatebion i'r ymgynghoriad**

WJ 1 - Ymateb personol (Dr Peter Freeman) (Saesneg yn unig)

WJ 2 - Ymateb personol (Mr Gwyn Hopkins) (Saesneg yn unig)

WJ 3 - Sefydliad y Cyfrifwyr Siartredig (Saesneg yn unig)

WJ 4 - Ymateb personol (Dr Dominic De Saulles) (Saesneg yn unig)

WJ 5 - Ymateb gan gynrychiolwyr Cymru o Gyngor Cenedlaethol Cymdeithas yr Ynadon (Saesneg yn unig)

WJ 6 - 14 o Farnwyr Rhanbarth sy'n gwasanaethu mewn llysoedd ledled Cymru(Saesneg yn unig)

WJ7 - Ymateb personol (David Hughes) (Saesneg yn unig)

WJ 8 - Ymateb gan y Cyngor Cyfiawnder Gweinyddol a Thribiwnlysoedd (Saesneg yn unig)

WJ 9 - Ymateb gan Ombwdsmon Gwasanaethau Cyhoeddus Cymru (Saesneg yn unig)

WJ 10 - Ymateb personol (Yr Athro Gerry Maher QC) (Saesneg yn unig)

WJ 11 - Ymateb gan Gymdeithas Ynadon Cymru a Lloegr (Saesneg yn unig)

WJ 12 - Ymateb personol (David Williams, Barnwr Uwch Dribiwnlys y Deyrnas Unedig) (Saesneg yn unig)

WJ13 - Ymateb personol (Christopher Morton, Barnwr Cylchdaith) (Saesneg yn unig)

WJ 14 - Ymateb personol (Yr Athro R. Gwynedd Parry, LLB, PhD, FRHistS, Bargyfreithiwr)

WJ 15 - Ymateb gan Bwyllgor Cymreig Cyngor y Barnwyr, Barnwriaeth Cymru a Lloegr (Saesneg yn unig)

- WJ 16 - Ymateb personol (Yr Athro Thomas Glyn Watkin) (Saesneg yn unig)
- WJ 17 - Ymateb personol (Ei Anrhydedd y Barnwr Wyn Rees)
- WJ 18 - Ymateb personol (Rhys ab Owen Thomas) (Saesneg yn unig)
- WJ 19 - Ymateb personol (Yr Anrhydeddus Mr Ustus Roderick Evans) (Saesneg yn unig)
- WJ 20 – Ymateb gan Gymdeithas Barnwyr Cymru (Saesneg yn unig)
- WJ 21 – Ymateb gan Gymdeithas y Cyfreithwyr (Saesneg yn unig)
- WJ 22 - Ymateb personol (Barnwr Rhanbarth sy'n gwasanaethu ar hyn o bryd) (Saesneg yn unig)
- WJ 23 - Ymateb personol
- WJ 24 – Ymateb gan Ysgol y Gyfraith, Prifysgol Bangor, ac atodiad i'r ymateb (Saesneg yn unig)
- WJ 25 – Ymateb gan Hugh James (cwmni cyfreithiol) (Saesneg yn unig)
- WJ 26 – Ymateb gan y Bwrdd Gwasanaethau Cyfreithiol (Saesneg yn unig)
- WJ 27 – Ymateb gan Uned Llywodraeth Ganolog a Chyfiawnder Bwrdd yr Iaith Gymraeg (Saesneg yn unig)
- WJ 28 – Ymateb gan Mr Emyr Lewis a'r Athro Dan Winton (Prifysgol Caerdydd) (Saesneg yn unig)
- WJ 29 – Ymateb gan Bwyllgor Sefydlog Cymru'r Gyfraith (Saesneg yn unig)
- WJ 30 – Ymateb gan Gomisiwn y Gyfraith (Saesneg yn unig)

## CLA WJ 1

### **Inquiry into the establishment of a separate Welsh jurisdiction Personal Response (Dr Peter Freeman)**

Following the article by David Melding in Monday's Western Mail, in which he asks for views on the above, I would like to strongly object to a separate jurisdiction for Wales.

The legal system is not perfect but it is better than many other countries and the standard of High Court and Court of Appeal judges is high. There is a danger of throwing all this away to satisfy the insatiable demands of those who wish to have greater and greater devolution. There have always been only a few judges from Wales who were good enough for the High Court and Court of Appeal. Currently, there are about six and none on the Supreme Court bench. In fact, I can't remember a Welsh judge on the Supreme Court (or House of Lords) since Lord Edmund-Davies and the Lord Chancellor in Wilson's government (I forget his name! from Llanelli). There is just not the talent there as Wales is a small country.

Also, a separate jurisdiction would mean the continuation of the downward slope to separation and the break-up of the UK. There is also the question of cost in a climate where every bit of expenditure should come under scrutiny and be questioned as to its necessity.

(DR.) Peter Freeman

[Secretariat was asked to add the following phrase to the response: "...the Lord Chancellor I was thinking of was Lord Elwyn-Jones.."]



## CLA WJ 2

### **Inquiry into the establishment of a separate Welsh jurisdiction Personal response (Mr Gwyn Hopkins)**

#### **VIEWS ON FORMING A WELSH JURISDICTION.**

Although not a member of the legal profession I welcome the opportunity to comment on this issue.

As a result of last February's referendum the National Assembly is now the body that makes laws on the 20 fields under its control. The Welsh Government is now gradually legislating in these fields and, as a result, a body of Welsh Law is being established. This is very likely to differ from English Law in the same fields, with the difference inevitably increasing as time goes on. As the two sets of laws gradually diverge, more-and-more widely differing laws (even diametrically opposite and conflicting ones) will emerge between Wales and England. Having one jurisdiction to administer two such substantially diverse sets of laws doesn't seem to me - as a layman - to make any sense at all. Moreover, Scotland, Northern Ireland and even the tiny states of Isle of Man, Jersey and Guernsey have their own legal jurisdictions and run their own police services as well, making Wales stick out like a sore thumb in this respect. These successful precedents add weight to my view that establishing a Welsh jurisdiction is a rational and sensible course of action.

In my opinion, it would also be wise to consider the political background in which this issue is being considered. However grudgingly devolution is accepted in some quarters it is here to stay and it is a one-way-street. One can stop on it but it is not really possible to go backwards. Although the questions in the 1979, 1997 and 2011 referendums were different, their pro-Assembly results (20.3%, 50.3% and 63.5%), in my view, show "how the wind is blowing". Devolution is clearly becoming more acceptable to the people of Wales and - with increasing numbers of young electors having no recollection of Wales without its Assembly - the trend is very likely to continue, and may well soon be accelerated by political events in Scotland. I contend that politicians have a duty to respond positively to this trend. Forming a Welsh jurisdiction and, simultaneously, devolving responsibility for Wales' Police Service to the National Assembly appear to be the next rational, sensible and desirable steps in this general direction.

Gwyn Hopkins  
46 Cleviston Park  
Llangennech  
Llanelli SA14 9UP  
Tel: 01554-820249

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from The Institute of Chartered Accountants**



The Committee Clerk  
Constitutional and Legislative Affairs Committee  
Tŷ Hywel  
National Assembly for Wales  
Cardiff CF99 1NA

e-mail: [CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

25 January 2012

Dear Sir,

**INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE LEGAL JURISDICTION FOR WALES**

The Institute of Chartered Accountants in England and Wales (ICAEW) is delighted to have the opportunity to respond to the Inquiry into the Establishment of a Separate Legal Jurisdiction for Wales.

As a world class professional accountancy body, the ICAEW provides leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry to maintain the highest standards.

Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. ICAEW ensures that these skills are constantly developed, recognised and valued.

ICAEW is an active member of Business Wales and the Council for Economic Renewal, and most of our 3,000 members in Wales either advise or run small or medium sized businesses; in fact, evidence suggests that over 80% of businesses in Wales use the services of a chartered accountant. By drawing on their collective experience, ICAEW Wales is well placed to act as a barometer for the views of the private sector.

ICAEW Wales believes that it is critically important to make the operating environment for businesses in Wales simpler, rather than more complex. Businesses seeking to operate in more than local markets

need fewer, not more, barriers to streamlining their operations and it is essential that they are not deterred from investing in Wales by the opportunity costs of meeting a different set of legislative requirements than in England.

We are therefore not convinced that Wales requires a separate legal jurisdiction and believe more generally that the default position of the Welsh Government should be that legislative and regulatory frameworks which impact on businesses in Wales should only diverge from those in England where there is a clear and demonstrable benefit. Legislation should always be the last, not the first resort.

We hope this is useful.

Yours faithfully

David Leron  
Director for Wales

E: [david.leron@icaew.com](mailto:david.leron@icaew.com)

CLA WJ 4

**Inquiry into the establishment of a separate Welsh jurisdiction  
Personal Response (Dr Dominic De Saulles, Solicitor Advocate)**

The Law Building  
Museum Avenue  
Cardiff University  
CF10 3AX

25<sup>th</sup> January 2012

The Committee Clerk  
Constitutional and Legislative Affairs Committee  
Tŷ Hywel  
National Assembly for Wales  
Cardiff CF99 1NA

Dear Mr George

**Inquiry into the establishment of a separate Welsh jurisdiction**

I enclose a series of questions relating to the Inquiry which I think that it would be useful for the Inquiry to consider.

To some extent, of course, I am looking ahead but these matters need to be considered in advance particularly in circumstances where the scope of the powers of the Welsh Assembly is likely to increase and the gap between the laws of England and Wales to increase with it.

This submission is made on a personal basis.

Best wishes

Yours sincerely



Dominic De Saulles  
(Solicitor- Advocate)

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# The establishment of a separate Welsh jurisdiction?

A series of practical questions about the Administration of  
Justice in civil and commercial cases

To:  
The Committee Clerk  
Constitutional and Legislative Affairs Committee  
Tŷ Hywel  
National Assembly for Wales  
Cardiff CF99 1NA

e-mail: [CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

**DJ De Saulles**  
**25<sup>th</sup> January 2012**

## **Companies**

Will registration be for England and Wales or will it be for England *or* Wales?

## **Domicile**

How will domicile be defined?

Will the concept of company registration give way to the question of where the company has its seat?

*[Domicile, when mentioned hereafter in this document, is intended to incorporate the concept of where the company has its seat]*

## **Jurisdiction**

To what extent will there be freedom to choose jurisdiction?

What if companies domiciled in England choose to insert a contractual clause giving jurisdiction to the courts of England?

What if companies domiciled in Wales choose to insert a contractual clause giving jurisdiction to the courts of England?

In such cases would provision be made (under English procedural rules)

for cases to be heard eg in Bristol or Manchester? or

for cases to be tried by a judge from England sitting in a Welsh courtroom?

## **Choice of Law**

What if companies domiciled in England choose to insert a contractual clause incorporating the laws of England (and not Wales) into the contract?

What if companies domiciled in Wales choose to insert a contractual clause incorporating the laws of England (and not Wales) into the contract?

## **Service**

Will the rules as to deemed service by post apply in Welsh civil cases where the defendant is domiciled in England?

Will the rules as to deemed service by post apply in English civil cases where the defendant is domiciled in Wales?

## **Enforcement**

Will judgments be enforceable without some form of recognition procedure?

I.e. will the judgment of an English court be treated as akin to a foreign judgment when being enforced in Wales?

I.e. will the judgment of a Welsh court be treated as akin to a foreign judgment when being enforced in England?

Will there be any potential for the enforcement of such judgments being challenged on the grounds that the judgment of a court in one jurisdiction runs counter to the public policy of the other jurisdiction?

Will there be a need to utilise a similar procedure to that pertaining to the enforcement of Scottish judgments in England and Wales?

How much would such a procedure delay enforcement?

How much would such a procedure increase the cost to the judgment creditor?

### **Procedure**

What provisions will there be for transfer of civil and commercial cases between Wales and England?

Will the Civil Procedure Rules apply in Wales?

If yes, will there be Welsh representation on the Civil Procedure Rules Committee?

If no, who will undertake the drafting of new rules?

How much will that cost?

What extra costs would be imposed on legal professionals who need to be fluent in two different sets of rules?



## **Judges**

Will District Judges be able to sit in cases in both jurisdictions?

Will Circuit Judges be able to sit in cases in both jurisdictions?

To what extent will judges at this level be able to relocate from either jurisdiction?

What impact if any will there be to the ease of recruitment to the bench in Wales?

What impact if any will there be on promotion prospects for judges serving in Wales?

Will High Court judges be able to sit in cases in both jurisdictions?

If not, will that impact on the quality of recruitment to the benches in England and Wales?

If not, will that impact on the ease of recruitment to the bench in Wales?

If not, what impact on promotion prospect will this have for judges serving in Wales?

Will the Court of Appeal hear only Welsh cases when sitting in Cardiff? What for example, about cases from Bristol?

Will the Court of Appeal when sitting in Cardiff (or in London) be able to offer judges with Welsh expertise/experience on a long term basis?

How will that be managed?

What role will the Lord Chief Justice and other senior judges have in relation to Welsh Judges?

## **Courts**

Will there be a new Senior Court (High Court and Court of Appeal) exclusively for Wales?

How would it be staffed?

Who would serve on it? Would judges from England be able to sit?

What provision will be made for cases from Wales to go to the Supreme Court?

Will there be a constitutional arrangement to ensure that Wales has the same weighting of representation in the Supreme Court as Northern Ireland currently does.

If the Union is dissolved, what weighting would be appropriate for Wales in a Supreme Court without Scottish judges?

## **Legal professionals**

Will existing legal professionals in England have:

- automatic rights of audience in Wales, and
- the right to handle reserved work within Wales?

Will existing legal professionals in Wales have:

- automatic rights of audience in Wales, and
- the right to handle reserved work within England?

What impact will the creation of a new jurisdiction have on commercial law firms in Wales who currently do work for companies domiciled in England and/or work that relates to England?

Will it be harder for Welsh professionals to bid for work from England?

Might there be a reverse effect where placing work in Wales could be sold as a way of 'off-shoring'?

## **Education and Training**

Will professionals be able to do their qualifying law degrees and vocational education in either England or Wales?

Will courses in Wales have to have a minimum level of English law content?

Will courses in England have to have a minimum level of Welsh law content for those who wish to practice in Wales?

## **Legal Regulators**

Will the BSB and the SRA have responsibility for regulating Welsh professionals?

What will be the additional cost of this?

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from the Welsh representatives of the National Council of the  
Magistrates' Association**

**INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH  
JURISDICTION**

**Evidence to the Constitutional and Legislative Affairs Committee of the  
Welsh Assembly**

1. Thank you for the opportunity to give our views on the establishment of a separate Welsh Jurisdiction. We are aware that the Judicial Policy Committee of the Magistrates' Association will provide a response on behalf of that organisation. However, this is a considered response from a number of individual Justices of the Peace, currently serving in the courts within the Principality. We are aware that you are seeking views on the following specific matters as well as on any other relevant matter:

- the meaning of the term 'separate Welsh jurisdiction'
- the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction
- the practical implications of a separate jurisdiction for the legal profession and the public
- the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system

**Summary**

2. The result of the 2011 referendum in Wales provided the National Assembly with powers to make laws for Wales and this, *inter alia*, has prompted a further examination as to whether a separate Welsh jurisdiction is needed. The All Wales Convention Report in 2010 concluded that "a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence, even if the Assembly were to acquire the substantial powers of the Scottish model". As Magistrates serving in Wales we are not yet convinced there is a strong enough case made for such a change and moreover, in terms of time and cost alone, we doubt if the case is yet strong enough to necessitate a new inquiry.

## **The meaning of the term ‘separate Welsh jurisdiction’**

3. Devolution has many facets from full independence to greater autonomy but within a common jurisdiction. Thus a clear definition from the outset of what the current Welsh Assembly Government means when it uses the expression “separate Welsh Jurisdiction” would undoubtedly assist. That the National Assembly has powers to make laws for Wales does not automatically mean that this function cannot proceed unless there is a completely separate (independent) Welsh jurisdiction.

We note that the introduction of the paper implies that we now have a *separate independent* court administration in Wales – “HMCS (Wales)”. This is not correct (HMCTS(Wales) not HMCS(Wales)) as it is a regional department of HMCTS which is part of the Ministry of Justice, based in London under a Cabinet Minister, Moreover, the formation of the various courts, as detailed in the committee’s introductory letter, already provides an acknowledgement of the changed constitutional position of Wales following devolution.

## **The potential benefits, barriers and costs of introducing a separate Welsh jurisdiction**

4. As already mentioned, the various new courts already provide an acknowledgement of the changed constitutional position. What precisely will be the benefit that a separate jurisdiction will bring? How cost-effective would that be? The scoping paper already recognises that the conclusion of the All Wales Convention, in 2010, that “a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence, even if the Assembly were to acquire the substantial powers of the Scottish model”. That committee also stated that “the courts of England and Wales are fully competent to decide cases involving the laws of England and Wales, the laws of Wales only and European Union law”. To the best of our knowledge this remains true. Thus the principal question that comes into play is just *what* has radically changed, since this report was published, to affect the delivery of justice – and here we would include the recent changes with the courts that have already been set in place – to require an inquiry now?

5. The scoping paper outlines arguments ‘in favour’ and ‘against’ but mostly repeats pre-2010 papers and views which we would presume were already considered by the previous enquiry by the All Wales Convention. The opening line suggests that the calls for a separate jurisdiction have

“strengthened from some quarters”. Which quarters and how strong? As serving Magistrates within Wales we would not accept the later assertion, in the scoping paper, of Winston Roddick that devolved control ‘*would bring justice closer to the people for whom the laws were made*’. As Magistrates we already fulfil that duty.

6. For a number of years the Magistracy has made significant and successful efforts to achieve greater consistency and commonality in our sentencing and in the core training that we undertake. A separate jurisdiction would have to become responsible for training and sentencing guidelines and would therefore require a Judicial College for Wales and a Sentencing Council (Wales) with a potential consequence of different guidelines to England? We do not believe that there are the resources either in terms of staff or of finance within the WAG devolved budget to support such a function were devolvement to a separate Welsh jurisdiction to occur. We do not know what this cost will be but we presume that if resources are allocated to setting up a separate jurisdiction, then it is not available for other things. Which other devolved budget – education perhaps – would give up resources for something for which a clear need has yet to be demonstrated? Indeed, would the Welsh public readily agree to removal of resources from one budget to another to set up a separate jurisdiction? The overall ‘cost’ of a supporting a separate jurisdiction could be very high indeed.

### **The practical implications of a separate jurisdiction for the legal profession and the public**

7. There is much change currently underway in the HMCTS organisational structure and a proposal to initiate a separation of the jurisdiction will only result in a further lengthy and costly examination of issues and requirements (and undoubtedly a further lowering of morale for staff and users within the current court system) that we remain unconvinced that a proposal for a separate jurisdiction would be affordable, cost-effective or in the best interest of the communities. We also consider it is worth making the point about the speed at which the Assembly, and the Welsh Office before it, has taken on substantial new responsibilities. There has been a substantial increase in staff numbers and now a cutting back in response to the current financial pressures. We would suggest that the evidence that the Assembly administration has 'won its spurs' in terms of competence is mixed and this capability should be clear to both the administration and the public before any consideration of devolution of further significant responsibilities.

**The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that uses a common law system.**

8. We have no specific knowledge of the operation of the court systems in other small jurisdictions within the UK. However, unless there is a clear demonstration of real benefits outweighing costs in setting up a separate jurisdiction or firm evidence of significant failure of the present jurisdiction to support the delivery of justice our current views are more compatible with the opinion expressed by a former Lord Chancellor, within the scoping paper, that future development should “build on what has already happened over the past ten years but within a common jurisdiction”.

Response submitted by the Welsh representatives of the National Council of the Magistrates’ Association



## CLA WJ 6

### **Inquiry into the establishment of a separate Welsh jurisdiction Response from 14 District Judges based at various Courts throughout Wales**

This submission is made by the District Judges and is submitted to The Constitutional and Legislative Affairs Committee of the Welsh Assembly Government

1 As Judges we recognise that it would be wholly inappropriate for us to make any comment which is political. What follows therefore is subject to this proviso

2 The District Bench deals with the majority of the Civil work in England and Wales and in our experience the existing jurisdiction is well able to deal with any difference in the law that exists between England and Wales

3 The existence of HMCTS (Wales), the Mercantile Court for Wales, the Administrative Court of Wales and other such bodies does not in our view justify a separate jurisdiction

4 The reality is that there is a common jurisprudence between England and Wales which has served us well

5 The cost implications of having a separate jurisdiction would in our view be considerable

6 Such a proposal would complicate unnecessarily legal practice in Wales to no readily ascertainable benefit

7 Some of the questions to be answered would in our view be:

- How Judges would be appointed if there were to be a separate jurisdiction?
- Would there need to be a specific legal qualification before being able to practice in Wales?
- Would there need to be a Lord Chief Justice of Wales? (and a Deputy Lord Chief Justice of Wales ? )
- Would there need to be Welsh Heads of Division eg of the Queens Bench Division, the Family Division and so on?
- Would there need to be a separate set of Court Rules governing procedure in the civil and family courts?

8 Whilst we of course accept that in certain areas, the law in Wales will differ from that in England, we are of the opinion such differences are already being dealt with by the Courts

9 What is needed in our view is a mechanism whereby the difference in legislation between England and Wales is readily ascertainable. This should be attainable without having to set up a separate jurisdiction.

10 As District Judges we are yet to be persuaded of the benefits of any separate Welsh jurisdiction or the need for such jurisdiction

31<sup>st</sup> January 2012

**Inquiry into the establishment of a separate Welsh jurisdiction  
Personal Response (David Hughes)**

**Memorandum of evidence to the Constitutional and Legislative  
Affairs Committee of the National Assembly of Wales**

**Re a Separate Welsh Jurisdiction**

**Introduction**

- 1 I am a barrister practising at the Bar in Cardiff since June 2007. From 1997 until that date<sup>1</sup>, I practised at the Gibraltar Bar. My practice in Cardiff encompasses public and administrative law, and in Gibraltar I appeared in a number of cases regarding the interpretation of the Gibraltar Constitution. The practice of appearing before Anglo-Welsh judges in the Gibraltar Court of Appeal has played a significant part in forming my views on the desirability of creating a separate Welsh jurisdiction.
- 2 In this memorandum, I will seek to address the questions posed in the Committee's call for evidence. Although I believe that the creation of a Welsh jurisdiction would be a good thing, in preparing this memorandum I have sought to put before the Committee observations rather than to make points.

**The meaning of the term "separate Welsh jurisdiction"**

- 3 This term is most readily understood by comparing Wales with Scotland and Northern Ireland. Each of the latter has its own law (whether or not made (in the case of statute law) in Edinburgh/Belfast or Westminster); each has its own courts (although UK-wide tribunals may sit in those countries, the courts of England & Wales have no jurisdiction there). Each has its own legal professions.

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<sup>1</sup> Save for a period of pupillage in London.

- 4 Wales has none of these. Although the National Assembly has primary legislative competence in a number of areas, and although the law it makes applies only in Wales, it is still part of the law of England and Wales. Anglo-Welsh courts determine cases involving such law, and therefore legislation made by the National Assembly can be interpreted by courts sitting in England, whose judges may have little or no professional or personal experience of Wales. Welsh lawyers are admitted to practice and regulated by organisations based in England. By way of comparison, Gibraltarian lawyers, although educated in the UK and admitted firstly in one of its component jurisdictions, are admitted and regulated by the Supreme Court of Gibraltar. Gibraltar has its own judicial appointments system. Although its appellate judges are retired Anglo-Welsh appellate judges<sup>2</sup> (sitting part-time), their appointment in Gibraltar is made under Gibraltarian law and has no necessary legal connection to their judicial service elsewhere<sup>3</sup>.
- 5 A Welsh jurisdiction should be understood as involving the recognition of Welsh law as being distinct from English law (although it may well mirror it to a large extent), administered by Welsh courts (as opposed to Anglo-Welsh courts located in Wales), with lawyers admitted to practice in Wales appearing.

### **Potential benefits, barriers and costs of introducing a separate Welsh jurisdiction**

- 6 What the benefits of a separate jurisdiction would be depends, to an extent, on individuals' political views, but it would allow the justice system in Wales to better reflect the needs and priorities of the people of Wales and their elected

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<sup>2</sup> Which itself can be less than ideal, but the use of judges from other jurisdictions is perhaps inevitable in so small a jurisdiction. The same could not be said of Wales.

<sup>3</sup> Gibraltar Constitution, s62.

representatives. It is hard to see how the creation of our own jurisdiction could not bring with it control of the funding of access to justice. Some might want to use this to introduce, for example, a Conditional Legal Aid Fund as used in Hong Kong and some Australian states. Others might want to reform personal injury law by introducing a New Zealand style no-fault compensation scheme and thereby abolishing personal injury litigation. However, some benefits are easily identifiable.

- 7 The most obvious benefit to my mind is that it avoids the risks inherent in having the same courts applying distinct primary legislation from two different sources within the same jurisdiction. I do not believe that the comparison with courts in the United States having to deal with state and federal legislation is apt; the United States is a federal country, its lawyers and judges educated within a legal culture in which different federal and state competences are well understood. Anglo-Welsh lawyers, by contrast, are educated in a unitary tradition, and the Anglo-Welsh jurisdiction is not a federal one.
- 8 My experience in Gibraltar was that it was sometimes difficult for retired Anglo-Welsh judges sitting in the Court of Appeal to adjust their thinking from one appropriate to applying Anglo-Welsh law to one appropriate to applying the Law of Gibraltar. Although this most often manifested itself in the course of argument before the court, an example can be seen in the case of *Rojas -v- Berllaque* [2001-02] *Gib LR* 252, when the majority of the court struggled with provisions of the Gibraltar Constitution that provided for remedies in the event of violations of constitutional rights, preferring instead an Anglo-Welsh approach. That this happened in a jurisdiction physically separate from England & Wales leads me to believe that, if a separate Welsh jurisdiction is not established, at

some point in the future Welsh legislation drafted to be different from that applying in England will be interpreted to mean the same as that applying in England. Although the creation of a separate jurisdiction would not totally eliminate this risk, it would do much to reduce it. This risk would, if it materialised, be a significant detriment to the public. Avoiding it is a considerable benefit.

- 9 Another benefit would be what might be termed the civic culture of Wales. At present, the centre of our jurisdiction is in London. Although the administrative court sits in Wales, there are still some matters which must be heard in London<sup>4</sup>. What the call for evidence describes as “regular sittings” of the court of appeal in Cardiff are, in fact, short visits by a London-based court.
- 10 Amongst the consequences of this is a perception in some quarters that “London is best”. Although there are some very distinguished barristers practising in Wales, other able Welsh practitioners have chosen to live and to make their careers in London. Users of legal services too often instruct solicitors based outside Wales, and even when Welsh solicitors are used, English-based counsel are often instructed. Although its centrality means that, on occasion, people may need to instruct London-based lawyers on very specific issues, at present English-based lawyers<sup>5</sup> are used in cases that could perfectly well be done by Welsh-based lawyers. The negative effects of this are manifold; not only are the legal fees exported to England, but the idea of Wales as a backwater is perpetuated. This in turn poses a dilemma to those starting out on a legal career – do they base themselves in Wales, or do they practice in London? Every able lawyer who makes the

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<sup>4</sup> CPR 54PD 3.1.

<sup>5</sup> And I suggest that where lawyers choose to live and based their practices is a better indication of their commitment to Wales than where they may happen to have been born or raised.

latter choice is a loss to Wales. The same is all the more true for every socially committed lawyer, who could make a contribution not only to legal and business life in Wales, but through community involvement to the cultural and political life of our country. By way of comparison, relatively few Gibraltarians who qualify as lawyers choose to practice elsewhere (although I recognise that physical distance and cultural differences may also influence this).

### **The practical implications of a separate jurisdiction for the legal profession and the public**

- 11 Although it is likely that there would continue, for at least some years, to be significant cross-border practice, one would expect to see less use of London-based layers in Wales. There would be costs benefits to this. There would also be the obvious reduction in costs that would come from not having to travel to hearings in London (other than in the UK Supreme Court).
- 12 Leaving aside the obvious desirability of having a trustworthy and efficient legal system<sup>6</sup>, much is said about the importance of the Anglo-Welsh legal system as a source of business to the UK<sup>7</sup>. But the benefits of this are largely, if not exclusively, confined to the south east of England. If Wales were a separate jurisdiction, we would be free to run a court service at least as trustworthy as that in England and more efficient, and therefore compete against London as a venue for dispute resolution.
- 13 One might well see the cost of regulating the legal profession reduce. Although the need for proper regulation cannot be disputed, there is a good argument to make that lawyers in a Welsh jurisdiction could safely be subject to a more economic regulatory regime. For example, it is questionable whether

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<sup>6</sup> And our current system is certainly trustworthy and largely efficient.

<sup>7</sup> For example, see <http://www.economist.com/node/21543557?fsrc=scn/fb/wl/ar/unsungheroes>

the introduction of Alternative Business Structures serves to answer a need in Wales. From a barrister's point of view, there seems to be a good argument for the regulation of lawyers to be done by function, rather than by title. This is probably not the place to go into the regulation of lawyers at length. I would be happy to supply the committee with further evidence on this, but the long and the short of it is that, if Welsh lawyers are regulated by Welsh bodies, those Welsh bodies can tailor the regulation of Welsh lawyers to meet Welsh needs.

- 14 Thought would have to be given to legal education. In Gibraltar, there is no local legal education, lawyers are admitted in one of the UK's jurisdictions and then apply to the Supreme Court for admission, for which there is no exam. Lawyers are not permitted to establish their own practices immediately, but instead have to practice together with more experienced lawyers for a time.
- 15 There would be no reason why England & Wales should not continue to have joint legal education. The legal systems would be likely to continue to have great similarity, certainly more than exists between the Anglo-Welsh jurisdiction and Gibraltar. One practical advantage to retaining common legal education would be that it would be easier for those intending to become Barristers to continue to have access to the Inns of Court Scholarship funds. The Inns distribute a significant amount of money each year, and they can make a real difference to students from non-wealthy backgrounds looking to come to the Bar (as was my own case). Although physically located in London, the Inns have accumulated their funds as the Inns for the whole of England & Wales. Justice requires that Welsh students continue to be able to access them, and the practical need for scholarships is likely to be greater in Wales than in England.



- 16 There is the question of precedent. Pre-separation caselaw would remain binding precedent. Precedent from post-separation English courts could not be binding precedent, although it would be of persuasive authority. Statutory provision enabling a Welsh Court of Appeal to depart from pre-separation precedent where appropriate should be considered. Wales could be expected to produce a lower volume of caselaw than England, which means that pre-separation precedent could be overruled in England but remain in force in Wales. There may be no compelling reason for statutory change in the law, and the point may not arise for a number of years in Wales. A Welsh Court of Appeal ought to be free to depart from pre-separation precedent in these or similar circumstances.
- 17 In Gibraltar, the lack of local precedent causes little practical difficulty. Although Anglo-Welsh caselaw is not thought to be binding<sup>8</sup>, this has not led to great uncertainty in the law. In practice, Anglo-Welsh caselaw is treated as the starting point, both for common-law matters and when interpreting a similar statute.
- 18 A separate Welsh jurisdiction should include provision for Welsh QCs. Not to appoint silks, when they are appointed in the other UK jurisdictions and in Ireland, would be to deny Welsh lawyers a distinction available in comparable jurisdictions. There is a view that the current system works against able Welsh lawyers. Although this is not the occasion for a detailed critique of the current system, the ideal would be that a Welsh system should command the confidence of the legal profession and the public.

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<sup>8</sup> The relevant statutory provision (the English Law Application Act 1962, s2) is ambiguous, and the interpretation given in Almeda –v- AG for Gibraltar [2003] UKPC 81, [2003] All ER (D) 335 (Nov) (@ para 13) is open to criticism.

- 19 At present, it appears that Anglo-Welsh silks called to the Northern Ireland Bar appear there as silks. They are permitted as a courtesy to appear as if they were local silks in Gibraltar, although their exact status is not clear. The contrary is not true – Northern Irish or Gibraltar Silks appearing before an Anglo-Welsh Court do not appear as silks. This is an unjustifiable discrimination, and should not happen in Wales. Wales should seek an understanding with the other common law jurisdictions within the UK<sup>9</sup> that either silks be mutually recognised, or they be required to appear as juniors when appearing outside the jurisdiction in which they take silk. Thought will also have to be given to whom is to be eligible to take silk in Wales. It would not be desirable for those whose practice is predominantly based in English to seek to take silk in what one hopes would be a more economical Welsh regime for the sake of cost or convenience.
- 20 An issue that has the potential to cause difficulty is the use of the term “English Law” in contracts. Many contracts, particularly standard form contracts, use this term instead of the preferable “Anglo-Welsh law”, and the related term “English Courts”, in controlling law and jurisdiction clauses. At present, the latter means the Courts of England & Wales. The former is probably intended to mean that the contract is controlled by the law of England & Wales<sup>10</sup>. Statutory provision should be considered to make clear the position of both pre-separation contracts and post-separation contracts. It would be highly undesirable, to say the least, for people in Wales who have entered into contracts to find that those contracts are controlled by English, rather than Welsh law, and that the Welsh Courts have no jurisdiction to adjudicate any disputes about them. It should not be presumed that this

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<sup>9</sup> I recognise that this may not be appropriate with Scotland.

<sup>10</sup> What the position is where the law is different in the two countries is unclear.

problem will be confined to pre-separation contracts. Standard forms pre-dating separation are likely to continue to be in use for some time thereafter, and it may be that those who draft standard form contracts will be unaware of separation or fail to take account of it. A recent visit to London revealed almost complete unawareness of the possibility of Wales becoming a separate jurisdiction.

**The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.**

- 21 I believe that I have dealt with this question above. Although not technically within the UK, and although a far smaller jurisdiction than Wales would be, I believe that Gibraltar has some lessons for Wales.
- 22 In addition to comparison with Northern Ireland, it may be that the Australian jurisdictions have lessons to offer. I have in mind particularly Western Australia and Northern Territory, in which a de facto independent Bar is a relatively recent phenomenon, and the lessons that they may have for Wales regarding legal education and the regulation of the Bar in particular.

David Hughes  
30 Park Place  
Cardiff  
CF10 3BS



## Inquiry into the establishment of a separate Welsh jurisdiction Response from Administrative Justice and Tribunals Council



81 Chancery Lane  
London WC2A 1BQ  
T 020 7855 5200  
F 020 7855 5201  
W [www.ajtc.gov.uk](http://www.ajtc.gov.uk)  
E [enquiries@ajtc.gsi.gov.uk](mailto:enquiries@ajtc.gsi.gov.uk)

Mr George  
The Committee Clerk  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff CF99 1NA

2 February 2012

Dear Mr George

Please find enclosed the written evidence of the Welsh Committee of the Administrative Justice and Tribunals Council for the inquiry into the establishment of a separate Welsh jurisdiction.

The Welsh Committee is a statutory body created under the Tribunals, Courts and Enforcement Act and this evidence is submitted on the behalf of the Welsh Committee as a whole.

The Chair of the Welsh Committee, Professor Sir Adrian Webb, would be more than happy to give oral evidence on this issue if it would be of assistance.

Regards,

Sara Ogilvie  
Secretary to the Welsh Committee of the AJTC

**Submission of the Welsh Committee of the Administrative Justice and  
Tribunals Council to the inquiry on the creation of a separate Welsh  
jurisdiction**

Summary

1. This submission notes that although responsibility for the administration of justice is not a devolved matter, in fact Wales does have competence to create and determine legal rights and entitlements under the umbrella of administrative justice. As part of this, Wales has responsibility for the administration of a number of judicial redress mechanisms, such as certain tribunals. The submission goes on to detail the current process of reform affecting tribunals devolved to Wales. The submission does not contain a view as to whether Wales needs its own jurisdiction, but suggests that the need for Wales-only redress mechanisms is likely to increase over time, and that Wales must have in place the appropriate strategy and institutions to handle administrative justice fairly and efficiently.

Welsh Committee of the Administrative Justice and Tribunals Council

2. The Administrative Justice and Tribunals Council was created under Schedule 7 of the Tribunals, Courts and Enforcement Act 2007 (TCE Act), as the successor body to the Council on Tribunals. The Welsh Committee of the AJTC was established under the same Act, and came into existence in June 2008. The Committee is charged with keeping under review the administrative justice system in Wales, considering ways to make it accessible, fair and efficient. The Committee seeks to understand the system from the perspective of the user and, to support this, members of the Committee have a statutory right to visit tribunal hearings.

Administrative justice and devolution

3. The TCE Act defines the administrative justice system as the overall system by which decisions of an administrative nature are made in relation to particular persons, including (a) the procedures for making such decisions; (b) the law under which such decisions are made; and, (c) the system for resolving disputes and airing grievances in relation to such decisions. The

system therefore encompasses the whole cycle of interaction between the individual and the state, from original decisions made by public bodies to the redress mechanisms provided to allow citizens to challenge these decisions or their treatment by the state, such as review panels, ombudsmen and tribunals.

4. The subject matter covered by the administrative justice system is vast, including areas such as asylum and immigration, adoption and fostering, social security entitlements, tax, education admissions and exclusions, mental health, pensions, planning and parking. The Government of Wales Act 2006 transferred executive responsibility for some of these areas to the Welsh Government, whereas responsibility for other areas is retained by Westminster. In most cases where executive responsibility was transferred, responsibility for redress mechanisms in those areas followed. Responsibility for the operation of non-devolved tribunals in Wales sits with Her Majesty's Courts and Tribunals Service.
5. The Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007 contains a list of tribunals for which the Welsh Ministers are the 'authority responsible'. The list is at Annex A. The Welsh Committee of the AJTC also treats as 'Welsh' tribunals the Mental Health Review Tribunal for Wales, the Agricultural Lands Tribunal Wales and the Traffic Penalty Tribunal (when conducting hearings in Wales). Although these tribunals are not listed in the 2007 Order, they do deal with devolved subject matter and are sponsored by the Welsh Government or Welsh Local Authorities.
6. Wales also has its own public services ombudsman, with legal powers to look into complaints about public services in Wales. The Public Services Ombudsman for Wales has led the way in developing a common complaints procedure that can be used by public services in Wales, helping to develop a consistent approach to complaints that is tailored to the needs of users in Wales.
7. With devolution, and in particular following the 2011 referendum on extending the law making powers of Wales, the National Assembly also gained the ability to create new tribunals and appeal mechanisms in devolved policy areas, opening opportunities for difference and innovation in Welsh tribunals

and dispute resolution. One such opportunity has been taken: the creation of a Welsh Language Tribunal (see later).

#### Review of Tribunals Operating in Wales and tribunal reform

8. In January 2010 the Welsh Committee of the AJTC published the report of its Review of Tribunals Operating in Wales (Annex B). The Review was initiated in order to test whether observations that the tribunals system in Wales was complex and fragmented were reflected in reality. The Review found that Wales inherited a patchwork of tribunals that had evolved in an *ad hoc* way prior to devolution, with this set up resulting in a number of deficiencies. The Committee was concerned that instead of reform relating to devolved tribunals developing in a strategic manner, the system might continue to operate in this *ad hoc* way, and that this state of affairs would be detrimental to the system users, the public purse and the reputation of justice in Wales.
9. The most pressing issue was the lack of separation of powers between devolved tribunals and the body being appealed against. It is fundamental that when citizens seek redress against an arm of the state that the redress process should be – and should be seen to be – institutionally independent. Unfortunately, the Review discovered that most Welsh tribunals were not sufficiently independent from the departments or agencies whose decisions they were considering. For non-devolved tribunals, this situation was largely, although not entirely, addressed by the creation of the then Tribunals Service (now part of Her Majesty's Courts and Tribunals Service) as an executive agency of the Ministry of Justice charged with administering tribunals.
10. The Report made 21 recommendations for change, which it was hoped, if implemented, would bring the Welsh tribunals into a more coherent, efficient and accessible system. The recommendations related to matters such as appointment, training and appraisal of tribunal members, the development of policy on the use of the Welsh language and hearing venues, and the use of simple tribunal forms and procedures.

*Independence and impartiality*



11. In relation to the key finding for the need for separation of powers, in Wales there is currently no equivalent to the Ministry of Justice, and given the relatively small size and scope of Welsh tribunals (for the time being, at least), it did not appear that a separate executive agency would be the most economical or efficient solution. Instead, the Committee recommended that responsibility for all Welsh tribunals should be transferred to an area of the Welsh Government which had no specific responsibility for any of the government decisions under dispute – the then Department for the First Minister and Cabinet, ensuring tribunal independence and also creating a focal point for administrative justice and tribunals in Wales.
  
12. In March 2010 the Welsh Government agreed to create a post to manage the implementation of the recommendations made in the Review, and subsequently established the Administrative Justice and Tribunals Unit. The Unit was initially located within the Department for the First Minister and Cabinet, but has since moved to the Permanent Secretary's Division. In November 2010 the Welsh Cabinet approved an Action Plan for the implementation of the recommendations made in the Review. The Action Plan explained that in keeping with the Review, staff working to support tribunals but based within policy divisions would transfer, with the relevant budgets, to the Unit.
  
13. On 1 April 2011, the Special Educational Needs Tribunal for Wales, the Registered School Inspectors Appeals Tribunal and the Registered Nursery Inspectors Appeal Tribunal all transferred to the Unit. Over the course of 2012, it is anticipated that responsibility for the administration of the Adjudication Panel for Wales, the Forestry Committee for Wales, the Mental Health Review tribunal for Wales, the Agricultural Lands Tribunal and the Residential Property Tribunal will all transfer to the central Unit.
  
14. There are a number of tribunals which it is not currently possible to transfer. Independent Review of Determinations Panels for both adoption and fostering are currently outsourced to the British Association for Adoption and Fostering, and the Fire-fighter Board of Medical Referees is also under contract. Independent Social Services Complaints Panels are currently under review and the process for complaints is likely to be reformed, obviating the need for these panels.

15. The futures of the Valuation Tribunals for Wales, School Admission Panels and School Exclusion Panels are still under discussion, although the AJTC Welsh Committee very much hopes that steps will be taken to ensure the transfer of these tribunals in the near future.

*Accessibility, efficiency, effectiveness and coherence*

16. In addition to securing an independent system of tribunals, the Review noted that values such as accessibility, efficiency, effectiveness and coherence should underpin any redress system in Wales. As part of this, the Welsh Committee considers that the development of harmonised procedures to be used across the devolved tribunals and the use of a unique tribunals website containing all the information tribunal users will need is an essential part of the reform process. The Committee hopes also that the process will create the opportunity for efficiency savings and closer working between tribunal administrators and judiciary across the system.

17. A fuller account of progress made since 2010 can be found in the AJTC Welsh Committee Annual Report 2011-2012 (Annex C).

Opportunities for innovation – current examples

18. As a result of devolution, the National Assembly for Wales has the ability to create new redress mechanisms in devolved policy areas. The creation of new tribunals or redress mechanisms offers the opportunity for innovation, but also carries risks. The AJTC is concerned to ensure that in keeping with the reforms outlined above, the development of new redress mechanisms is guided by an overarching strategy. Recommendation 19 of the Review suggested that the Welsh Government should develop guidelines to inform the establishment of new tribunals and that the Unit should be consulted on any proposals at an early stage.
19. In 2011, the National Assembly for Wales passed the Welsh Language (Wales) Measure 2011, providing for the creation of a Welsh Language Tribunal. This will be the first tribunal created since the establishment of the central tribunals Unit and the Welsh Committee considers this to be an

important moment for Wales, creating the opportunity to demonstrate that the principles enshrined in the Review are being put into practice. The Welsh Committee had concerns about a number of provisions contained in the Measure, and while we expect these concerns to be resolved, early adoption of guidelines would have helped to avoid some of these issues arising.

20. In addition, the UK government localism agenda is creating further opportunities for Wales to take the lead in developing its own redress systems. For example, the Welfare Reform Bill makes provisions to abolish the discretionary Social Fund, with the funding devolved to local authorities in England and to the Welsh and Scottish governments. Currently, decisions about whether to award a loan or grant are decided by staff within JobCentre Plus, with the applicant having the opportunity to apply for a review of this decision by the Independent Review Service, overseen by the Social Fund Commissioner. There have already been consultations in both England and Scotland as to how to fill the gap left by the social fund. The Welsh Government is currently consulting on how to replace the social fund scheme in Wales, and the Committee is hopeful that any redress mechanism will follow the principles set out in the Review of Tribunals and will respond to the needs of users in Wales. However, the Committee has some concern that the Welsh Government does not appear to have given early consideration to the details of this change, and is especially concerned as it will affect some of the most vulnerable individuals in Wales.
21. The Welfare Reform Bill raises a number of other areas likely to result in changes to the redress mechanisms open to Welsh citizens as they seek to challenge decisions of the state. A further example relates to plans to abolish council tax benefits, and to devolve responsibility for assessment and payment of council tax support to local authorities. The Department for Communities and Local Government has consulted on how to implement the system in England, and has proposed that appeals against decisions be heard by the Valuation Tribunals for England rather than by the Social Security and Child Support Chamber of the unified structure, which currently hears appeals for England and Wales. If such an approach is taken, there will be a need for some Wales-only redress mechanism to determine appeals.

22. The Welsh Committee considers that these examples demonstrate that Wales must be ready to develop the necessary and appropriate administrative justice redress mechanisms, ensuring that tribunals do not return to their old, incoherent ways in the process. At this stage, the Committee does not take a view as to whether or not a separate Welsh jurisdiction is necessary for this purpose, but instead suggests that a Welsh administrative justice jurisdiction is very much developing in a *de facto* fashion. The principles set out the Review of Tribunals must be understood and applied to any instances of reform, but also Wales needs to have in place the appropriate institutions and processes to recognise when these principles are engaged, and to ensure that Wales is ready to respond to emerging developments outside its control.



Y Cyngor Cyfiaunder Gweinyddol a  
Thribiunlysoedd **Pwyllgor Cymru**  
Administrative Justice & Tribunals Council  
**Welsh Committee**

Hyrwyddo Cyfiaunder Gweinyddol  
Advancing Administrative Justice

# REVIEW OF TRIBUNALS OPERATING IN WALES

This Report is made to the Welsh Ministers pursuant to paragraph 19(4) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 and must be laid before the National Assembly for Wales by the Welsh Ministers pursuant to paragraph 19(6) of that Schedule.

**Tudalen 41**

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## Chair's Foreword



This, the first special report initiated by the Welsh Committee of the Administrative Justice and Tribunals Council, raises matters of serious concern – but also opportunities for improvements in the cost-effectiveness of tribunals and of the administration of public services to which they relate. It highlights the urgent need for strong and informed leadership in a specialist, but crucial area of the devolution agenda that bears directly on the rights of citizens and the quality of citizen-centred public services delivery.

Wales has inherited a patchwork of tribunals that, as we make clear, evolved in an *ad hoc* way prior to devolution. This has resulted in a number of deficiencies that mar much good practice. The most pressing issue is the lack of a “separation of powers”. When citizens seek redress the process should be – and should be seen to be – truly independent of the body appealed against. This is a fundamental principle that is recognised internationally and that is in process of being firmly embedded in the tribunal system across the UK – except, presently, in Wales. Wales cannot afford to fall behind or potentially expose itself to considerable embarrassment.

If for no other reason, continuing with current arrangements is not a comfortable option; but there are other strong arguments for immediate change. As devolution evolves, the range and complexity of remedial actions – and the legislation giving rise to them – will continue to grow. To respond appropriately and cost-effectively there needs to be a single focal point of knowledge and expertise capable of establishing consistent and defensible policies and practices, rather than *ad hoc* and dispersed action.

Our primary recommendation is that there should be such a single focal point and that it should cover matters of general policy, practice guidelines and overall administration. This could be achieved in a number of ways that meet the particular circumstance of devolution in Wales, but we see its location within the office of the First Minister as the best option. Such a move would offer the element of independence from service departments that we see as essential, while keeping the concern for administrative justice close to the Cabinet as a whole. Given such a development, the more detailed matters to which we refer in the report could readily be addressed in a systematic way.

We recognise that the issues we highlight in this report are not of Wales’ making, but the solutions lie wholly within our hands. We most strongly urge that early and appropriate action be taken.

A handwritten signature in black ink that reads "Adrian Webb".

**Sir Adrian Webb**  
Chairman – Welsh Committee of the AJTC

# Executive Summary and Recommendations

The Welsh tribunals have developed on an *ad hoc* basis, which has led to a fragmented system. There is wide variation across a number of areas, including appointment processes, budgets, training and appraisal and support for users, for no principled reason. In many cases, responsibility for tribunals and their administration lies with the departments whose decisions it is the tribunals' duty to consider. This is clearly unacceptable. Citizens in Wales have the right to expect that all tribunals are (and are seen to be) independent, accessible and designed with their needs in mind.

The problems highlighted in this report are not the failings of any individual tribunal. In fact, there are some individual instances of best practice and innovation. For the most part, the problems stem from the unplanned way in which tribunals have been established, without regard to an overarching policy or a conception of tribunal independence. This is further complicated by the nature of devolution and the establishment of a completely different structure for cross-border tribunals. There is a lack of overall oversight and co-ordination of Welsh tribunals.

Our recommendations are designed to promote a more integrated, user-focused system, in which Welsh tribunals conform to the principles outlined in Part 2 of this report. They are divided into two categories. The core recommendations are aimed at establishing the scrutiny mechanisms and institutions needed to reform the tribunal and administrative justice system in Wales. The other recommendations outline what we consider should be the early priorities for reform.

## CORE RECOMMENDATIONS

### Welsh Assembly Government

#### *Tribunal Independence and Impartiality*

Most Welsh tribunals are not sufficiently independent from the departments or agencies whose decisions they are considering. This needs to be put right by the Welsh Assembly Government as a matter of urgency. The people of Wales are entitled to a tribunal system that is independent, compatible with the European Convention on Human Rights and in line with the Welsh Assembly Government commitment to citizen-centred services.

## *Administrative Justice Focal Point*

While tribunal reform is necessary, it should not stand alone. What matters to citizens is the quality of the system as whole. There is an opportunity for the Welsh Assembly Government to lead the way in establishing a central administrative justice focal point, including the policy and administration of tribunals, to consider the development of the whole administrative justice system from a user perspective. Given the need for whole-of-government working, the Department for the First Minister and Cabinet is the most suitable location for tribunal and administrative justice policy and administration.

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### **Recommendation 1:**

**That the Welsh Assembly Government establish a focal point for administrative justice in the Department for the First Minister and Cabinet (p. 28).**

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### **Recommendation 2:**

**That in order to ensure that tribunals are seen to be properly independent and impartial, the Welsh Assembly Government transfer policy and administrative responsibility for tribunals to this focal point in the Department for the First Minister and Cabinet, which has no specific responsibility for any of the government decisions under dispute (p. 28).**

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### **Recommendation 3:**

**That the Welsh Assembly Government ensure that the procedures for the selection of tribunal members are open, fair and based on merit, and that all appointments are made by the Welsh Ministers or the Lord Chancellor (p. 28).**

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## *Rationalisation*

There is potential for combining the jurisdictions of some tribunals according to subject matter to achieve economies of scale, administrative efficiency and improve opportunities for members to sit regularly. This should ultimately lead to a better experience for tribunal users, and better value for taxpayers.

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### **Recommendation 4:**

**That the Welsh Assembly Government and Local Authorities consider the appropriate amalgamation of Welsh tribunal jurisdictions according to subject matter (p. 29).**

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## Tribunal Judiciary

Improved communication and working between the Welsh tribunal judiciary is an important step in establishing a more integrated, joined-up tribunal system. Tribunal reform needs strong leadership from the tribunal judiciary, members and support staff, who will be essential to its successful implementation. Communication and collaboration between Welsh tribunals with cross-border tribunals should be improved.

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### **Recommendation 5:**

**That the judicial leaders and administrators of each Welsh tribunal work together on issues of common interest and towards implementing the recommendations in this report (p. 30).**

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## National Assembly

The National Assembly should become a key partner in oversight of the administrative justice system. We would welcome measures to ensure co-ordinated scrutiny of the implementation of our recommendations across government.

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### **Recommendation 6:**

**That the National Assembly scrutinise and monitor the Welsh Assembly Government's implementation of the recommendations in this report, including holding a debate in plenary (p. 30).**

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## OTHER RECOMMENDATIONS

The following recommendations outline areas for further work and reform on which we consider the National Assembly, Welsh Assembly Government, Local Authorities and the tribunal judiciary and administrators should focus, at least initially.

### **Accessibility**

#### *Information*

Further work is needed to determine exactly how information is currently being delivered to tribunal users, the methods that are most helpful to the user, and how the current situation could be improved and standardised where possible.

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### **Recommendation 7:**

**That the Welsh Assembly Government and the Welsh tribunal judicial leaders and administrators work together to ensure that the information provided to tribunal users is clear, comprehensive and accessible.**

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## *Procedures*

Tribunal procedures should be enabling and take account of the fact that there is often an inequality of arms between the government and tribunal user. Welsh tribunals should continue to operate at minimum cost to tribunal users and information about any fees and costs should be readily available to tribunal users.

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### **Recommendation 8:**

**That the Welsh Assembly Government and the Welsh tribunal judicial leaders and administrators work together to ensure in the first instance that tribunal forms and procedures are clear and simple and designed for the convenience of tribunal users.**

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## *Advice and Representation*

It is uncertain whether the advice and assistance available to tribunal users, and users of the administrative justice system more generally, is adequate, accessible and comprehensive across Wales. While outside the scope of this report, this is an important issue that warrants significant further research and study.

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### **Recommendation 9:**

**That the Welsh Assembly Government conduct a review of the general and specialist advice available to tribunal users, and whether there are any gaps in advice provision.**

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## *Engagement with Users*

The tribunal judiciary and the government should engage effectively with tribunal users and seek their feedback, so that practices and procedures can be tailored to meet the needs of tribunal users.

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### **Recommendation 10:**

**That the Welsh tribunal judicial leaders and administrators and Welsh Assembly Government ensure that there is an appropriate strategy to engage with tribunal users for each tribunal jurisdiction.**

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## *Complaints Policy and Procedure*

All tribunals should have a complaints policy and procedure in relation to the performance of both the members and administration, based on complaint handling guidance provided by the Public Services Ombudsman for Wales.

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### **Recommendation 11:**

**That the Welsh Assembly Government and Welsh tribunal judicial leaders establish a complaints policy and procedure for all Welsh tribunals, based on guidance from the Public Services Ombudsman for Wales.**

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## *Welsh Language*

There should be consistent and adequate level of Welsh language services across Welsh tribunals. All Welsh tribunals should adopt a common Welsh Language Scheme. As well as ensuring that all tribunals are operating to the same standards, a common scheme could reduce the administrative burden of each tribunal creating and publishing its own scheme and allow for joint Welsh language training initiatives.

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### ***Recommendation 12:***

**That the Welsh Assembly Government and Welsh tribunal judicial leaders and administrators work with the Welsh Language Board and the Tribunals Service to formulate a common Welsh Language Scheme for all Welsh tribunals.**

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## *Hearing Venues*

In arranging hearing venues, accessibility for users should be the primary concern. There should be a common Welsh tribunal policy for hearing venues to promote consistent standards, including standards on the maximum distance from parties, access to transport links, disability access, refreshment facilities, and separate waiting rooms for parties.

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### ***Recommendation 13:***

**That the Welsh Assembly Government and Welsh tribunal judicial leaders and administrators formulate a policy on standards for hearing venues, focused on the needs of tribunal users.**

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## *Annual Reports and Performance Monitoring*

To ensure greater public accountability, we consider that all Welsh tribunals should produce a yearly account of their activities. The level of detail required and information should be proportionate to the level of tribunal activity.

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### ***Recommendation 14:***

**That the Welsh tribunal judiciary and administrators ensure that all Welsh tribunals collect consistent performance management data and produce a yearly account of their activities.**

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## Efficiency & Effectiveness

### *Resources and Support*

The resources, administrative and other support available to Welsh tribunals vary significantly, even taking account of the differing caseloads and complexity of subject matter. A more streamlined and amalgamated system would be able to take advantage of economies of scale and spread resources more fairly across tribunals. For example, it would allow the pooling of administrative and support staff, hearing venues, IT systems and Secretariat accommodation.

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#### **Recommendation 15:**

**That the Welsh Assembly Government explore ways in which tribunal resources can be deployed more efficiently.**

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### *Training and Appraisal*

The quality and experience of tribunal members has a significant direct impact on the experience of tribunal users and the quality of judicial decision-making. Appropriate training should be provided for tribunal members and staff and standards of judicial performance should be set and monitored.

The low caseloads of some Welsh tribunals mean that members are not sitting frequently enough to retain proficiency and that there is a need to review the number of tribunal members in some jurisdictions. In order to increase sitting opportunities for members, the possibility of appointing members to more than one jurisdiction should be explored.

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#### **Recommendation 16:**

**That the Welsh Assembly Government ensure that tribunals have an adequate budget for training, appraisal and the monitoring of member performance.**

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#### **Recommendation 17:**

**That the Welsh tribunal judicial leaders and administrators ensure that tribunals have appropriate training, appraisal and performance monitoring systems in place.**

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#### **Recommendation 18:**

**That the Welsh Assembly Government, the Welsh tribunal judicial leaders and administrators explore options to ensure that tribunal members are given the opportunity to sit frequently enough to maintain knowledge and skills.**

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## Coherence

### *Framework for establishing new tribunals*

Guidelines are needed to ensure that tribunals do not continue to develop in an *ad hoc* and unstructured way. The guidelines should apply to all Welsh Assembly Government Departments and the Department for the First Minister and Cabinet should be consulted on the establishment of any new tribunals.

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**Recommendation 19:**

**That the Welsh Assembly Government adopt a consistent and coherent approach to the establishment of new tribunals.**

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### *Appeals*

There is wide variation in appeal rights and routes from Welsh tribunals. In some jurisdictions appeal can be made only on a point of law, and in others appeal is permitted both on alleged errors of law and fact. Appeal is either to the Upper Tribunal, or to the High Court on appeal or judicial review.

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**Recommendation 20:**

**That the Welsh Assembly Government ensures that there are appropriate rights of appeal from tribunals.**

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### *Improving Original Decisions*

Tribunals are an integral part of the administrative justice system. It is important that the process from original decision, through internal and external complaint mechanisms, tribunals, courts and the Ombudsman are coherent and complementary. It is equally important that lessons are learnt from tribunal decisions and incorporated back into the system. For this to happen, there need to be good channels of communication between tribunals and original decision-makers.

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**Recommendation 21:**

**That the Welsh tribunal judicial leaders and administrators, the Welsh Assembly Government and Local Authorities work together to ensure that lessons learnt from tribunal decisions lead to improvements in original decision making, and thereby to better and more efficient service to the Welsh public.**

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# Introduction

## Background

1. As the Welsh Committee of the Administrative Justice & Tribunals Council (AJTC) our role is to keep under review the administrative justice system, tribunals and inquiries in Wales. In fulfilling our role regarding tribunals, we may report on:
  - The constitution and working of listed tribunals<sup>1</sup> operating in Wales;
  - Any other matter relating to listed tribunals operating in Wales that we determine to be of special importance;
  - Any particular matter relating to tribunals in Wales that is referred to us by the Welsh Ministers or the Lord Chancellor<sup>2</sup>.

This report is made under the second of these powers.

2. We initiated a review of devolved tribunals operating in Wales in November 2008 as a result of:
  - Our observations of the complexity and fragmentation of tribunals in Wales, with significant differences in the way the various devolved tribunals operate and are administered;
  - Instances of reform relating to devolved tribunals being considered in an *ad hoc* and disjointed way;
  - An apparent lack of independence of Welsh tribunals, with responsibility for tribunals and their administration lying with those whose decisions it is the tribunals' duty to consider;
  - Discussions with users.

## Process

3. In conducting this review, we have:
  - Researched both devolved and cross-border tribunals, including distribution of a questionnaire to all Welsh tribunals aimed at collecting detailed and consistent information on a range of issues such as caseload, member appointments, training and information provided to tribunal users;
  - Formulated principles by which to analyse this information and judge the performance of these tribunals;
  - Made recommendations for reform.

1 "Listed tribunals" are the First-tier Tribunal and Upper Tribunal established by the Tribunals, Courts and Enforcement Act 2007 and tribunals listed by orders made by the Lord Chancellor, the Scottish Ministers and the Welsh Ministers.

2 Tribunals, Courts and Enforcement Act 2007, Schedule 7, para 14.

## Definitions

4. The definition of what constitutes a tribunal is not easy. At its broadest, a tribunal is 'something that decides or determines'. However, for the purposes of this Review, the term 'tribunal' refers to:
  - Tribunals listed under the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007;
  - The First-tier and Upper Tribunal, where they have jurisdiction in Wales;
  - Tribunals listed under the Administrative Justice and Tribunals Council (Listed Tribunals) Order 2007, where they have jurisdiction in Wales.
5. Not all the bodies listed under these Orders are called tribunals – some are called authorities, commissioners, committees, panels or adjudicators as well as tribunals. They come in a wide variety of shapes and sizes, cover a diverse range of jurisdictions and have various powers and expertise.
6. In this document 'Welsh tribunal' means a tribunal listed under the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007 ('the Order')<sup>3</sup> as well as those tribunals concerned with devolved subject areas. The following tribunals appear in the Order:
  - Adjudication Panel for Wales;
  - Board of Medical Referees;
  - Forestry Committees for Wales;
  - Independent Review of Determinations Panels (IRDP) in Wales;
  - National Health Service Independent Complaints Panels;
  - Parking Adjudicators in Wales<sup>4</sup>;
  - Registered Nursery Education Inspectors Appeal Tribunal;
  - Registered School Inspectors Appeal Tribunal;
  - Residential Property Tribunal for Wales;
  - School Admission Appeal Panels for Wales;
  - School Exclusion Appeal Panels for Wales;
  - Social Services Independent Complaints Panels;
  - Special Educational Needs Tribunal for Wales (SENTW);
  - Valuation Tribunals in Wales.

3 The Order contains a list of tribunals for which the Welsh Ministers are the 'authority responsible'. The Welsh Ministers are the 'authority responsible' for listing a tribunal if:

- (a) All of the tribunal's functions are exercisable only in relation to Wales; and
- (b) at least one of the following powers is exercisable by the Welsh Ministers:
  - (i) the power to appoint the members of the tribunal; or
  - (ii) the power to make procedural rules for the tribunal.
- (c) In the case of a tribunal that exercises functions in relation to Wales and also exercises those or other functions in relation to somewhere other than Wales, the Welsh Ministers are the authority responsible for the tribunal to the extent that it exercises functions in relation to Wales, if at least one of the following powers is exercisable by the Welsh Ministers:
  - (i) the power to appoint the members of the tribunal who exercise the tribunal's functions in relation to Wales;
  - (ii) the power to make procedural rules for the tribunal's functions in relation to Wales.

4 The Parking Adjudicators in Wales have been abolished and replaced by the Traffic Penalty Tribunal adjudicators.

7. For the purposes of this report, we have also classified the following as Welsh tribunals:
  - Mental Health Review Tribunal (MHRT) for Wales;
  - Agricultural Land Tribunal (ALT) (Wales);
  - Traffic Penalty Tribunal (when conducting hearings in Wales).

While these tribunals are not listed under the Welsh Order, they deal with devolved subject matter and are sponsored by the Welsh Assembly Government or Welsh Local Authorities.

8. It is the Welsh tribunals on which this review is focused, and on which we have collected detailed information and made recommendations for reform. In doing so, we have only considered current arrangements. Potential issues from further devolution are outside our scope. Similarly, we are aware of some cross-over between the work of ombudsmen and tribunals. We have chosen to consider this matter at a later date.

### **Stakeholder Engagement**

9. Since our inception we have met with most of the Presidents and Regional Chairs of tribunals operating in Wales. Where possible, we have also observed at least one hearing in each jurisdiction and have attended tribunal user group meetings, in order to experience first-hand how the system operates. We have met with various officials in the Welsh Assembly Government, the Welsh Local Government Association and others to discuss the review and test our recommendations.
10. At our conference in June 2009 in Cardiff, our Chair made a presentation on this review, and some of the key questions in the breakout group exercise were aimed at eliciting views on:
  - The main issues affecting both devolved and cross-border tribunals in Wales;
  - The most urgent issues that any tribunal reform process in Wales should address;
  - Aspects of tribunals in Wales that should not be lost in any reform process;
  - Opportunities for uniquely Welsh arrangements for devolved tribunals.

# Part 1 – The Tribunal Landscape in Wales

***‘Because tribunals were administered by sponsoring Government Departments, where substantive areas of government have been devolved, the tribunals within those areas have been devolved too.’***

*His Honour Judge Gary Hickinbottom speaking at the Council on Tribunals’ Wales Conference in Cardiff on 21 June 2007<sup>5</sup>.*

11. The tribunal landscape in Wales is complicated, with devolved tribunals being administered by various Welsh Assembly Government departments or Local Authorities, and cross-border tribunals by the UK Tribunals Service or UK government departments.

## Welsh Tribunals

12. The devolution of some tribunals operating in Wales arose as a result of the Government of Wales Act 1998, which created the National Assembly for Wales and devolved executive responsibility for key policy areas such as education, health, social and housing policy to it. This included the transfer of executive responsibility for tribunals concerned with these policy areas as they operated in Wales. With devolution, the National Assembly also gained the ability to create new tribunals and appeal mechanisms in some devolved policy areas. With the Government of Wales Act 2006, and allocation of primary legislative functions to the National Assembly, there are further opportunities for difference and innovation in Welsh tribunals.
13. To date, however, the Welsh tribunals are in large part legacies of Westminster laws and policy, whereby tribunals developed in an *ad hoc* fashion without being underpinned by any theoretical framework. That is, they were set up to meet specific needs and not according to a rational pattern. Our research, outlined below, shows that they remain unchanged from when Sir Andrew Leggatt conducted a review of tribunals in England and Wales in 2002 and found that:

*...the present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence<sup>6</sup>.*

14. For some of the cross-border tribunals operating in Wales, this situation has been remedied by the creation of a Tribunals Service to provide independent administrative support, and by the introduction of the Tribunals, Courts and Enforcement Act 2007 which provides for a new unified structure for many tribunals. The Welsh Assembly Government has decided that devolved tribunals will not join the Tribunals Service or the new unified tribunal structure.

<sup>5</sup> ‘Tribunal reform: the issues for Wales’ in Adjust, July 2007 at [http://www.council-on-tribunals.gov.uk/adjust/item/comment\\_reformwales.htm](http://www.council-on-tribunals.gov.uk/adjust/item/comment_reformwales.htm) (accessed on 4 June 2009)

<sup>6</sup> ‘Tribunals for Users: One System, One Service’, Report of the Review of Tribunals by Sir Andrew Leggatt, March 2001, p.15, para 1.3

## Cross-Border Tribunals

15. While it is not the intention of this review to look in detail at the operation of cross-border tribunals<sup>7</sup>, they constitute a substantial proportion of the delivery of administrative justice through tribunals in Wales. The size and scale of these tribunals means that they are important to the context in which Welsh tribunals operate. Reforms have, sometimes unintended, impacts on Welsh tribunals. A list of the larger and more significant of these tribunals is at Appendix B. To date, there has been little formal or informal interaction between cross-border tribunals and devolved Welsh tribunals.
16. As a result of the recommendations in the Leggatt Review of Tribunals in 2001<sup>8</sup> and subsequent White Paper in 2004<sup>9</sup> many of these cross-border tribunals have undergone significant reform, which began in April 2006 with the creation of a unified Tribunals Service to provide administrative support. The reform process was extended under the Tribunals, Courts and Enforcement Act 2007 and included:
  - The creation of a unified tribunal structure;
  - The creation of the Upper Tribunal, leading to new and rationalised rights of appeal;
  - The establishment of the office of Senior President as a senior judicial office to provide focus and leadership for tribunals covered by the Act;
  - The ability to ‘cross-ticket’ and assign tribunal judges and members across different jurisdictions.
17. On 3 November 2008 two new unified tribunals were established, consisting of a First-tier and an Upper Tribunal. Initially, these tribunals comprised:
  - Three First-tier Chambers – Social Entitlement; Health, Education and Social Care; War Pensions & Armed Forces Compensation;
  - The Administrative Appeals Chamber of the Upper Tribunal.
18. In April 2009 further tribunals were transferred into the new structure leading to the creation of a First-tier Tribunal Tax Chamber, and Upper Tribunal Finance and Tax Chamber. In June 2009 the Lands Chamber of the Upper Tribunal was established. In September 2009 the General Regulatory Chamber of the First-tier Tribunal was commenced (comprising Estate Agents appeals; Consumer Credit Appeals Tribunal; Transport and Charity Tribunals). The government has also announced that the Asylum and Immigration jurisdiction will join the new structure<sup>10</sup>. It is intended that eventually most of the tribunal jurisdictions administered by central government will be incorporated into the new structure.

<sup>7</sup> A cross-border tribunal is one which has jurisdiction in both England and Wales.

<sup>8</sup> ‘Tribunals for Users: One System, One Service’, Report of the Review of Tribunals by Sir Andrew Leggatt, August 2001.

<sup>9</sup> ‘Transforming Public Services: Complaints, Redress and Tribunals’, A White Paper produced by the Department for Constitutional Affairs, Cm 6243, published July 2004.

<sup>10</sup> ‘Immigration Appeals Government Response to Consultation: Fair decisions; faster justice’, UK Border Agency and Tribunals Service, published 8 May 2009, at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>. (accessed on 20 October 2009)

19. As part of the reforms, the Employment Tribunal and Employment Appeal Tribunal are administered by the Tribunals Service. In recognition of their different needs and role in adjudicating disputes between parties, as opposed to disputes between citizen and state, it was decided that they would form a separate pillar of that organisation and not join the unified tribunal structure<sup>11</sup>.
20. Joint Upper Tribunal and Administrative Court facilities have been established in Cardiff, and a number of suitable venues have been identified around Wales to ensure accessibility for Welsh tribunal users. The Tribunals Service organisation includes a 'Wales and the South West' business area and offices in Wales. It also has a number of permanent hearing centres (Newport, Cardiff, Swansea, Colwyn Bay and Wrexham) and temporary hearing venues (including Carmarthen, Haverfordwest, Aberystwyth, Newtown, Caernarfon and Llangefni) in Wales.
21. The Tribunals Service has its own Welsh Language Scheme, and is able to handle telephone calls and letters in Welsh and arrange for appeal hearings in Welsh, and all Tribunals Service buildings in Wales have bilingual signage, leaflets and notices. It operates a single website for all the tribunals that it administers – [www.tribunals.gov.uk](http://www.tribunals.gov.uk) – with dedicated areas for each jurisdiction.
22. There are also a number of cross-border tribunals that currently remain outside the Tribunals Service. These include the Copyright Tribunal, the Competition Appeal Tribunal and the Traffic Commissioners. The Traffic Commissioner for Wales and the West Midlands has raised a number of issues in his Annual Report for 2008/09 associated with cross-border operations in his jurisdiction:

*Although there are eight Traffic Areas for Great Britain, there are seven Traffic Commissioners. I am the Traffic Commissioner with two distinct Traffic Areas... Compliance services for Wales (are) serviced from the Birmingham office. Statistics are compiled separately for Wales, and hearings are heard in Wales; apart from this, the Welsh Traffic Area is treated as an adjunct of the West Midland Traffic Area. By way of illustration, budgets allocated for operator seminars are based on the offices and commissioners... Sadly the result of Wales being treated differently to England is that the standards of regulation in parts of Wales are sometimes lower<sup>12</sup>.*

<sup>11</sup> 'Transforming Tribunals Consultation Paper', Ministry of Justice, CP30/07, published 28 November 2007, p.22, para 99.

<sup>12</sup> Traffic Commissioners' Annual Report for 2008/09 <http://www.dft.gov.uk/pgr/roads/tpm/trafficcommissioners/annualreports/> p. 67. (accessed on 20 October 2009)

## Some statistics at a glance...

Tens of thousands of Welsh citizens are affected by tribunal decisions every year.

### *Cross-Border Tribunals*

In **Wales** in 2008/09 the:

- Social Security and Child Support jurisdiction of the Social Entitlement Chamber dealt with 15,291 appeals, employed 35 judges (5 of which were salaried) and 71 members
- Employment Tribunal dealt with 8,917 cases, employed 12 judges (3 of which were salaried) and 50 members
- Asylum and Immigration Tribunal dealt with 11,367 cases (including English cases), employed 36 judges (10 of which were salaried) and 4 members<sup>13</sup>.

In **England** in 2008/09 the:

- Special Educational Needs and Disability jurisdiction of the Health, Education and Social Care Chamber received 3,115 appeals (2,313 were withdrawn), decided 992 cases, and comprised 160 members
- Mental Health Review Tribunal jurisdiction of the Health, Education and Social Care Chamber received 22,964 cases (10,393 were withdrawn), decided 14,998 cases and comprised 999 members<sup>14</sup>.

UK wide in 2008/09 the Tribunals Services dealt with **568,153 cases**, employed **2,737 staff** and had net operating costs of **£310 million**<sup>15</sup>.

### *Welsh Tribunals*

In 2008/09 the:

- Special Educational Needs Tribunal for Wales registered 96 appeals and decided 37 cases, employed 5 staff and comprised 13 members
- Mental Health Review Tribunal for Wales registered 1,450 applications (211 were withdrawn) and comprised 90 members (the President is salaried)
- Adjudication Panel for Wales received two referrals from the Ombudsman, and no appeals against the decisions of standards committees and comprised 8 members (including the President)
- Residential Property Tribunal for Wales received 208 cases (11 were withdrawn) and comprised 42 members.

Due to differences in the way in which expenditure is recorded by Welsh tribunals (or not recorded at all in some cases), it is impossible to estimate the combined operating budget of Welsh tribunals.

<sup>13</sup> These figures were supplied by the Tribunals Service.

<sup>14</sup> Tribunals Service Annual Report and Accounts 2008/09, HC599, p.121

<sup>15</sup> Tribunals Service Annual Report and Accounts 2008/09, HC599, p.8

## Our Survey of Welsh Tribunals

23. In early 2009 we distributed a survey to all Welsh tribunals, in order to collect detailed and consistent information on a range of issues such as caseloads, budgets, information for tribunal users and Welsh language capability. The detailed results of this survey are at Appendix C. The data we collected reveal a fragmented tribunals system which has developed in an *ad hoc* fashion. Not only are there no guiding or common principles but the way in which these tribunals operate differs greatly.
24. The information we have collected was provided by representatives of each tribunal. While some efforts have been made to check whether it is correct, we cannot vouch for its accuracy. In some instances there are also differences in statistical and data collection methods between tribunals.
25. The tribunals operating in Wales cover a variety of jurisdictions, as listed in Table 1 (p.42), ranging from particular bodies such as the Board of Medical Referees which adjudicates appeals concerning whether or not a fire fighter should be retired; to the Mental Health Review Tribunal (MHRT) for Wales which reviews the cases of patients detained under Mental Health Act powers; and the School Exclusion Appeal Panels which hear appeals against the permanent exclusion of students from schools. The Welsh Assembly Government has also established a number of independent panels to review initial decisions. These include, for example, the Independent Social Services Complaints Panels<sup>16</sup> and Independent Review of Determinations Panels<sup>17</sup>. Both of these are listed under The Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007 and are included in this review.
26. It is also interesting to note that while some of the tribunals in Wales have operated for many years, with the Agricultural Land Tribunal dating from 1947, there have also been much more recent additions to the landscape, with the Special Educational Needs Tribunal for Wales (SENTW) coming into existence as recently as 2003. The Department for Children, Education, Lifelong Learning and Skills, the Department of Health and Social Security, the Department for Social Justice and Local Government and the Department for Rural Affairs all sponsor various tribunals, depending on the jurisdiction of the tribunal.
27. Tribunals were asked to provide details of the way in which they are organised, with the responses suggesting that, generally speaking, there are four structures:
  - a. A single tribunal covering the whole of Wales, with a single judicial leader;
  - b. A single tribunal covering the whole of Wales, with no overall judicial leader;
  - c. Tribunals organised on a regional basis, headed by a President for each region<sup>18</sup>;
  - d. Tribunals organised on a regional basis, with each panel hearing being headed by a Chair but no overall leader.

<sup>16</sup> These panels deal with complaints about social services where the complaint is not resolved at an earlier stage.

<sup>17</sup> These panels provide a review process which prospective adopters can use when they do not agree with the qualifying determination made by their adoption agency.

<sup>18</sup> This is the present structure of the Valuation Tribunal for Wales. The Welsh Assembly Government has consulted on proposals to merge the four tribunals into a single tribunal.



28. The number of members appointed to a tribunal at any given time and the composition of panels differ greatly among the tribunals, a fact hardly surprising given the different workloads and subject matter. With the exception of the Valuation Tribunals, which consist entirely of lay members, most tribunals comprise a mixture of legal and other members, with most members requiring professional or practical experience in the field in question. Tribunals usually consist of three members, however in some tribunals they can consist of up to five members. The composition of each tribunal is shown in Table 2 (p.46).
29. The responses received with regard to questions on remuneration and allowances are set out in Table 3 (p.48). In three cases the President of a Tribunal receives a salary (MHRT for Wales, Traffic Penalty Tribunal and Residential Property Tribunal<sup>19</sup>) whereas other members of the tribunal panels receive fees, which in some circumstances are paid at a daily rate and in others are allocated per case. In a couple of situations, the members receive no sort of remuneration other than for loss of earnings.
30. The rules governing the selection of members are neither uniform nor consistent, with some appointments being the responsibility of Welsh Ministers and some the responsibility of the Lord Chancellor. Further to this, in some tribunals it is the Local Authority that decides on the appointment of members. The way in which this responsibility is allocated is shown in Table 4 (p.49). Similarly, the responsibility for the making of procedural rules is either with the Welsh Ministers or the Lord Chancellor, depending upon the tribunal.
31. The ability of tribunals to appoint advisers demonstrates the way in which the procedural rules can differ greatly from one tribunal to another. Some procedural rules allow for the tribunal to consult an expert, as with, for example, the Adjudication Panel for Wales. The Independent Review of Determinations Panel Rules provide that the panel must be advised by a social worker, and may also be advised by a legal adviser. On the other hand, various tribunals indicated that they are not able to appoint additional advisers at all, with this being the case for the MHRT for Wales, the Residential Property Tribunal, Valuation Tribunals for Wales, School Admission Appeal Panels and School Exclusion Appeal Panels. Although the SENTW cannot currently use advisers, they are seeking to amend their regulations so that the use of expert witnesses is permitted.
32. Our survey asked several questions about the training and appraisal of members of the tribunals. The responses revealed that the responsibility for training of members is in some cases that of the judicial head, in others that of the support staff of the tribunal and in others it falls to the Local Authority. In the majority of cases the funding for training comes from the tribunal's overall budget. The different tribunals offer different forms of training to members. Many have regular annual training events (SENTW, Adjudication Panel, MHRT for Wales, Residential Property Tribunal, Independent Social Services Complaints Panels, Traffic Penalty Tribunal, Valuation Tribunal for Wales) although some tribunals arrange training on a locally determined basis (School Admission Appeal Panels and School

Exclusion Appeal Panels). There are also less formal training methods, such as circular letters highlighting developments in the law and best practice and other tribunal members benefit from 'on the job' training.

33. In some tribunals there exists a formal mechanism for the appraisal of members, with, for example, the President and members of the Adjudication Panel for Wales being appraised on an annual basis, and the President of the Agricultural Land Tribunal (Wales) being subject to a formal process. Similarly, the Chairmen and Deputy Chairmen of the MHRT for Wales are assessed by a First-tier Tribunal Circuit Judge, and they in turn assess the members. The Residential Property Tribunal has a system of appraisals, but due to the small caseload it is difficult to conduct the necessary observations. Otherwise, however, it appears that the majority of tribunal members are not assessed on any regular or formal basis, although the Valuation Tribunals for Wales are attempting to establish an appraisal system.
34. Comparison of the workloads of the Welsh tribunals is inherently difficult, given that not only do the tribunals have different processes, but also because available statistics concerning caseload do not reflect the complexity or duration of cases. As indicated in Table 5 (p.54), the Valuation Tribunals for Wales deal with the most cases on a yearly basis; however, it has indicated that it is able to schedule up to 30 cases per day, whereas one case in front of the Adjudication Panel may last for several days.
35. This difference in caseload and complexity of work also means that the expenditure of tribunals varies greatly, as it impacts upon the amount spent on fees, administrative work and rent. Comparison of the expenditure of different tribunals is further complicated by the use of different calculations for determining expenditure. It also has to be noted that different tribunals benefit from different levels of support from the government, which in some cases provides offices and staff to assist the tribunals, as outlined in Table 7 (p.57).
36. The survey asked several questions with regard to the way in which hearings operate. A common feature of all the tribunals is that hearings tend to be heard in informal settings that are convenient for the user. The Agricultural Land Tribunal (Wales) holds hearings in local hotels, which allow site visits to take place easily, and the Traffic Penalty Tribunal allows users to state a preference as to where their hearing will take place. For the MHRT for Wales, the venue of the hearing is usually in the hospital where a patient is detained.
37. Responses to the survey revealed that the majority of tribunals have a degree of flexibility with regard to the nature of hearings, as indicated in Table 8 (p.63). Approximately half of the tribunals responded that they normally hold hearings in private, primarily when the tribunals are dealing with vulnerable users or sensitive information. For most of these tribunals, however, it remains possible to hold hearings in public where certain conditions are met. Equally, of the tribunals that habitually hold hearings in public, there is discretion to hold hearings in private.

38. Over half the tribunals publish their decisions, with some publishing in local newspapers and with others sending decisions to relevant organisations, but those tribunals dealing with sensitive personal matters generally do not publish their decisions. A few tribunals reported that they make either an audio or written transcript of the hearing which in most cases can be accessed.
39. Although roughly half of the tribunals indicated that they are able to award costs, predominantly in cases where a person has acted frivolously or vexatiously, none of the tribunals reported that they were able to enforce their orders. The range of support available from the tribunal clerk ranges from making administrative arrangements through to offering advice on procedure or on points of law. In the MHRT for Wales the clerk is often the caseworker who has overseen the gathering of reports and assembling of witnesses, and for the Adjudication Panel for Wales the clerk can offer advice on procedure but not on points of law.
40. There are a number of different appeal routes from the decisions of tribunals. In some cases, a person has a right of appeal to the Upper Tribunal, for example from the Special Educational Needs Tribunal (Wales). In tribunals such as the Traffic Penalty Tribunal, there is no right of appeal other than to request a judicial review. Appeal from certain tribunals must be made to the High Court.
41. As seen in Table 8 (p.63), with the exception of SENTW, all the tribunals responded that there are no restrictions on the parties being accompanied by a representative, either legal or otherwise. In the case of SENTW, there is a restriction of one representative per party. The only Welsh tribunal where legal aid is available for applicant representation is the MHRT for Wales, although in other tribunals it may be possible to obtain legal advice for preparation.
42. Information about the tribunals is often made available to users via the internet, although fewer than half of the tribunals responded that they have comprehensive websites, as indicated in Table 10 (p.68). Information about tribunals without their own full website can sometimes be found on different sites, such as the Welsh Assembly Government website. SENTW has a dedicated helpline for users, and other tribunals indicated that information can be obtained simply by calling the tribunal telephone line. Leaflets and booklets are also published by tribunals, although the type of information contained varies from tribunal to tribunal.
43. The majority of tribunals are equipped to deal with Welsh language appeals, as shown in Table 11 (p.69), even though there is limited demand for Welsh language services. SENTW indicated that it has heard hearings conducted in Welsh. While the Adjudication Panel for Wales indicated that there have been no hearings conducted in the Welsh language, a number of participants have given evidence in the Welsh language. A few tribunals do not have a record of the number of Welsh speaking tribunal members.

44. Interaction with users by the tribunals is relatively limited, although there are some exceptions. SENTW and the Traffic Penalty Tribunal operate tribunal user groups, and representatives of the Valuation Tribunals for Wales participate in the Valuation Office Agency Ratepayers Forum. SENTW also indicated that parties are invited to complete a satisfaction survey following their case. The Chairman of the MHRT for Wales sits on a number of committees with user representatives.
45. The tribunals were asked to provide information about their complaints procedure, with Table 12 (p.73) showing the responses. SENTW's complaints policy is available to the public on request and is on its website, as is the policy of the Traffic Penalty Tribunal. For some tribunals, users also have recourse to the Public Services Ombudsman for Wales ['the Ombudsman']. For the Adjudication Panel for Wales, the Ombudsman will be the first point of contact in misconduct cases and where complaints are being made against the social services, users will have the option to go to the Ombudsman. The Ombudsman can investigate complaints of maladministration against the School Admission and Exclusion Appeal Panels, but only has the power to make recommendations. Similarly, the Ombudsman can investigate complaints about the maladministration of appeals by the Valuation Tribunal Service for Wales, but this power does not extend to looking at the tribunal's judicial decision-making function.

## Part 2 – Principles for Tribunals

### Background

46. In formulating principles by which to judge the operation of Welsh tribunals we have taken account of the Welsh Assembly Government's commitment to citizen-centred service delivery, international human rights principles and previous initiatives to outline principles and standards for tribunals in the United Kingdom.

### *Policy Context in Wales*

***'Credibility and reputation depends on continued dialogue with well-informed citizens. This should include simple and speedy processes for complaint and redress. Organisations must be mature enough to apologise when things go wrong, put things right and provide suitable redress.'***

*Beyond Boundaries: Citizen-Centred Local Services for Wales, Welsh Assembly Government, 2006, p.58*

47. In formulating principles we considered the Welsh Assembly Government citizen-centred approach to the design and provision of public services. This policy framework was enunciated in 'Making the Connections: Delivering Beyond Boundaries'<sup>20</sup> and requires, among other things:
- Speedy and appropriate redress mechanisms, requiring organisations to ensure that systems of complaint and redress are simple, accessible and congruent across organisational and sectoral boundaries;
  - A citizen-centred approach that incorporates the needs of services users as the primary concern;
  - Well-informed citizens that have meaningful, diverse ways to express their expectations, experiences and needs within all spheres of government.

### *Human Rights Legislation*

48. Our principles are also grounded in a consideration of human rights legislation, namely the Human Rights Act 1998 which incorporates the European Convention on Human Rights into domestic law. Compatibility with Convention rights is built into the devolution settlement. Section 81 of the Government of Wales Act 2006 specifically provides that the Welsh Ministers cannot act incompatibly with Convention rights, and section 94 provides that it is outside the Assembly's competence to pass legislation which is incompatible with Convention rights.

<sup>20</sup> 'Making the Connections: Delivering Beyond Boundaries: Transforming Public Services in Wales', Welsh Assembly Government, November 2006, at <http://new.wales.gov.uk/topics/development/transport/deliveringbb/?lang=en> (accessed on 3 September 2009).

49. The principle of independence is reflected in Article 6 of the ECHR. This holds that ‘in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ Article 6 does not apply to all of the tribunals operating in Wales, as ‘its central focus is not administrative law... but criminal law and private law (that is, rights that arise between individuals such as contractual rights).’<sup>21</sup>
50. However, as argued by Sir Andrew Leggatt, who was asked to consider whether the administrative and practical arrangements for supporting tribunals meet the requirements of the ECHR for independence and impartiality:
- A narrowly ECHR-based approach would, we think, lead to an absurd result. It would be possible for a government to argue that it is acceptable for there to be an inferior standard of fairness, or of independence and impartiality, in a tribunal case because it involved not a dispute in private law between individual citizens to which the ECHR applied, but a dispute between the citizen and the state itself in an area to which the ECHR did not apply. That is an untenable position...<sup>22</sup>.*
51. In many cases tribunals are the only realistic or practicable remedy a citizen has against a government decision. In the UK at least, it has been firmly accepted that they are ‘an alternative to court, not administrative, processes’<sup>23</sup>. Thus to hold tribunals to a standard of independence that is less than that of a court would be illogical at best, and unjust at worse.

### **Franks Report**

52. In 1957 the Report of the Committee on Administrative Tribunals and Enquiries (the ‘Franks Report’) outlined three principles for the tribunal system. These were **openness**, **fairness** and **impartiality** – procedures should be open to scrutiny if they are to retain public confidence; they should provide a fair hearing at which citizens should state their case and be informed of all the evidence; and tribunals should reach their decisions demonstrably free from all personal interest and bias. The report emphasised that impartiality within the system meant ‘the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject matter of their decisions’<sup>24</sup>.

<sup>21</sup> Tribunals for Users, One System, One Service, HMSO 2001, p.26, para 2.14.

<sup>22</sup> Tribunals for Users: One System, One Service, HMSO 2001, p.27, para 2.17.

<sup>23</sup> Tribunals for Users: One System, One Service, HMSO 2001, p.27, para 2.18.

<sup>24</sup> Report of the Committee on Administrative Tribunals and Enquiries: 1957 (reprinted by HMSO 1993), p.5, para 25.

## **Leggatt Report**

53. In 2000 Sir Andrew Leggatt was asked to look at tribunals across the United Kingdom and ‘to recommend a system that is **independent, coherent, professional, cost-effective** and **user friendly**’<sup>25</sup>. As well as the principles outlined in the Franks Report, the emphasis of this review shifted to accessibility and meeting the needs of tribunal users. As stated in the report of the review titled ‘Tribunals for Users: One System, One Service’ (the ‘Leggatt Report’):

*It is important to remember that tribunals exist to serve the users, not the other way around. They need to be accessible by the variety of users they are intended to help. In order to make the tribunal experience a positive one for users they need advice and support at all stages of the appeal process*<sup>26</sup>.

54. Consequently, the Leggatt Review considered the help given to tribunal users to prepare and present their cases, the information provided to them by the tribunal, and the degree to which tribunals actively engaged with users, including tribunal user groups.
55. As well as the need for independent and transparent appointment systems for tribunal members (in order, among other things, to be compliant with the European Convention on Human Rights and Human Rights Act 1998), the report also argued for strong judicial leadership, modern merits-based appointment processes and a competency based training and appraisal system.
56. A central premiss of the Leggatt Review was the desirability of coherence and the creation of a tribunal ‘system’, as well as that tribunals should be efficient and ensure best value use of government resources and taxpayer funds.

## **Framework of Standards for Tribunals**

57. In 2002 the Council on Tribunals (predecessor organisation to the AJTC) published its ‘Framework of Standards for Tribunals’. The purpose of this framework is to ‘provide advice [to tribunals], to promote good practice and to highlight problems’ as well as to ‘...provide tribunals with clear guidance on the Council’s expectations and priorities’<sup>27</sup>. This document was based on its supervision and observation of tribunals across Great Britain for over forty years. The three principles outlined in the framework are:

- 1) **Tribunals should be independent and provide open, fair and impartial hearings**
- 2) **Tribunals should be accessible to users and focus on the needs of users**
- 3) **Tribunals should offer cost effective procedures and be properly resourced and organised**

<sup>25</sup> Tribunals for Users: One System, One Service, HMSO 2001, p.5, para 1.

<sup>26</sup> Tribunals for Users: One System, One Service, HMSO 2001, p.43, para 4.1.

<sup>27</sup> Framework of Standards for Tribunals, Council on Tribunals, November 2002, p.2 at <http://www.council-on-tribunals.gov.uk/standards/framework.htm> (accessed 3 September 2009).

## Principles for Welsh Tribunals

### *Principle 1: Independence and Impartiality*

58. Tribunals should be independent and impartial, and perceived as such. A tribunal should be able to reach decisions according to law without pressure, or suspicion of pressure, from either the body or person whose decision is being appealed, from any party to a dispute or from anyone else.
59. Tribunal members should be independent, and the procedures for their selection and appointment should be fair, open and based on merit.

### *Principle 2: Accessibility to Users*

60. The Welsh Assembly Government's citizen-focused approach to public services requires that tribunals should be designed and organised with regard to the needs of the citizen.
61. In order that tribunals be accessible:
  - Users must know of their right to seek redress;
  - Users must be provided with information about tribunal processes and procedures;
  - Users should be provided with sufficient advice, assistance and, in some cases, representation;
  - There must be equality of access to justice in the Welsh Language;
  - Procedures should be informal and enabling;
  - Hearing venues should be conveniently located and arranged for tribunal users, and accessible for those with disabilities;
  - Costs and fees should be minimal;
  - All efforts should be made to engage with tribunal users;
  - There should be policies in place for users to complain about the service provided;
  - Tribunals should produce an annual report of their activities to ensure public accountability.



### ***Principle 3: Efficiency and Effectiveness***

62. Tribunals must provide cost efficient services to ensure good value to the taxpayer. This is particularly the case in the current economic and funding climate. Some indicators of efficiency are:
- That proceedings are proportionate to issues under consideration;
  - There is speedy and well organised determination of cases;
  - There are appropriate levels of administrative support;
  - Tribunal resources, including judicial time, accommodation and hearing venues are properly utilised.
63. Effectiveness is about producing desired good-quality outcomes and depends on:
- Well organised and clear judicial leadership and structure of the tribunal;
  - Tribunal members receiving appropriate induction, training and appraisal;
  - Appropriate numbers and types of tribunal members.

### ***Principle 4: Coherence***

64. The Welsh Assembly Government 'Making the Connections' agenda requires that systems of redress, such as tribunals, are 'congruent across organisational and sectoral boundaries'. This applies on a number of different levels:
- Tribunals overall should have a coherent structure;
  - There should be a common framework or principles to guide the establishment of new tribunals;
  - There should be appropriate and consistent avenues for appeal or review of tribunal decisions.
65. Tribunals are an integral part of the administrative justice system. It is important that the process from original decision, through internal and/or external complaint mechanisms, tribunals, courts and ombudsmen are coherent and complementary. It is equally important that the lessons are learnt from tribunal decisions and incorporated back into the system, so as to improve frontline decision making and enhance the service to the public.

## Part 3 – Recommendations

66. Our recommendations are designed to promote a more integrated, user-focused system, in which Welsh tribunals conform to the principles outlined in Part 2 of this report. They are divided into two categories. The core recommendations are aimed at establishing the scrutiny mechanisms and institutions needed to reform the tribunal and administrative justice system in Wales. The other recommendations outline what we consider should be the early priorities for reform.

### CORE RECOMMENDATIONS

#### Welsh Assembly Government

*‘The challenge for the Assembly is to create an administrative justice system in Wales which delivers to the Welsh public a service as good as, if not better than, that being proposed in England [notwithstanding that] there are functions being carried out in Wales over which it has no control.’*

*‘Public Service or Pale Shadow? Issues for the Future of the Tribunals Service in Wales’ Carolyn Kirby, Chair of the Mental Health Review Tribunal for Wales, p.106*

#### *Tribunal Independence and Impartiality*

67. Most Welsh tribunals are not sufficiently independent from the departments or agencies whose decisions they are considering. This needs to be put right by the Welsh Assembly Government as a matter of urgency. For cross-border tribunals this situation was remedied by the creation of a Tribunals Service as an executive agency of the Ministry of Justice as recommended in the Leggatt Review.
68. However, we do not consider it appropriate for the Welsh tribunals to join the UK Tribunals Service. The increased powers of the Welsh Assembly Government and National Assembly under the Government of Wales Act 2006 allow for ever increasing divergence between policy and practice in England and Wales. Also, the small scale of Welsh tribunals means that Welsh issues could potentially be lost in such a large organisation.
69. Other UK jurisdictions have also recognised the need for reform. In Scotland, the government has announced that it will create a separate Scottish Tribunals Service for devolved Scottish tribunals. In Northern Ireland an agency agreement<sup>28</sup> has been made transferring, on a phased basis, the responsibility for the administration of Northern Ireland tribunals to the Northern Ireland Court Service, which is currently an agency in the Ministry of Justice. When devolution of policing and justice powers takes place, the Northern Ireland Court Service would be transferred to the new Northern Ireland Department of Justice. However, neither of these options is right or practicable in Wales, having regard to the differences in scale and in the respective devolution settlements.

70. Given the relatively small size and scope of the Welsh tribunals, a separate executive agency is not the most efficient or economical solution. Rather, policy and administrative responsibility for all Welsh tribunals should be transferred to an area of the Welsh Assembly Government which has no specific responsibility for any of the government decisions under dispute. This would also have the advantage of increasing cost effectiveness by creating economies of scale and spreading resources more fairly across Welsh tribunals.
71. There should be open, independent and impartial recruitment processes for all tribunal members, either by judicial or Welsh Assembly Government public appointment processes. Currently, the appointment processes for tribunal members vary but they are often administered by the government departments or Local Authorities whose decisions are under review and in some instances they are not on a merit-based selection process. If this situation is not remedied, we consider that the government will be vulnerable to legal challenge. To ensure manifest independence appointments should be made by either the Welsh Ministers (who already have a public appointments unit) or the Lord Chancellor.

#### ***Administrative Justice Focal Point***

72. While tribunal reform is necessary, it should not stand alone. What matters to citizens is the quality of the system as whole, and how they are treated from the start of the process (the original decision from government, and the reasons given for the decision) to the end (potentially an appeal to the High Court or Upper Tribunal). When formulating policy for tribunals, consideration must be given to this broader administrative justice context. Strong and informed leadership is needed to ensure the system as a whole is focused on the needs of the citizen, and that disputes are resolved in a way which is proportionate to the issues under consideration.
73. There is an opportunity for the Welsh Assembly Government to lead the way in establishing a central administrative justice focal point, including the policy and administration of tribunals, to consider the development of the whole administrative justice system from a user perspective. This focal point should:
  - Be separate from subject specific policy departments, not just to ensure tribunal independence, but also in order to take an overarching view, to connect different parts of the system, and to promote best practice across local and national government;
  - Be a centre of expertise in administrative justice and provide leadership on administrative justice and tribunal legislative and policy development, reform and research;
  - Co-ordinate disparate initiatives and developments across the Welsh Assembly Government;
  - Act as a point of contact for internal and external stakeholders, including the advice sector and advocacy groups, tribunal members and judiciary and the Ombudsman.

74. Initially we explored the possibility that the Counsel General's office might be the most appropriate area to contain this focal point. However, we are advised that the constitutional arrangements do not allow for the Counsel General to take up this role. In any case, given the need for whole-of-government working, we consider that the Department for the First Minister and Cabinet is the most suitable location for tribunal and administrative justice policy and administration.

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**Recommendation 1:**

**That the Welsh Assembly Government establish a focal point for administrative justice in the Department for the First Minister and Cabinet.**

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**Recommendation 2:**

**That in order to ensure that tribunals are seen to be properly independent and impartial, the Welsh Assembly Government transfer policy and administrative responsibility for tribunals to this focal point in the Department for the First Minister and Cabinet, which has no specific responsibility for any of the government decisions under dispute.**

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**Recommendation 3:**

**That the Welsh Assembly Government ensure that the procedures for the selection of tribunal members are open, fair and based on merit, and that all appointments are made by the Welsh Ministers or the Lord Chancellor.**

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## Rationalisation

75. The unification and rationalisation of tribunals has been considered as part of tribunal review processes in a number of jurisdictions – including the UK, Scotland<sup>29</sup>, Canada<sup>30</sup>, Australia<sup>31</sup> and New Zealand<sup>32</sup>. As discussed in Part 1 of this report, a new unified tribunal structure has been implemented for UK cross-border tribunals, including those operating in Wales<sup>33</sup>. However, given the scale of Welsh tribunals and their disparate jurisdictions, along with the current devolution settlement, we are not convinced of the merits of a similarly unified system in Wales. Nevertheless, given the low caseload in Wales, we do

29 'Future of the Administration and Supervision of Tribunals in Scotland', the Administrative Justice Steering Group, 6 October 2008, at <http://www.ajtc.gov.uk/news/227.htm> (accessed 20 October 2009)

30 In 1996 the province of Quebec established the Administrative Tribunal of Quebec (QAT), which saw the amalgamation of a number of tribunal jurisdictions in Quebec <http://www.ta.qc.ca/english/index.jsp>. (accessed 20 October 2009).

31 In March 2008 the Queensland government announced its intention to establish an amalgamated civil and administrative tribunal which it aims to have in place by the end of 2009. In Victoria there is a combined Victorian Civil and Administrative Tribunal (VCAT) and in New South Wales an Administrative Decisions Tribunal (ADT). In 1998 there was an attempt to establish an amalgamated tribunal at a Commonwealth level, but this was defeated in the Senate. In Western Australia, the Administrative Review Tribunal Taskforce, Western Australian Civil and Administrative Review Tribunal Taskforce report on the establishment of the State Administrative Tribunal, Perth, May 2002.

32 Tribunals in New Zealand: Issues Paper, New Zealand Law Commission, Wellington, New Zealand, January 2008.

33 This new system came into existence in November 2007 under the Tribunals, Courts and Enforcement Act 2007 and reform is still on-going, with additional jurisdictions being added in stages.

consider that there is some potential for combining the jurisdictions of some tribunals by subject matter to achieve economies of scale, administrative efficiency and improving opportunities for members to sit regularly. This should ultimately lead to a better experience for tribunal users, and better value for taxpayers.

76. An obvious possibility is the creation of an 'Education Tribunal', combining the jurisdictions of the Special Educational Needs Tribunal, School Admission Appeal Panels and School Exclusion Appeal Panels. The importance of access to education cannot be overestimated, and a high quality, independent tribunal in this area is of particular consequence. This is especially so with the recent decision to give children the right to appeal to SENTW and existing provision for some children to appeal to School Exclusion Appeal Panels.
77. Currently, Admission and Exclusion Appeal Panels are administered by individual Local Authorities with little interaction between them. There is also no central collation of data or record of outcomes and most importantly, they are not properly independent. On the other hand, our survey results and visits to hearings reveal that SENTW is well administered, operates effective user groups, and comprises expert and legally qualified members. It would seem well placed to cope with an expanded education jurisdiction, given appropriate additional resources. This arrangement would be unique to Wales, and we consider that the number of cases and quality of judiciary and support staff would allow the creation of a centre of excellence and best practice.
78. Other possible jurisdictions that could benefit from amalgamation include the Valuation Tribunals, Residential Property Tribunal and the Agricultural Land Tribunal (Wales) to form a 'Land and Local Taxation Tribunal'. There are some significant difficulties associated with this, not the least of which is that the Lord Chancellor is responsible for the procedural rules and appointments in some of these jurisdictions and the Welsh Ministers for others. Additionally, a number of problems have been identified with the operation of the Valuation Tribunals in a Welsh Assembly Government sponsored review by Martin Rolph, and these have not yet been resolved<sup>34</sup>. However, if these issues can be resolved, we consider that there are substantial benefits to be had from the creation of a land and tax tribunal.

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**Recommendation 4:**

**That the Welsh Assembly Government and Local Authorities consider the appropriate amalgamation of Welsh tribunal jurisdictions according to subject matter.**

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<sup>34</sup> Review of Valuation Tribunals in Wales, Welsh Assembly Government, March 2007, at <http://new.wales.gov.uk/dsjlg/publications/localgov/valuation/item?lang=en&ts=1> (accessed on 6 October 2009).

## Tribunal Judiciary

79. While there have been previous attempts, there is currently no structured interaction between the judicial leaders of each Welsh tribunal, and little informal interaction. Improved communication and working between the Welsh tribunal judiciary is an important step in establishing a more integrated, joined-up tribunal system. Tribunal reform needs strong leadership, not just from the National Assembly and government, but from the tribunal judiciary, members and support staff, who will be essential to its successful implementation. We also consider that communication and collaboration between Welsh tribunals with cross-border tribunals should be improved. There is scope for the creation of a forum for Welsh tribunals and cross border tribunals to share best practice and discuss common issues.
80. A group comprising the leaders of each Welsh tribunal should be established to share best practice, discuss common problems and issues, and promote consistency in practice across tribunals where possible. This group would play an integral role in implementing many of the recommendations in this report and promoting a holistic view of the delivery of administrative justice in Wales.

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### **Recommendation 5:**

**That the judicial leaders and administrators of each Welsh tribunal work together on issues of common interest and towards implementing the recommendations in this report.**

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## National Assembly

81. We consider that the National Assembly should become a key partner in oversight of the administrative justice system. The issues highlighted in this report, such as a lack of tribunal independence, the opportunities for more effective, efficient and economical practices, and the lack of user-friendly information, point to the need for National Assembly scrutiny of administrative justice and tribunal policy and administration.
82. The current Committee structure in the National Assembly does not work well for the oversight of administrative justice as a whole. The four scrutiny Committees, while cross-departmental, are structured around: Communities and Culture; Enterprise and Learning; Health, Wellbeing and Local Government; and Sustainability. While the Children and Young People and Legislation Committee may consider aspects of administrative justice, their remit does not extend to all parts of the administrative justice system. We would welcome measures to ensure co-ordinated scrutiny of the implementation of our recommendations across government.

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### **Recommendation 6:**

**That the National Assembly scrutinise and monitor the Welsh Assembly Government's implementation of the recommendations in this report, including holding a debate in plenary.**

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## OTHER RECOMMENDATIONS

The following recommendations outline areas for further work and reform on which we consider the National Assembly, Welsh Assembly Government, Local Authorities and the tribunal judiciary and administrators should focus, at least initially.

### Accessibility

#### *Information*

83. Individuals learn of their right to appeal or apply to a tribunal in a number of different ways – for example, they might receive this information in a letter containing the original decision, they might access a tribunal website, or may be advised by an advocate or advice provider. Similarly, they may learn about tribunal procedures and forms in a variety of different ways – including receiving booklets and leaflets from the tribunal, advice from administrative staff of the tribunal or advice from an advocate. Parents appearing before SENTW are provided with a DVD detailing what to expect at the hearing. Our survey results also reveal that there are a variety of ways by which the tribunal's decision is recorded and communicated to users.
84. Different methods of communication will be appropriate for different audiences and tribunals, and much will depend on the subject matter and level of complexity of the issues under consideration. Any information should be designed with the needs of tribunal users in mind and the forms and procedural rules of tribunals should be as short, clear, simple and up to date as possible. Information should always be available in Welsh, and other languages where appropriate.
85. We believe that further work is needed to determine exactly how information is currently being delivered to tribunal users, the methods that are most helpful to the user, and how the current situation could be improved and standardised where possible. This could include, for example, an identification of the most effective strategies by surveying or interviewing tribunal users.

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#### **Recommendation 7:**

**That the Welsh Assembly Government and the Welsh tribunal judicial leaders and administrators work together to ensure that the information provided to tribunal users is clear, comprehensive and accessible.**

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#### *Procedures*

86. Tribunal procedures should be enabling and take account of the fact that there is often an inequality of arms between the government and tribunal user. In many cases a person appearing before a tribunal will be unrepresented, and the procedures for tribunals should recognise and accommodate for this, as should training for tribunal members in conducting hearings.

87. Another important factor from the perspective of the tribunal user is any fees or costs associated with the hearing. We consider that Welsh tribunals should continue to operate at minimum cost to tribunal users, and that information about any fees and costs is made readily available to tribunal users.

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**Recommendation 8:**

**That the Welsh Assembly Government and the Welsh tribunal judicial leaders and administrators work together to ensure in the first instance that tribunal forms and procedures are clear and simple and designed for the convenience of tribunal users.**

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**Advice and Representation**

88. There is a disparity in advice services available for tribunal users, and the help and assistance offered to them, for both Welsh and cross-border tribunals. For example, parents and young people wishing to appeal to SENTW have access to specialist support from organisations such as SNAP Cymru, which in some cases includes an advocate to represent them at the hearing. A person wishing to appeal a decision regarding social services and benefit entitlements may have access to specialist advice and representation from organisations such as an independent advice agency or a Local Authority Welfare Rights Unit.
89. Legally aided representation is only available, as of right, in asylum cases and mental health review cases. Legal help services sponsored by the Legal Services Commission or Local Authorities may be available in a number of other cases (such as for employment, benefits, housing and other disputes) but this will not usually include representation before a tribunal. The Welsh Assembly Government has introduced advocacy services for children and young people and other vulnerable groups.
90. There are a number of different initiatives across the Legal Services Commission, Welsh Assembly Government, not-for-profit sector and Local Authorities. However, it is uncertain whether the advice and assistance available to tribunal users, and users of the administrative justice system more generally, is adequate, accessible and comprehensive across Wales. While outside the scope of this report, this is an important issue that warrants significant further research and study. Any projects in this area would need to consider the current work being undertaken by other organisations, including the Welsh Assembly Government, on the funding for advice services in Wales<sup>35</sup> and the Legal Services Research Centre<sup>36</sup>.

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**Recommendation 9:**

**That the Welsh Assembly Government conduct a review of the general and specialist advice available to tribunal users, and whether there are any gaps in advice provision.**

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<sup>35</sup> See Consultation on Establishing an Alternative Advice Services Commissioning Model for Local Authority and Assembly Government Funding in Wales,

<http://www.dglegal.co.uk/consultations.html> (accessed on 8 October 2010).

<sup>36</sup> For current Legal Services Research Centre projects, see <http://www.lsrc.org.uk/projects.htm>.



## *Engagement with Users*

91. In order to promote a citizen-centred approach to tribunal services, it is important that the tribunal judiciary and the government engage effectively with tribunal users and seek their feedback, so that practices and procedures can be tailored to meet their needs.
92. Different strategies may be needed for different jurisdictions. Where caseloads and user numbers are quite low, there is scope at least to offer users an opportunity to complete a customer survey at the end of proceedings. Tribunal user groups should also be utilised in some of the larger tribunals.

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### **Recommendation 10:**

**That the Welsh tribunal judicial leaders and administrators and Welsh Assembly Government ensure that there is an appropriate strategy to engage with tribunal users for each tribunal jurisdiction.**

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## *Complaints Policy and Procedure*

93. Our survey revealed that many tribunals do not have complaints policies or collect information on the number and type of complaints that they have received, or seek feedback from those attending hearings or who have been otherwise involved with tribunals. This situation should be remedied, as effective monitoring of complaints provides a valuable source of feedback in highlighting areas where improvement is needed.
94. All tribunals should have a complaints policy and procedures in relation to the performance of both the members and administration, based on complaint handling guidance provided by the Public Services Ombudsman for Wales<sup>37</sup>. With the establishment of a centralised administration for tribunals, it may be more resource effective to institute a common complaints policy for all tribunals. This would also ensure that lessons learnt from complaints lead to improvement in future practices across all Welsh tribunals.

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### **Recommendation 11:**

**That the Welsh Assembly Government and Welsh tribunal judicial leaders establish a complaints policy and procedure for all Welsh tribunals, based on guidance from the Public Services Ombudsman for Wales.**

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## *Welsh Language*

95. Tribunal users who wish to conduct proceedings in the Welsh language should be able to expect a consistent and adequate level of service across Welsh tribunals. Our survey results suggest that while most tribunals are equipped to deal with Welsh language appeals, some tribunals are better prepared and resourced in this area than others.

<sup>37</sup> The Public Services Ombudsman for Wales has issued a number of guides to public bodies on complaint handling, remedy, and good administration. More are available on the Ombudsman's website at <http://www.ombudsman-wales.org.uk/en/guidance-to-public-bodies/>.

96. We consider that all Welsh tribunals should adopt a common Welsh Language Scheme, outlining the way in which they will give effect to the principle established by the Welsh Language Act 1993 that, in the conduct of public business and the administration of justice in Wales, the Welsh and English languages should be treated on a basis of equality. As well as ensuring that all tribunals are operating to the same standards, a common scheme could reduce the administrative burden of each tribunal creating and publishing its own scheme and allow for joint Welsh language training initiatives.
97. There should also be consistency in Welsh language training for tribunal members. In designing this training scheme, regard should be had to the work of the Lord Chancellor's Standing Committee on the Welsh Language. The Training Protocol for Justice Agencies in Wales endorsed by the Standing Committee in July 2008 should be implemented in Welsh tribunals.

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**Recommendation 12:**

**That the Welsh Assembly Government and Welsh tribunal judicial leaders and administrators work with the Welsh Language Board and the Tribunals Service to formulate a common Welsh Language Scheme for all Welsh tribunals.**

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### *Hearing Venues*

98. Our survey revealed that the majority of Welsh tribunals utilise hotels and other temporary venues for tribunal hearings. We understand this practice, given the small caseloads of most tribunals which make it neither viable nor economical for Welsh tribunals to lease permanent hearing centres. We also recognise that formal courtroom facilities are often not appropriate for tribunal hearings, especially where there is a need for informality such as in SENTW and School Exclusion cases. However, in some cases there may be scope to utilise Tribunals Service hearing venues and less formal court service facilities.
99. In arranging hearing venues, accessibility for users should be the primary concern. We were encouraged that most Welsh tribunals responded to our survey by indicating that hearing venues are chosen based on convenience for the parties. We consider that there should be a common Welsh tribunal policy for hearing venues to promote consistent standards. This could include standards on the maximum distance from parties, access to transport links, disability access, refreshment facilities, and separate waiting rooms for parties.

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**Recommendation 13:**

**That the Welsh Assembly Government and Welsh tribunal judicial leaders and administrators formulate a policy on standards for hearing venues, focused on the needs of tribunal users.**

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## *Annual Reports and Performance Monitoring*

100. We were concerned to find that most Welsh tribunals do not produce annual reports. Moreover, not all Welsh tribunals collect and collate accurate data on issues such as caseload, case outcomes and tribunal expenditure. The way in which data are collected is also inconsistent across tribunals. For example, some tribunals measure caseload by financial year, and others by calendar year.
101. To ensure greater public accountability, we consider that all Welsh tribunals should produce a yearly account of their activities, including information such as: number and types of appeals and any trends; member and staff numbers; details of training for members and staff and information about complaints. It should also include, where possible, feedback to original decision makers.
102. The level of detail required and information should be proportionate to the level of tribunal activity and a full report may not be needed in some cases. For example, the Adjudication Panel for Wales normally produces an Annual Report. However, owing to the small number of cases before the tribunal in 2008/09, it instead opted to issue a letter to interested stakeholders, briefly summarising the tribunal's activities for the year.

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### **Recommendation 14:**

**That the Welsh tribunal judiciary and administrators ensure that all Welsh tribunals collect consistent performance management data and produce a yearly account of their activities.**

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## **Efficiency & Effectiveness**

### *Resources and Support*

103. The resources and administrative and other support available to Welsh tribunals vary significantly, even taking account of the differing caseloads and complexity of subject matter. A more streamlined and amalgamated system would be able to take advantage of economies of scale and spread resources more fairly across tribunals. For example, it would allow the pooling of administrative and support staff, hearing venues, IT systems and Secretariat accommodation.
104. Combined administrative support also means that there is scope for sharing staff and resources between tribunals to cope with peaks and troughs in demand and volatile workloads. The savings generated by this new system could then be re-invested for projects to improve the tribunal system, for example, improving the assistance and information available to tribunal users.

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### **Recommendation 15:**

**That the Welsh Assembly Government explore ways in which tribunal resources can be deployed more efficiently.**

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## *Training and Appraisal*

105. The type, frequency and quality of training, appraisal and performance management systems for tribunal members vary widely. We are concerned about this situation, as the quality and experience of tribunal members has a significant direct impact on the experience of tribunal users and the quality of judicial decision making.
106. As a minimum, we consider that programmes of induction and training should be provided for tribunal chairs, members and staff. Tribunal chairs should be specially trained in the skills of chairing, and guidance should be provided regularly to members upon matters of law and practice. Training in diversity and equal treatment issues is also important.
107. Standards of judicial performance should be set and monitored. All chairs and members should participate in a review of their performance at appropriate intervals to identify areas of good performance and areas for improvement. These reviews should be undertaken by suitably experienced colleagues, who are appropriately trained to be able to give constructive feedback. In formulating training and appraisal schemes, regard should be had to the work of the Judicial Studies Board.
108. We are also concerned that the low caseloads of some Welsh tribunals mean that members are not sitting frequently enough to retain proficiency and that there is a need to review the number of tribunal members in some jurisdictions. In order to increase sitting opportunities for members, the possibility of appointing members to more than one jurisdiction should also be explored.

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### ***Recommendation 16:***

**That the Welsh Assembly Government ensure that tribunals have an adequate budget for training, appraisal and the monitoring of member performance.**

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### ***Recommendation 17:***

**That the Welsh tribunal judicial leaders and administrators ensure that tribunals have appropriate training, appraisal and performance monitoring systems in place.**

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### ***Recommendation 18:***

**That the Welsh Assembly Government, the Welsh tribunal judicial leaders and administrators explore options to ensure that tribunal members are given the opportunity to sit frequently enough to maintain knowledge and skills.**

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## Coherence

### *Framework for establishing new tribunals*

109. Many of the problems we have identified are the result of the *ad hoc* and unstructured way in which tribunals have developed. We consider that guidelines are needed to ensure that tribunals do not continue to develop in this way. These guidelines should establish, among other things:

- That before a new tribunal is set up, consideration is given to whether a tribunal is the most appropriate redress mechanism rather than internal or external review, the Ombudsman or the courts;
- Whether jurisdiction should be given to an existing tribunal, or whether a new tribunal should be created;
- That any new tribunals conform to the principles outlined in Part 2 of this report.

110. The guidelines should apply to all Welsh Assembly Government Departments and the Department for the First Minister and Cabinet should be consulted on the establishment of any new tribunals.

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#### **Recommendation 19:**

**That the Welsh Assembly Government adopt a consistent and coherent approach to the establishment of new tribunals.**

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### *Appeals*

111. Our survey results reveal that there is wide variation in appeal rights and routes from Welsh tribunals. In some jurisdictions appeal can be made only on a point of law, and in others appeal is permitted both on alleged errors of law and fact. Appeal is either to the Upper Tribunal, or to the High Court on appeal or judicial review.

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#### **Recommendation 20:**

**That the Welsh Assembly Government ensures that there are appropriate rights of appeal from tribunals.**

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### *Improving Original Decisions*

112. Tribunals are an integral part of the administrative justice system. It is important that the process from original decision, through internal and external complaint mechanisms, tribunals, courts and the Ombudsman are coherent and complementary. It is equally important that lessons are learnt from tribunal decisions and incorporated back into the system. For this to happen, there need to be good channels of communication between tribunals and original decision makers.

113. The SENTW user groups are a good example of effective feedback from tribunal to original decision-makers. Meetings are held twice a year at three locations around Wales and attended by Local Authority original decision makers, among others. They provide an opportunity for the tribunal President to highlight areas where original decisions have fallen short and to discuss important decisions by the tribunal that may have an impact on the work of Local Authorities<sup>38</sup>.

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**Recommendation 21:**

That the Welsh tribunal judicial leaders and administrators, the Welsh Assembly Government and Local Authorities work together to ensure that lessons learnt from tribunal decisions lead to improvements in original decision making, and thereby to better and more efficient service to the Welsh public.

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## Appendix A: Membership of the AJTC Welsh Committee



**Professor Sir Adrian Webb (Chair):** Chair of the Pontypridd and Rhondda NHS Trust until the end of March 2008. Was also a non-executive member of the Welsh Assembly Government's Executive Board until recently. He was Vice-Chancellor of the University of Glamorgan until December 2005. He was previously an academic at the London School of Economics and Professor of Social Policy at Loughborough University. He has held many committee and advisory roles both in Whitehall and in Wales, including HM Treasury's Public Service Productivity Panel, and has chaired several national enquiries. He was a member of the Review Team which reported to the Welsh Assembly Government in 2006 on Local Service Delivery (the "Beecham Review"), and Chair of the review of Post 14 Education in Wales (the Webb Review, published as "Promise and Performance" in December 2007). He grew up in and currently lives in South Wales.



**Bob Chapman:** Part-time management consultant working mainly in the legal sector, and a Member of the Board of Consumer Focus Wales. Following 25 years in advice work at Citizens Advice Bureaux and local authority Welfare Rights Units he joined the Legal Services Commission where he became the Acting Wales Director before taking early retirement in 2007. He is a school governor, and was until recently a member of the Trustee Board of Shelter Cymru (Welsh Housing Aid Ltd.)



**Gareth Lewis:** Member of the Employment Appeal Tribunal and a Member of Council of the University of Wales. He was previously a part-time Director of the Office of the Independent Adjudicator for Higher Education, Secretary of University College, Cardiff and Deputy Principal and Clerk to the Board of the Royal Welsh College of Music and Drama.



**Rhian Williams-Flew:** Qualified mental health nurse and registered social worker. She is a Mental Health Act Commissioner for the Care Quality Commission, a Mental Health Act Reviewer for Healthcare Inspectorate Wales and a member of the First-tier Tribunal, (Mental Health) in England. She was previously a freelance investigator of complaints made by social service users and carers and a Regulatory Inspector for the Commission for Social Care Inspection.



**Peter Tyndall:** Public Services Ombudsman for Wales. *Ex officio* member of the AJTC Welsh Committee. He was Chief Executive at the Arts Council of Wales from 2001 to 2008 and before that Head of Education and Cultural Affairs with the Welsh Local Government Association.



**Ann Abraham:** UK Parliamentary Ombudsman and Health Service Ombudsman for England. *Ex officio* member of the AJTC and its Welsh and Scottish Committees. *Ex officio* member of the Commission for Local Administration in England. Chair of the British and Irish Ombudsman Association 2004-2006 and currently a member of its Validation Committee.

**Robert Grindrod**

Secretary to the Welsh Committee  
81 Chancery Lane  
London WC2A 1BQ

020 7855 5200  
[enquiries@ajtc.gsi.gov.uk](mailto:enquiries@ajtc.gsi.gov.uk)



## Appendix B: Cross-border Tribunals Operating in Wales

- First-tier Tribunal
  - Social Entitlement Chamber
  - Health, Education and Social Care Chamber (excluding the Special Educational Needs and Mental Health jurisdictions)
  - War Pensions & Armed Forces Compensation Chamber
  - Tax Chamber
  - General Regulatory Chamber
- Upper Tribunal
  - Administrative Appeals Chamber
  - Tax and Chancery Chamber
  - Lands Chamber
- Adjudicator to HM Land Registry
- Asylum and Immigration Tribunal
- Competition Appeal Tribunal
- Copyright Tribunal
- Employment Tribunal
- Employment Appeal Tribunal
- Family Health Services Appeal Authority
- Gender Recognition Panel
- Immigration Services Tribunal
- Information Commissioner
- Information Tribunal
- Special Immigration Appeals Commission

## Appendix C: Welsh Tribunals Survey Results

1. In early 2009 a survey was distributed to all Welsh tribunals aimed at collecting detailed and consistent information on a range of issues such as caseload, member appointments, training and information provided to tribunal users. Below is the information that was provided by representatives of each tribunal. While some efforts have been made to check its factual accuracy, there may be errors in the information provided. In some instances there are also differences in statistical and data collection method between tribunals, particularly in relation to caseloads.
2. Overall, the data collected reveals that Welsh tribunals have developed in an *ad hoc* way, which has led to a fragmented tribunal system. There appear to be no guiding or common principles for the operation of existing tribunals, or the establishment of new ones. There is a wide variation in the level of help, support and information available to tribunal users, varying levels of judicial and administrative resources and different routes of appeal. In some cases this can be justified by differing subject matter and caseload (demand); in others there seems to be no principled reason for the variations.

### Jurisdictions

3. The 'Welsh' tribunals operating in Wales comprise a variety of different jurisdictions. Here is a summary of the definition given by each tribunal:

**Table 1: 'Welsh' tribunals operating in Wales**

Tribunal	Brief description of jurisdiction
Adjudication Panel for Wales (est. 1 October 2002)	To consider whether elected members or co-opted members of county, county borough and community and town councils, police, fire and rescue and national park authorities in Wales have breached their authority's statutory code of conduct.
Agricultural Land Tribunal (Wales) (est. 1947)	To make judgments in disputes between agricultural landlords and tenants under the Agricultural Holdings Act 1986 and drainage disputes in respect of ditches under the Land Drainage Act 1991.
Board of Medical Referees*	To adjudicate appeals to medical referees under the Firefighters' Pension Scheme, the New Firefighters' Pension Scheme and the Firefighters' Compensation Scheme <sup>39</sup> .
Forestry Committees for Wales (est. 2006)*	To review the refusal or conditions of a felling licence, to appeal against a restocking notice, to review felling directions.

<sup>39</sup> Determinations will be, for example, whether or not a firefighter should be retired from service on medical grounds, whether a firefighter's disability was caused by or aggravated by an injury sustained through his or her duties, or a firefighter's degree of disablement for the purposes of injury benefits.

Tribunal	Brief description of jurisdiction
Independent Review of Determination Panels (est. 2005)	To provide a review process which prospective adopters can use when they do not agree with the qualifying determination made by their adoption agency.
Independent Social Services Complaints Panels (est. 1 April 2006)	To further consider a complaint about social services (where certain criteria are met).
Local Health Boards in Wales in respect of their functions under the National Health Service (Service Committees and Tribunal) Regulations 1992*	To review the decisions of Local Health Boards in respect of their disciplinary functions under the NHS (Service Committees and Tribunal) Regulations 1992 <sup>40</sup> .
Mental Health Review Tribunal for Wales (est. 1959)	To review the cases of patients detained under the Mental Health Acts and to direct the discharge of any patients where the statutory criteria for discharge have been satisfied.
Registered Nursery Education Inspectors Appeal Panels (est. 1999)*	To hear appeals by Registered Nursery Inspectors against a decision to remove their name from the Register of Inspectors or to alter their conditions of registration
Registered School Inspectors Appeal Panels (est. 1999)*	To hear appeals by Registered School Inspectors against a decision to remove their name from the Register of Inspectors or to alter their conditions of registration.
Residential Property Tribunal (est. 1977)	To decide appeals against fair rent determinations, adjudicate in disputes about enfranchisement of freehold and leasehold renewals, and deal with a wide range of other housing matters.
School Admission Appeal Panels (est. 1998)	To consider appeals against a decision by an admission authority or governing bodies to refuse a child admission.
School Exclusion Appeal Panels (est. 1996)	To hear appeals against permanent exclusions.
Special Educational Needs Tribunal for Wales (est. 1 September 2003)	To hear and decide appeals from parents against decisions made by Welsh Local Education Authorities about children's special educational needs and to hear and decide parents' claims of disability discrimination in Welsh schools.
Traffic Penalty Tribunal (est. July 1999)	To hear and decides appeals brought against Penalty Charge Notices issued by local authorities in England (outside London) and Wales that operate civil parking enforcement.
Valuation Tribunals for Wales	To deal with appeals arising from Non-Domestic Rating Valuation and Council Tax banding, Council Tax liability and drainage rates.

\* *These tribunals have very small caseloads (on average, less than 2 cases a year) and have not been included in the detailed information below.*

40 The NHS (Service Committees and Tribunal) Regulations 1992 were revoked on 1 April 2004, with the commencement of the General Medical Service contract. Transitional Regulations came into force on 1 April 2004 to deal with outstanding cases. Matters that were covered under the Regulations are now included in the General Medical Service contract Regulations, and it is for the Local Health Boards to determine disciplinary matters under the contract.

## Structure and Leadership

4. Tribunals were asked to provide details of the tribunal structure and leadership arrangements. Responses seemed to fall into four broad categories:
  - a. A single tribunal covering the whole of Wales, with a single judicial leader (SENTW, MHRT for Wales, Adjudication Panel for Wales, ALT (Wales), Residential Property Tribunal, Traffic Penalty Tribunal);
  - b. A single tribunal covering the whole of Wales, with no overall judicial leadership (Independent Social Services Complaints Panel, Independent Review of Determination Panels);
  - c. Tribunal organised on a proposed regional basis, headed by a President for each region (Valuation Tribunals for Wales<sup>41</sup>);
  - d. Tribunal organised on a regional basis, with each panel hearing being headed by a chair, but no overall leadership (School Admission Appeal Panels, School Exclusion Appeal Panels).
5. The judicial head of the tribunal is referred to in most cases as the Tribunal President. However, the term Chairman is used in the ALT (Wales) and MHRT for Wales<sup>42</sup>. The Traffic Penalty Tribunal is a special case, in that it operates as a single tribunal for local authorities in England and Wales, and is headed by a Chief Adjudicator.

## Relationships with Departments

6. The various tribunals are sponsored by a variety of Welsh Assembly Government Departments.
7. The Department for Children, Education, Lifelong Learning and Skills directly sponsors SENTW, the Registered School Inspectors Appeal Panels and Registered Nursery Education Inspectors Appeal Panels. This Department is also responsible for Admissions Appeals and Exclusion Appeals policy and rules, but not for the funding and administration of these panels, which falls to Local Authorities and Admission Authorities.
8. The Department of Health and Social Services sponsors the MHRT for Wales, the Independent Social Services Complaints Panels, the Independent Review of Determination Panels and Local Health Boards in Wales in respect of their functions under the National Health Service (Service Committees and Tribunal) Regulations 1992.
9. The Department for Social Justice and Local Government sponsors the Adjudication Panel for Wales, the Valuation Tribunals for Wales and the Board of Medical Referees established under the Firefighters' Pension Scheme (Wales) Order 2007.

<sup>41</sup> However, the Welsh Assembly Government has recently consulted on whether there should be a single tribunal covering the whole of Wales.

<sup>42</sup> It is reported that this causes confusion in the MHRT for Wales. The Mental Health Act 2007 provides that the MHRT for Wales be headed by a President, but this section has not yet been commenced. The legal member chairing each panel is known as the President of the panel, but the judicial lead for the whole tribunal is known as the Chairman.

10. The Department for Rural Affairs sponsors the Agricultural Land Tribunal for Wales and the Forestry Committees for Wales. The Department for the Environment, Sustainability and Housing sponsors the Residential Property Tribunal.
11. The sponsoring arrangement for the Traffic Penalty Tribunal is quite complicated. The Department for Economy and Transport is responsible for traffic management policy in Wales. Individual Local Authorities are responsible for determining whether to operate a criminal or civil traffic management system, and in Wales, eight Local Authorities have signed up to the civil (decriminalised) system. Where a Local Authority opts in to the civil traffic management system, they must provide for adjudication of disputes. In practice, civil enforcement authorities (Local Authorities) have become members of the PATROL Joint Committee, comprising all the civil enforcement authorities across England and Wales and including a recently established Executive Sub-Committee (Wales). Its functions are to appoint adjudicators to the Traffic Penalty Tribunal and provide the adjudicators with administrative staff and accommodation and hearing venues. Because the Joint Committee has no corporate status and cannot therefore contract, one of the constituent Councils has been appointed Lead Authority to enable goods and services to be provided on behalf of the Joint Committee. Initially Manchester has been appointed the Lead Authority.

### **Tribunal Members**

12. As part of the survey, tribunals were asked to provide information on the following:
  - Number and types of tribunal members;
  - Member qualifications and/ or experience;
  - Tribunal composition.
13. The survey responses revealed a large variation in the total number of members appointed to each tribunal. This is unsurprising given the differences in the caseload of the tribunals (discussed below). Some tribunals such as the School Admission Appeal Panels and the School Exclusion Appeal Panels are organised by individual local authorities on an *ad hoc* basis, and there is no record of the number of people that regularly sit on these panels. Table 2 includes the total number of members for each tribunal at the time at which the survey was completed, as supplied by the tribunals<sup>43</sup>.
14. The composition and types of members on each tribunal is varied. Most tribunals comprise of a mixture of legal and other members. The exception is the Valuation Tribunals, which consist entirely of 'lay' members, although these members do have training and the support of a Statutory Clerk. While other tribunals may refer to 'lay' members, there is normally a statutory or other requirement that these members have practical experience in a given field or professional qualifications.

<sup>43</sup> Certain tribunals are excluded as they have no members appointed, rarely sit etc.

15. Many of the tribunals (MHRT for Wales, Adjudication Panel for Wales, SENTW, ALT (Wales), Residential Property Tribunal) include a legal Chair, who is required to have at least seven years experiences as a barrister or solicitor. Some tribunals require specialist professional expertise, such as the MHRT for Wales, which includes a medical member, and the Residential Property Tribunal, which includes a surveyor. Others require members with practical experience in a given field, such as the Independent Social Services Complaints Panels, where expert members must have experience in the provision of social services. Exclusion Appeal Panels must include a head teacher or other person currently working in education management, and a school governor with the requisite experience.
16. Most tribunals consist of three members, but there are a number of exceptions. For example, Traffic Penalty Tribunal cases are heard by a single adjudicator, Exclusion Appeal Panels and Admission Appeal Panels comprise either three or five members, and the Independent Review of Determination Panels can comprise four or five members.

**Table 2: Composition of tribunals**

Tribunal	Total Members	Composition of tribunal
Adjudication Panel for Wales	8	Legal Chair Two members
Agricultural Land Tribunal (Wales)	26	Legal Chair 1 member from 'Farmers Panel' 1 member from 'Landowners Panel'
Independent Review of Determinations Panels	28	4 or 5 panel members considered by the Welsh Ministers to be suitable, by virtue of their skills, qualifications or experience. The panel must include social workers with at least five years post-qualifying experience in adoption and family placement work; and where practicable, persons with personal experience of adoption.
Independent Social Services Complaints Panels	41	Lay chair Lay member Expert member
Mental Health Review Tribunal for Wales	90 (approx.)	Legal chair Medical member 1 Member
Residential Property Tribunal	42	Legal chair Professional member (surveyor) Lay member

Tribunal	Total Members	Composition of tribunal
School Admission Appeal Panels <sup>44</sup>	–	3 or 5 members 1 or 2 Education members 1 or 2 Lay members
School Exclusion Appeal Panels <sup>45</sup>	–	Lay chair 1 or 2 educational practitioners 1 or 2 school governors
Special Educational Needs Tribunal for Wales	12	Legal chair 2 members
Traffic Penalty Tribunal	31 (Eng and Wales)	Legal Adjudicator
Valuation Tribunals for Wales	238	Lay chair 2 Lay members <sup>46</sup>

### Remuneration and Allowances

17. The survey results revealed that members of all tribunals are generally reimbursed for travel and subsistence expenses<sup>47</sup>. However, this is where the common ground ends, as illustrated in Table 3.
18. Members of the Valuation Tribunals for Wales, the Exclusion Appeal Panels, the Admission Appeal Panels and non-legal members of the ALT (Wales) are not remunerated, except for loss of earnings in certain circumstances. All other tribunal members receive some form of remuneration, though this varies considerably.
19. The judicial heads of both the MHRT for Wales and the Traffic Penalty Tribunal are paid a salary, as are the President and Vice Presidents of the Residential Property Tribunal. All other members are paid a fee for services, in some cases measured in hours, and others, in days. The fees for legal members range from £360 for the Chair of an ALT (Wales) hearing, to £575 for legal members hearing restricted cases before the MHRT for Wales. The fees for other members range from £153.75 for the Independent Social Services Complaints Panels, to £240 for the Adjudication Panel for Wales. Some tribunals pay members for preparation for the hearing and reading time (Adjudication Panel for Wales, Chairs of the ALT (Wales), IRDPs), while others do not (MHRT for Wales, SENTW). This may, to some degree, explain the variation in fee levels.

<sup>44</sup> Panels are established on an *ad hoc* basis, and there is no central record of member numbers.

<sup>45</sup> Panels are established on an *ad hoc* basis, and there is no central record of member numbers.

<sup>46</sup> Although there is provision with the agreement of both parties for the tribunal to comprise only two members.

<sup>47</sup> Exclusion Appeal Panels – ‘any costs associated with the membership of the panel will be met by the Local Authority’. Admission Appeal Panels ‘in certain circumstances’.

**Table 3: Tribunal remuneration and allowances**

Tribunal	Fees	Including prep/reading time?
Adjudication Panel for Wales	President, £467 per day Legal member, £392 per day Member, £240 per day	One day's fee for reading and preparation, with additional time for more complex cases
Agricultural Land Tribunal (Wales)	Chairman and Deputy Chairmen, £365 for 7 hours <sup>48</sup> Members are not paid a fee but are paid a financial loss allowance of £30.40 for less than 4 hours and £60.80 for over 4 hours	Chairs are paid for reading and preparation time, but members are not
Independent Review of Determinations Panels	Fees are negotiated before the panel hearing	Yes
Independent Social Services Complaints Panels	Lay Chair, £307.50 per hearing Lay member, £153.75 per hearing Expert member, £205 per hearing	The paid fee covers these elements of the process
Mental Health Review Tribunal for Wales	Legal (restricted), £575 per day Legal (non-restricted), £447 per day Medical member, £447 per day, £174 per examination Member, £209 per day Appraisal Fee, £370 Tribunal Chairman's Salary per annum (3 days a week) £71,400	No
Residential Property Tribunal	Chair, £405 per day Professional members (surveyor), £288 per day Lay members, £187 per day	No, although if a matter is complex the tribunal President can use their discretion to allow a further day or half day, depending on the circumstances
School Admission Appeal Panels	No, except for loss of earnings.	–
School Exclusion Appeal Panels	No, except for loss of earnings.	–
Special Educational Needs Tribunal for Wales	President, £571.25 for 8 hours work Chairs (legal members), £459 for between 6-12 hours work	No
Traffic Penalty Tribunal	Chief Adjudicator (full time/salaried) £101,400 Part-Time Salaried Adjudicator (salaried) £54,756 Part-Time Fee Paid Adjudicators, £415 per day	Preparation and reading time would only be paid for in exceptional circumstances and by prior agreement with the Chief Adjudicator
Valuation Tribunals for Wales	No, except for loss of earnings	–



## Appointments

20. The survey results revealed that the procedure for appointing tribunal members differs significantly between tribunals as illustrated in Table 4. In some cases, the Welsh Ministers are the authority responsible for appointment, and in others the Lord Chancellor. In some cases, the Welsh Ministers and Lord Chancellor share responsibility, with the Lord Chancellor responsible for legal appointments, and the Welsh Ministers for other members. Local authorities also play a significant role in the appointment processes for some tribunals. The length of appointment is typically four or five years, with the option for reappointment.
21. Most tribunal members are appointed following a merit selection process, however, this is not always the case. For example, the tribunal members elect the Presidents and Chairpersons of the Valuation Tribunals<sup>49</sup> and Admission and Exclusion panel members are appointed at the discretion of Local Education Authorities.

**Table 4: Appointment of tribunal members**

Tribunal	Authority Responsible for Member Appointment	Length of Appointment
Adjudication Panel for Wales	Welsh Ministers	5 years with provision for reappointment, subject to satisfactory performance appraisal, up to a maximum of 10 years
Agricultural Land Tribunal (Wales)	Lord Chancellor	5 years and may be renewed subject to satisfactory performance until the age of 70 years
Independent Review of Determinations Panels	Welsh Ministers	Panel members are not appointed for a time limited period. They remain on the approved list until they ask to be removed
Independent Social Services Complaints Panels	Welsh Ministers	4 years, can be re-appointed for a maximum of 10 years
Mental Health Review Tribunal for Wales	Lord Chancellor	The Chairman, being salaried, is a permanent appointment. All other members are appointed for terms of 4 years but as they can only be stood down on certain specific grounds, the appointments are in effect permanent
Residential Property Tribunal	Lord Chancellor appoints legal members. Welsh Ministers appoint expert and lay members	5 years, and can be renewed in 5 year increments, unless there is cause not to or the member does not wish to renew

<sup>49</sup> Except that, if the tribunal fails to make an appointment after a specified period of time, the Welsh Ministers have a duty to appoint tribunal presidents and chairpersons after undertaking the required consultation.

Tribunal	Authority Responsible for Member Appointment	Length of Appointment
School Admission Appeal Panels	Local Education Authorities appoint panel members for community and voluntary controlled schools. Governing Bodies are responsible for voluntary aided and foundation schools. Joint arrangements can be made	No restriction <sup>50</sup>
School Exclusion Appeal Panels	Local Education Authorities	No restriction <sup>51</sup>
Special Educational Needs Tribunal for Wales	Lord Chancellor appoints the President and Chairpersons, Welsh Ministers appoint tribunal members	5 years, which can be renewed
Traffic Penalty Tribunal	The PATROL Joint Committee has delegated the appointment process to the Chief Adjudicator and the Lord Chancellor's judicial appointments department. Appointments are made with the consent of the Lord Chancellor	Adjudicators appointed for a term not exceeding 5 years, can be re-appointed for a further term
Valuation Tribunals for Wales	This is delegated to the local authorities in their area of jurisdiction and the President of Valuation Tribunals jointly, or by the Welsh Ministers. The LA plays no other role	6 years, with option to re-apply for a further term

<sup>50</sup> The law does not restrict the length of time panel members may serve but the admission authority should regularly review panel membership. It is good practice to change members regularly eg. every three years, to tie in with the duty to advertise for lay members.

<sup>51</sup> There are no legal restrictions and it is left to the authority responsible to determine the length of appointment.

## Procedural Rules

22. The survey indicated that there are various authorities responsible for creating procedural rules for Welsh Tribunals. The Welsh Ministers are responsible for issuing procedural rules for the: Adjudication Panel for Wales<sup>52</sup>; Residential Property Tribunal; Independent Review of Determination Panels; Independent Social Services Complaints Panel; Valuation Tribunals for Wales; SENTW; School Admission Appeal Panels and School Exclusion Appeal Panels. The Lord Chancellor makes the procedural rules for the MHRT for Wales, the ALT (Wales) and the Traffic Penalty Tribunal.

## Advisers

23. Some tribunals are able to appoint expert advisers to assist in their determinations, while others are not.
24. The Adjudication Panel for Wales indicated that where any question arises on which it would like the assistance of an expert, it may make arrangements for a suitably qualified person to enquire into and report on the matter and, if necessary, to attend the hearing and to give evidence. A copy of the expert's report is supplied to each party before the hearing or any resumed hearing.
25. Legislation requires that the Independent Review of Determinations Panel must be advised by a social worker<sup>53</sup>. The Panel may also, where it considers it appropriate, be advised by a legal adviser with knowledge and expertise in adoption legislation and any other person whom the Panel considers has relevant expertise in relation to the determination being considered.
26. The Agricultural Land Tribunal (Wales) Chairman has the discretion, rarely exercised, to nominate two Assessors from a panel of professional experts nominated by the Royal Institute of Chartered Surveyors. In drainage cases a Technical Report prepared by a qualified drainage engineer is requested. A copy of the expert's Report is supplied to each party and the expert attends the hearing to give evidence,
27. The Traffic Penalty Tribunal indicated that although not expressly provided for by regulations, when the need arises, there is capacity for the Chief Adjudicator to appoint a special adviser.
28. The Independent Social Services Complaints Panels, MHRT for Wales, Residential Property Tribunal, SENTW<sup>54</sup>, Admission Appeal Panels and Exclusion Appeal Panels indicated that they are unable to appoint advisers.

<sup>52</sup> The President of the Adjudication Panel has statutory powers to give directions as to the practice and procedure to be followed by tribunals drawn from the Panel. Such directions must reflect the provisions of regulations made by Welsh Ministers in respect of tribunals. In addition, it is a statutory function of the President of the Adjudication Panel to issue guidance on how tribunals are to reach decisions.

<sup>53</sup> Within the meaning of Part IV of the Care Standards Act 2000 with appropriate qualifications, skills and experience.

<sup>54</sup> However, SENTW indicated that they are looking to amend their Regulations to give the tribunal the power to call witnesses, including expert witnesses.

## Training and Appraisal

29. Tribunals were asked to give details of training for tribunal members, specifically:
- Who is responsible for the training of tribunal members?
  - How is tribunal training funded?
  - How is the training budget determined?
  - How frequent are training events?
30. Survey responses revealed significant variations in the provision of training. In some cases, responsibility for training falls to the judicial head (Adjudication Panel, MHRT for Wales, Residential Property Tribunal, Traffic Penalty Tribunal, Valuation Tribunals), or to tribunal support staff (SENTW, ALT (Wales)), and in others to the sponsoring department or Local Authority (Admission Appeal Panels, Exclusion Appeal Panels, Independent Social Services Complaints Panels).
31. In most cases, the funding of training for tribunal members is allocated from the tribunal's overall budget, which is provided by either the Welsh Assembly Government or Local Authorities. In the case of School Admission Appeal Panels, where 'a Local Authority is required to allocate reasonable funds to governing bodies of schools which are admission authorities... it is for the LA to decide whether these funds should be allocated to schools as earmarked allocations which are additional to, and separate from, their budget shares.' So in the case of Admission Appeal Panels, there is scope for a separate training budget, but this is dependent upon the decision of the Local Authority.
32. As expected, the frequency and type of training events diverges greatly between tribunals. For example, some tribunals have regular annual training events (SENTW, Adjudication Panel for Wales, MHRT for Wales, Residential Property Tribunal, Independent Social Services Complaints Panels, Traffic Penalty Tribunal, Valuation Tribunals for Wales), or biennial events (ALT (Wales)). Others arrange training on a locally determined basis (School Admission Panels and School Exclusion Panels). Some tribunals indicated that they provide specific training for tribunal Chairs (School Admission Panels and Valuation Tribunals). Other training includes circular letters to members informing them of developments in the law and best practice (MHRT for Wales) and 'on the job' training, where new members are asked to sit as observers on different types of tribunal hearings in order to gain experience (Valuation Tribunals for Wales).

33. The survey responses revealed decreasing integration of training events and resources compared to English equivalent tribunals. For example, the Adjudication Panel for Wales previously participated in an annual joint training event with the Adjudication Panel for England. However, the tribunal indicated that as a consequence of the tribunal reforms in England, it was unlikely that such an event would be held in 2009. The Valuation Tribunals for Wales indicated that in the past they have participated in modular training delivered by the VTS for England and have also shared joint training sessions for Presidents and Chairs. However, this arrangement is currently suspended. ALT Wales are having a joint training event with ALT England in 2010.
34. Tribunals were asked to provide details of their appraisal arrangements. Survey responses revealed that with few exceptions, review and appraisal of tribunal members does not exist, or happens infrequently. With the exception of the following, the tribunals surveyed indicated that they did not have a formal appraisal or review process.
35. The President and members of the Adjudication Panel for Wales are appraised on an annual basis (depending on the availability of suitable hearings). There is an appraisal process for the Chairmen and Deputy Chairmen of ALT (Wales), but no formal review and appraisal process for other members. There is an appraisal system for Rent Assessment Committee members, but it is difficult to operate due to the small caseload of the tribunal. The Valuation Tribunals for Wales and the SENTW are in the process of establishing appraisal systems.
36. The MHRT for Wales Chairman and two deputies are appraised by a Circuit Judge from the First-tier Tribunal (Mental Health) in England. They then appraise the other members on a two-year rotation. This is considered a useful opportunity to review performance and discuss issues, but is limited in that due to budgetary constraints, any remedial training needs identified at appraisals are unmet.

### **Caseload**

37. Survey information showed that the caseloads of the Welsh Tribunals vary significantly, as illustrated in Table 5 below. While the data indicates significant variation between the caseloads, it is only helpful to a point in understanding the workload of the tribunals, as the complexity and length of cases varies significantly between tribunals. For example, the Valuation Tribunals for Wales will often schedule several cases in a day, with most of the cases being settled prior to hearing, whereas some of the Adjudication Panel cases encompass complex legal issues and run for a number of days.

**Table 5: Tribunal caseload**

Tribunal	Year	Appeals received	Appeals registered	Cases decided	Cases withdrawn	Cases conceded
Adjudication Panel for Wales <sup>55</sup>	2005/06	13	–	4	2	–
	2006/07	6	–	8	0	–
	2007/08	4	–	8	1	–
Agricultural Land Tribunal (Wales) <sup>56</sup>	2005/06	12	–	3	12	3
	2006/07	16	–	1	5	9
	2007/08	12	–	1	8	2
Independent Review of Determinations Panels	2007/08	2	–	1	1	–
Independent Social Services Complaints Panels	2006/07	61	–	38	23*	–
	2007/08	48	–	35	13*	–
Mental Health Review Tribunal for Wales <sup>57</sup>	2006	1,296	–	1,036	195	–
	2007	1,370	–	1,090	203	–
	2008	1,450	–	1,139	211	–
Residential Property Tribunal	2006	123	–	–	8	–
	2007	103	–	–	unknown	–
	2008	108	–	–	11	–
School Admission Appeal Panels <sup>58</sup>	n/a	n/a	n/a	n/a	n/a	n/a
School Exclusion Appeal Panels <sup>59</sup>	n/a	n/a	n/a	n/a	n/a	n/a
Special Educational Needs Tribunal for Wales	2005/06	157	150	48	79	35
	2006/07	138	118	36	58	31
	2007/08	98	94	28	46	18
Traffic Penalty Tribunal	2006	146	142	79	1	59
	2007	209	205	136	3	61
	2008	152	149	85	0	54
Valuation Tribunals for Wales	2005/06	25,484	25,484	1,258	16,100	–
	2006/07	11,607	11,607	1,537	13,518	–
	2007/08	6,556	6,556	1,061	8,017	–

\* This figure includes discontinued cases

55 Includes both cases received from the Public Service Ombudsman for determination and appeals against the decisions of local authority Standards Committees.

56 The ALT (Wales) deals with both applications and appeals.

57 The MHRT for Wales deals with applications rather than appeals. The patient has the right to ask to withdraw an application, and an application is automatically cancelled if the patient is discharged from detention before the application is heard.

58 While this information is not currently available, the new School Admission Appeals Code provides that admission forums must provide an annual report to the Welsh Assembly Government which provides the number of appeals received, and the number that were successful.

59 This information is not currently collected in Wales, but the Welsh Assembly Government will start to collect some of it in 2008/09.

## Outcomes

38. Tribunals were asked for figures on the number of appeals that were upheld or dismissed over the past three years. Not all tribunals maintain a record of these figures, but for those that do the results are presented below in Table 6.

**Table 6: Tribunal outcomes**

Tribunal	Year	Upheld	Dismissed
Adjudication Panel for Wales	2005/06	4	0
	2006/07	5	3 <sup>60</sup>
	2007/08	7	1
Agricultural Land Tribunal (Wales)	2005/06	0	3
	2006/07	1	0
	2007/08	1	1
Independent Review of Determinations Panels <sup>61</sup>	2007/08	0	1
Independent Social Services Complaints Panels <sup>62</sup>	–	–	–
Mental Health Review Tribunal for Wales <sup>63</sup>	2006	41	995
	2007	79	1,011
	2008	83	1,056
Residential Property Tribunal	n/a	n/a	n/a
School Admission Appeal Panels	n/a	n/a	n/a
School Exclusion Appeal Panels	n/a	n/a	n/a
Special Educational Needs Tribunal for Wales	2005/06	41	7
	2006/07	28	8
	2007/08	23	5
Traffic Penalty Tribunal	2006	41	38
	2007	54	82
	2008	31	54
Valuation Tribunals for Wales	2006/07	708	829
	2007/08	209	852

<sup>60</sup> One of these cases was quashed as the notice from the Standards Committee was inadequate and the tribunal had no powers to amend.

<sup>61</sup> The Independent Review of Determination Panel makes recommendations and these figures represent the number of times the panel has recommended or not that an adoption agency reconsider its decision.

<sup>62</sup> The Independent Social Services Complaints Commission makes recommendations and does not record this information.

<sup>63</sup> The MHRT for Wales deals with applications rather than appeals. Patients are either discharged (indicated in the table above as 'upheld') or their detention is confirmed (indicated in the table above as 'dismissed').

## Support and Resources

39. The survey results revealed that a number of Welsh tribunals operate administratively from Welsh Assembly Government buildings, with support staff also provided by the Welsh Assembly Government (Adjudication Panel for Wales, Agricultural Land Tribunal (Wales), Independent Review of Determinations Panels, Independent Social Services Complaints Panels (ISSCP), MHRT for Wales, Residential Property Tribunal and SENTW). In some of these tribunals, support staff provided by the Welsh Assembly Government also have other responsibilities that are unrelated to their role in supporting the tribunal.
40. The four statutory Valuation Tribunals in Wales work under the administrative umbrella of the Valuation Tribunal Service for Wales. Neither the School Admission Appeal Panels nor the School Exclusion Appeal Panels have a central administration. Local Authorities provide administrative and other support as the need arises. The Traffic Penalty Tribunal is supported from Manchester, with staff and accommodation provided by PATROL, a coalition of the Local Authorities that have adopted a civil traffic management system.
41. The desire to operate as informally as possible means court and other formal hearing centres are not generally used for hearings, which are generally held in locations convenient to users. For example, SENTW indicated that hearings are not normally held more than 90 minutes travelling time from the parental home. The ALT (Wales) holds hearings in hotels near to the land in question, as site visits are made by the tribunal. The Traffic Penalty Tribunal allows appellants to state a preference for where their hearing is heard on the Notice of Appeal form, giving a first, second and third preference.
42. In the MHRT for Wales the venue of the hearing depends on the location of the patient. Where a patient is detained in a hospital, the hearing will be held in the hospital. Where a patient is based in the community, the hearing can be held at a variety of venues, such as hospitals, community mental health team offices or residential/care homes. A few hospital venues have dedicated rooms for the use of the tribunal. In all cases the tribunal requires (but does not always get) a private room with a large table and at least ten chairs with a separate room to be used as a waiting room for the attendees and witnesses. It is virtually unknown for this tribunal to pay for hearing accommodation.
43. As expected, because of the variations in caseload and case complexity, total expenditure varies considerably between tribunals – see Table 7 for details. There appears to be no common method for calculating total expenditure and some of the figures provided by tribunals do not include all expenditure, for example, where administrative support from Welsh Assembly Government cannot be separately attributed.



**Table 7: Tribunal expenditure**

Tribunal	Accommodation	Support Staff	Total Expenditure
Adjudication Panel for Wales	The support staff are located within the Welsh Assembly Government offices in Cathays Park, Cardiff. Hearings are normally in a hotel close to the respondent/appellant. Where a case is determined by written representations only, a meeting room is hired in a location convenient for the Panel members. Expenditure on hearing accommodation: £2,480 (05/06) £4,000 (06/07) £4,705 (07/08)	The Adjudication Panel (and its tribunals) is supported by four members of the Assembly Government's Local Government Policy Division, Partnership and Ethics Team. In practice, all staff concerned have other responsibilities and duties unrelated to the Adjudication Panel work. The amount of time spent on Adjudication Panel work varies in line with caseload. The Head of the Partnership and Ethics Team currently fulfils the statutory functions of the Registrar to the Panel.	£69,928* (05/06) £79,691* (06/07) £79,713* (07/08) * Approximate figures only. Certain administrative support costs are not separately attributed to Adjudication Panel work within the Assembly Government's Departmental Running Costs budget.
Agricultural Land Tribunal (Wales)	The tribunal operates from WAG owned premises in Llandrindod Wells. Hearings are held in hotels across Wales.	Secretary, provided by the Welsh Assembly Government.	£36,891 (05/06) £53,222 (06/07) £47,931 (07/08)
Independent Review of Determinations Panels	Panel hearings are held in temporary rented accommodation. Expenditure on hearing accommodation: £862 (08/09)	Panel administered by the Welsh Assembly Government, which must make suitable arrangements for the clerking of the panels.	£14,000 (07/08) £3,500 (08/09)

Tribunal	Accommodation	Support Staff	Total Expenditure
Independent Social Services Complaints Panels	Support staff operate from the Business Services Centre, Mamhilad, Pontypool. Hearings are held in various buildings across Wales as appropriate, public buildings are used whenever possible. Expenditure on hearing accommodation: £2,998.61 (06/07) £4,451.86 (07/08)	Manager: 0.5 Secretariat Officers: 2 Social Services staff administer the panels under the umbrella of Independent Complaints Secretariat, which also has responsibility for NHS Panels (but as a separate function).	£397,000 over the past three years
Mental Health Review Tribunal for Wales	The secretariat utilises office space within the WAG building at Cathays Park. Where a patient is detained in hospital, the hearing will be held in the hospital. Where a patient is based in the community, the hearing can be held at a variety of venues, such as hospitals, community mental health team offices or residential/care homes.	1 Higher Executive Officer (branch manager / clerk to the tribunal) 6 Executive officers who act as caseworkers and also clerk hearings 5 Team Support Staff. The branch is overseen by senior management within the WAG Department of Health and Social Services.	£1,147,000 (06/07) £1,309,000 (07/08) £1,340,000 (08/09) NB. This does not include secretariat costs
Residential Property Tribunal	Two offices and a hearing room at Southgate House in Cardiff. Otherwise, the tribunal uses hotels, community centres etc	2 Clerks based in Cardiff	£132,021 (2006) £124,707 (2007) £197,000 (2008) (estimated due to an increase in training)
School Admission Appeal Panels <sup>64</sup>	–	–	–
School Exclusion Appeal Panels <sup>65</sup>	–	–	–

<sup>64</sup> Accommodation is organised locally and temporarily, there are no permanent support staff, and total expenditure is not available centrally.

<sup>65</sup> Accommodation is organised locally and temporarily, there are no permanent support staff, and total expenditure is not available centrally.

Tribunal	Accommodation	Support Staff	Total Expenditure
Special Educational Needs Tribunal for Wales	The tribunal operates from premises leased by WAG in Llandrindod Wells. Hearings are held in hotel accommodation across Wales.	1 Tribunal Manager (Secretary) 2 Appeals Team Manager 2 Team Support	£363,353 (05/06) £345,118 (06/07) £316,960 (07/08) NB – This figure includes secretariat costs
Traffic Penalty Tribunal	The tribunal secretariat and support functions operate from premises in Manchester. Hearings in the following venues in Wales: Caernarfon (The Galeri) Denbigh (Denbighshire Voluntary Services Council) Llandudno (St Georges Hotel) Swansea (Express by Holiday Inn)	Support staff for Wales are not separately accounted for. England and Wales Support Staff: 1 Tribunal Manager 1 Appeals Manager 1 Technology Manager 1 Technology Officer 1 Communications Officer 1 Information Officer 4 Appeals Coordinators 4 Appeals Administrator 1 Secretary to the Chief Adjudicator	Expenditure in relation to Wales is not separately accounted for. England and Wales expenditure: £2,150,346 (05/06) £2,149,580 (06/07) £2,255,506 (07/08)
Valuation Tribunals for Wales	The East and South Wales Valuation Tribunals are co-located in the same premises at Gold Tops, Newport, but operate independently of each other. The West Wales VT is housed in Carmarthen, in a property owned by WAG. The North Wales VT Office is based at Rhos-on-Sea, Colwyn Bay, and lies within a Government building complex <sup>66</sup> .	The Valuation Tribunal Service for Wales (VTSW) provides an administrative support framework, staff and members training. The complement of 20 full-time staff include 4 Statutory Clerks and 7 Tribunal Officers	£1.092m (05/06) £1.264m (06/07) £1.01m (07/08)

<sup>66</sup> The location of the North Wales Tribunal is proposed to be the Welsh Assembly Government's move to the new purpose built complex planned for Llandudno Junction.

## Hearings

44. The Welsh tribunals surveyed were asked to provide details on whether:
- Hearings are normally held in public or private;
  - The tribunal has the power to award costs;
  - The tribunal has the power to enforce its orders;
  - Decisions are published;
  - The tribunal is supported by a clerk and, if so, the role of the clerk;
  - The hearing is recorded (audio or written transcript) and, if so, whether a copy is available to the parties.

A summary of the responses is at Table 8.

### *Private or public*

45. About half of the tribunals surveyed normally hold hearings in private, typically those dealing with vulnerable groups and/or sensitive issues. In some cases, while hearings are normally in private, the tribunal has the discretion to decide that it will be in public. For example, while hearings before the MHRT for Wales are normally private, this can be altered where a patient requests that the hearing be in public and the Tribunal is satisfied that that would be in the interests of the patient. SENTW hearings are normally in private, unless both parties request otherwise and the President orders that the hearing should be in public<sup>67</sup>.
46. Of the tribunals that normally hold hearings in public, the tribunal often has the discretion to determine that proceedings, or part of the proceedings will be held in private. For example, Adjudication Panel for Wales hearings will normally be held in public except where the tribunal considers that publicity would prejudice the interests of justice, or where the respondent or appellant agrees that the allegations may be dealt with by way of written representations.

### *Costs*

47. Roughly half the tribunals surveyed indicated that they are able to award costs. In most cases, this power is only exercisable where a person has acted frivolously or vexatiously or where their conduct has been wholly unreasonable (Adjudication Panel for Wales, ALT (Wales), SENTW and the Traffic Penalty Tribunal).

### *Enforcement*

48. None of the tribunals surveyed have powers to enforce their orders. The Independent Social Services Complaints Panels and Independent Review of Determinations Panels can be distinguished in that they make recommendations to the original decision-makers, rather than binding determinations.

### ***Published decisions***

49. Just over half of tribunals publish their decisions, and the extent to which decisions are made widely available varies considerably. For example, the Adjudication Panel for Wales publishes its decisions in one or more newspapers circulating in the area of the relevant authority and a copy of the full decision is published on the Panel's website<sup>68</sup>. Copies are also sent to relevant parties. Copies of the ALT (Wales) decisions are sent to several organisations, and may be obtained from the tribunal Secretary on request. While SENTW does not publish its decisions, it is in the process of producing an anonymised digest of decisions that will be available on the tribunal's web-site. Those tribunals that deal with sensitive personal issues or vulnerable groups generally do not publish their decisions.

### ***Role of Clerk***

50. The role and qualifications of the tribunal clerk vary across tribunals. In some, the clerk plays an active role in advising the tribunal on, among other things, points of law, for example, School Admission Appeal Panels, School Exclusion Appeal Panels and Valuation Tribunals. In others, the clerk makes the administrative arrangements for the hearing and/or drafts the minutes of the proceedings, for example, ALT (Wales), IRDP, Residential Property Tribunal, SENTW and the Traffic Penalty Tribunal. The Secretary of the ALT Wales attends all hearings and carries out the role of the clerk, including ensuring that bio-security rules are followed at site inspections.
51. For the MHRT for Wales, the clerk is often the caseworker who has overseen the gathering of reports and assembling of witnesses in the period prior to the hearing. On the day of the hearing the clerk ensures the availability of suitable accommodation for the tribunal and liaises with the attendees to ensure all are present. The clerk is responsible for obtaining the patient's medical records for the use of the tribunal and for facilitating the tribunal's liaison with the hospital during the period of the hearing. They ensure that all the correct forms are fully completed after the decision and are responsible for the transcription of the forms back at the office and for the distribution of the decision forms to the appropriate parties. They will also inform Medical Records and/or the hospital ward of the patient's status following the hearing and before leaving the hospital premises.
52. For the Adjudication Panel for Wales, the role of the clerk is to ensure the smooth running of the tribunal hearing and to advise the tribunal on matters of procedure. The clerk is not legally qualified and so cannot advise the tribunal on points of law. The clerk also administers the taking of the oath/affirmation and records the tribunal proceedings. The clerk is a member of the Adjudication Panel Support Unit within the Assembly Government.

<sup>68</sup> Where a Panel hears evidence in private, arrangements may be made to the text of the written decision report in order to preserve confidentiality.

53. The clerk plays an active role in School Admission Appeal Panels, and makes the necessary administrative arrangements for hearings, explains the basic procedures to appellants, and ensures that the relevant facts, as provided by both the appellant and the admission authority, are presented and recorded at the hearing. The clerk also provides an independent source of advice on procedure, the Codes and the law and will tactfully intervene to assist the panel with procedure, if necessary. Other responsibilities include recording the proceedings, attendance, decisions, voting outcomes and reasons and notifying all parties of the panel's decision in writing.

#### ***Recording of hearings***

54. A number of tribunals indicated that they make either an audio or written transcript of the hearing. Adjudication Panel hearings are recorded (audio) and a copy of the recording is available on request. Written transcripts are not made available as a matter of course, but a request for a transcript for the purposes of an appeal to the High Court would be considered sympathetically. A written transcript is made of the Independent Review of Determinations Panels hearings. Traffic Penalty Tribunal hearings are recorded, but the release is subject to the agreement of the Adjudicator and, unless the need is related to a disability issue, is made available at a cost to cover transcription. Audio recordings of SENTU hearings are made and copied to parties on request.

**Table 8: Tribunal hearing arrangements**

Tribunal	Restrictions on legal repres.?	Legal aid available?	Generally public or private hearings?	Power to award costs?	Power to enforce orders?	Decision published?	Supported by a clerk?
Adjudication Panel for Wales	No	No	Public	Yes	No	Yes	Yes
Agricultural Land Tribunal (Wales)	No	No	Public	Yes	No	Yes	Yes
Independent Review of Determinations Panels	No	No	Private	Yes	No	No	Yes
Independent Social Services Complaints Panels	No	No	Private	No	No	No	No
Mental Health Review Tribunal for Wales	No	Yes	Private	No	No	No	Yes
Residential Property Tribunal	No	No	Public	Yes	No	Yes	Yes
School Admission Appeal Panels	No	No	Private <sup>69</sup>	No	No	No	Yes
School Exclusion Appeal Panels	No	No	Private	No	No	No	Yes
Special Educational Needs Tribunal for Wales	Yes	No	Private	Yes	No	No	Yes
Traffic Penalty Tribunal	No	No	Public	Yes	No	Only significant decisions	Yes
Valuation Tribunals for Wales	No	No	Public	No	No	Yes	Yes

## Appeals

55. There are a number of different appeal routes from the decisions of tribunals, as set out in Table 9 below. For cross-border tribunals operating in Wales that have joined the new two-tier tribunal system, appeal is now to the Upper Tribunal, with leave, on a point of law. An Upper Tribunal hearing centre and administrative facilities has been established in Cardiff, alongside the Administrative Court facilities, to deal with these appeals. There is also scope to hold hearings in a number of different locations around Wales for the convenience of the parties.
56. As part of the survey, the tribunals were asked whether there is a right of appeal from their decisions, whether on the facts or a point of law, and if so, where this right of appeal lies. A right of appeal to the Upper Tribunal lies from some Welsh tribunals, even while they remain outside the tribunal reform process – SENTW, MHRT for Wales<sup>70</sup> to the Administrative Appeals Chamber and some jurisdictions of the Valuation Tribunal to the Lands Chamber. There is a mixture of appeal rights from other Welsh Tribunals. In some cases, there is no right to appeal, apart from applying for judicial review (Adjudication Panel for Wales when acting as an appeal tribunal, School Exclusion Appeal Panels and the Traffic Penalty Tribunal). In others, appeal is to the High Court.

<sup>70</sup> Tribunals, Courts and Enforcement Act 2007, s32. Where a new right of appeal to the Upper Tribunal is created in England in relation to a tribunal that joins the first-tier tribunal, appeals from the equivalent Welsh Tribunal will also normally be to the Upper Tribunal.



**Table 9: Tribunal appeals**

Tribunal	Appeal?	On facts, point of law?	Where to?
Adjudication Panel for Wales	Case tribunals and interim case tribunals, yes Appeal tribunal, no	Both	To the High Court
Agricultural Land Tribunal (Wales)	Yes	Point of Law	To the High Court
Independent Review of Determinations Panels <sup>71</sup>	No	–	–
Independent Social Services Complaints Panels <sup>72</sup>	No	–	–
Mental Health Review Tribunal for Wales	Yes	Point of Law	With Leave to the Administrative Appeals Chamber of the Upper Tribunal
Residential Property Tribunal	Yes	General right of appeal	To the High Court
School Admission Appeal Panels	No	–	–
School Exclusion Appeal Panels	No	–	–
Special Educational Needs Tribunal for Wales	Yes	Point of Law	With Leave to the Administrative Appeals Chamber of the Upper Tribunal
Traffic Penalty Tribunal	No	–	–
Valuation Tribunals for Wales	Rating appeals, yes Council Tax appeals, yes	General right of appeal Point of law	With Leave to the Lands Chamber of the Upper Tribunal To the High Court

<sup>71</sup> These panels do not make binding decisions.

<sup>72</sup> These panels do not make binding decisions.

## Annual Reports

57. Four of the Welsh tribunals surveyed indicated that they produced annual reports, which are published in hard copy and on their websites, and sent to relevant Welsh Ministers and other stakeholders (SENTW, Adjudication Panel for Wales, Valuation Tribunals for Wales, Traffic Penalty Tribunal). However, most of the tribunals indicated that they do not publish annual reports: (ALT (Wales); MHRT for Wales; Independent Social Services Complaints Panel; Independent Review of Determinations Panel; School Exclusion Appeal Panels; School Admission Appeal Panels and Residential Property Tribunal).

## Representation and Legal Aid

58. With the exception of SENTW, all the tribunals responded that there are no restrictions on the parties being legally or otherwise represented. In the case of SENTW, there is a restriction to one representative per party, who may be legally qualified or otherwise, unless the President or tribunal gives permission for the LEA to be represented by more than one person.
59. The only Welsh tribunal where legal aid is available for applicant representation is the MHRT for Wales. However, in some cases legal advice and assistance may be available to help with preparation for the hearing, for example, in SENTW. While legal aid is not available for persons appearing before the Adjudication Panel for Wales, local authorities have powers under the 'Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006' to provide indemnities or insurance for members. Such provision can, among other things, be made in respect of misconduct proceedings brought against a member under Part III of the Local Government Act 2000. A member must reimburse the authority or insurer any sums expended where a breach of the code of conduct is found to have taken place and disciplinary measures are taken against the member concerned.

## Information for Users

60. Tribunals were surveyed on the information that they provide to users, the results of which are presented in Table 10. Under half of the tribunals surveyed have comprehensive websites (SENTW, Adjudication Panel for Wales, Traffic Penalty Tribunal and Valuation Tribunals for Wales). The information available to users and the way it is presented on these websites is different for each tribunal. The MHRT for Wales only has a static webpage, giving details of the postal address and telephone numbers of the tribunal.
61. Information about School Admission Appeal Panels can be found on the Welsh Assembly Government website. Information on exclusion appeals is located on the Advisory Centre for Education website, which is an organisation funded by the Welsh Assembly Government to provide advice for parents and children and young people on exclusion. The Welsh Assembly Government website contains some basic information on the ISSCPs, but very limited information on the IDRPCs. The Residential Property Tribunal for Wales does not have a website, but some information is available on the Residential Property Tribunal Service for England website.
62. Only SENTW has a dedicated helpline for users. A number of other tribunals indicated that anyone requiring assistance or information can ring the tribunal helpline and will be assisted by a member of staff (MHRT for Wales, Adjudication Panel for Wales, Valuation Tribunals for Wales). The Traffic Penalty Tribunal provides appellants with the contact details of a Co-ordinator to whom they can address their queries.
63. Most of the tribunals indicated that leaflets and booklets are available to assist tribunal users. However, the type of information, the way it is presented, and how it is supplied to the user differs. SENTW produces an appeal booklet and form and a 'how to make a claim' booklet and form. The Rent Assessment Committee uses booklets produced by Residential Property Tribunal Service for England or by LEASE. The ALT produces guidance notes and the Traffic Penalty Tribunal has a leaflet explaining how to appeal on-line. Information for parents booklets should be available from each Local Authority for School Admission Appeal Panels.

**Table 10: tribunal information for users**

Tribunal	Website	Helpline	Leaflets
Adjudication Panel for Wales	Yes	No dedicated line	Yes
Agricultural Land Tribunal (Wales)	Information available on WAG and DEFRA websites	No dedicated line	Yes
Independent Review of Determinations Panels	No	No	Yes
Independent Social Services Complaints Panels	No	No	Yes
Mental Health Review Tribunal for Wales	Yes, but limited	No dedicated line	Yes
Residential Property Tribunal	No	No	No
School Admission Appeal Panels	No dedicated website, but some info available on WAG site and LA sites	–	Yes
School Exclusion Appeal Panels	–	–	–
Special Educational Needs Tribunal for Wales	Yes	Yes	Yes
Traffic Penalty Tribunal	Yes	No	Yes
Valuation Tribunals for Wales	Yes	No	Yes

## Welsh Language

64. The tribunals were asked:

- Whether they operate under a Welsh Language policy or scheme;
- How many appeals have been lodged in Welsh over the past 3 years;
- How many hearings have been conducted in Welsh over the past 3 years;
- How many tribunal members and judges are Welsh language speakers.

The responses are presented in Table 11 below. It appears that most tribunals are equipped to deal with Welsh language appeals (some more than others), even though there is limited demand for Welsh language services.

**Table 11: Welsh language in tribunals**

Tribunal	Welsh language policy or scheme?	Number of appeals lodged in Welsh	Number of Welsh language hearing	Number of Welsh speaking tribunal members
Adjudication Panel for Wales	Yes, applies WAG Welsh Language Scheme	Nil	Nil*	President, legal members and one lay member
Agricultural Land Tribunal (Wales)	Simultaneous translation is available	Nil	Nil	Chair/Deputy Chair and landowner members do not speak Welsh. 8 Farmer members and 2 drainage members speak Welsh
Independent Review of Determinations Panels	Yes	Nil	Nil	Unknown
Independent Social Services Complaints Panels	WAG policy	2	1	6

\* The language preference of tribunal participants is established in advance. While no tribunal has been held entirely in Welsh, a number of participants have given evidence in Welsh. A simultaneous translation is provided.

Tribunal	Welsh language policy or scheme?	Number of appeals lodged in Welsh	Number of Welsh language hearing	Number of Welsh speaking tribunal members
Mental Health Review Tribunal for Wales	Yes	No formal record, but not more than 2 or 3 in the past 3 years	No formal record, but about 4 in the past 3 years	Approx. 10, including 7 legal members and at least 2 judges
Residential Property Tribunal	Yes	A few	Nil	A few
School Admission Appeal Panels	Local authorities bound by their own Welsh Language schemes	–	–	–
School Exclusion Appeal Panels	Local authorities bound by their own Welsh Language schemes	–	–	–
Special Educational Needs Tribunal for Wales	Yes, Welsh Language Scheme	Under 10 in the past three years	Under 10 in the past three years	President 2 Chairs 3 tribunal members
Traffic Penalty Tribunal	Forms and leaflets in Welsh and the tribunal is in process of translating website	Less than 10	Less than 10	3
Valuation Tribunals for Wales	Yes	Less than 3%	Less than 1%	45

## Engagement with Users

65. As part of the survey, tribunals were asked:
- What interaction the tribunal has with tribunal users (including applicants, government departments, legal and other representatives etc);
  - Whether there is there a tribunal user group and, if so, how is the group supported, and what function it performs;
  - Whether the tribunal meets with other devolved administration tribunals.
66. SENTW responded that parties are invited, post case, to complete a satisfaction form. The Adjudication Panel for Wales indicated that the President of the Panel maintains regular contact with stakeholder and other appropriate organisations, including the Welsh Assembly Government, the Public Services Ombudsman for Wales, local authority monitoring officers, the AJTC and its Scottish and Welsh Committees and the Adjudication Panel for England. Contact with local authority members tends to be at the point of delivery in terms of responding to information requests and in conducting tribunal hearings.
67. The Traffic Penalty Tribunal holds induction days with new local authorities to increase their understanding of the tribunal and its procedures. The tribunal conducts internal evaluation of new initiatives and from time to time commissions independent research; for example Birmingham University conducted a user survey for the tribunal. The Chairman of the MHRT for Wales sits on a number of committees and bodies where interaction with user representatives and other stakeholder groups takes place. The other tribunals surveyed indicated that there is no formal interaction with tribunal users.
68. Only SENTW and the Traffic Penalty Tribunal operate tribunal user groups. SENTW indicated that it has regular structured user group meetings held twice a year at regional locations in Wales. The Traffic Penalty Tribunal holds appellant user groups with representatives from motoring, advisory and disability organisations and others at least once a year. It also holds user group meetings with local authorities once a year to which operational and legal officers are invited. While there is no specific user group for the Valuation Tribunals for Wales, representatives participate in the Valuation Office Agency Ratepayers Forum. Recently, the ISSCP has involved users in an independent review of its complaints process.

69. The extent to which Welsh tribunals interact with their English and Scottish counterparts varies. SENTW takes part in an annual presidents and secretaries meeting with its Scottish, English and Northern Irish equivalent tribunals. The MHRT for Wales participates, on an informal basis, in a Presidents' group convened by a representative of the First-tier tribunal that meets on an *ad hoc* basis. Networking often takes place at conferences and other events. The ALT (Wales) indicated that there is an annual meeting of ALT England and Wales Chairmen and Secretaries and that the annual AJTC conferences are an opportunity to network with English counterparts. The Valuation Tribunals for Wales indicated that they have less interaction with the English Valuation Tribunal than previously, except at events such as the AJTC conference. The Chief Adjudicator of the Traffic Penalty Tribunal has met with other traffic and parking tribunals. The Adjudication Panel for Wales does not meet with its English and Scottish counterparts, but in the past members have attended joint training sessions.

### Complaints

70. Tribunals were asked whether they have a complaints policy, keep a record of complaints, and if so, how many complaints were received in the past three years. A summary of the responses is at Table 12. SENTW's complaints policy is available to the public on request and on its website, as is the Traffic Penalty Tribunal's policy.



**Table 12: Tribunal complaints policies**

Tribunal	Complaint Policy?	Record of complaints?	How many complaints over past 3 years?
Adjudication Panel for Wales	Yes	Yes	0 (2005/06) 1 (2006/07) 0 (2007/08)
Agricultural Land Tribunal (Wales)	Yes	Yes	Nil
Independent Review of Determinations Panels	No	Yes	Nil
Independent Social Services Complaints Panels	No	Informally only	8 (2006/07) 5 (2007/08)
Mental Health Review Tribunal for Wales	Yes	Yes	Not more than 1 per year
Residential Property Tribunal	No	No	1 in past 3 years
School Admission Appeal Panels	–	–	–
School Exclusion Appeal Panels	–	–	–
Special Educational Needs Tribunal for Wales	Yes	Yes	1 (2005/06) 4 (2006/07, 3 of which were from the same party and related to the same issue) 0 (2007/08)
Traffic Penalty Tribunal	Yes	Yes	1 (2006) 0 (2007) 1 (2008)
Valuation Tribunals for Wales	Yes	Yes	3 (2005/06, West Wales) 4 (2006/07, 1 East Wales, 3 West Wales) 2 (2007/08, 1 East Wales, 1 West Wales)

## Links to the Ombudsman

71. Some of the tribunals surveyed had very obvious links to the Public Services Ombudsman for Wales (PSOW). For the Adjudication Panel for Wales, the Ombudsman is the first point of contact in misconduct cases. Any person may make an allegation to the PSOW that a member of a local authority has failed to comply with their authority's code of conduct. It is for the Ombudsman to determine whether the allegation should be investigated and whether such investigation should be undertaken by his office or the relevant local monitoring officer. Where the PSOW undertakes the investigation, he may send his report to the local standards committee or, generally in more serious cases, to the Adjudication Panel. It is a function of the Adjudication Panel to form tribunals to consider reports from the PSOW and to determine whether there has been a breach of the code of conduct.
72. The PSOW is also an integral part of the investigation of social services complaints. On completion of Stage 2 of the statutory procedure, complainants have the option of taking their complaint to Stage 3: the ISSCP (with the right to go to the PSOW thereafter) or direct to the Ombudsman.
73. For School Admission and Exclusion Appeal Panels, a parent or pupil can complain to the PSOW on the grounds of maladministration by the appeal panel. The PSOW has the power to make recommendations, but no powers to direct reinstatement or to order a fresh appeal hearing, though a fresh appeal hearing could be recommended. It would be for the LEA to decide whether to accept the Ombudsman's recommendation, although it would normally be expected to comply.
74. Similarly, the PSOW can investigate complaints of maladministration against the Valuation Tribunal Service for Wales. The jurisdiction only concerns administration of appeals and does not extend to the judicial decision making function.
75. Other tribunals indicated that they did not have any links with the PSOW. For example, the PSOW does not have jurisdiction over detained patients, and thus does not have links to the MHRT for Wales.

Tribunals listed in the Schedule to the Administrative Justice and Tribunal Council  
(Listed Tribunals) (Wales) Order 2007

Adjudication Panel for Wales

Board of Medical Referees

Forestry Committees for Wales

Independent Review of Determinations Panels in Wales

National Health Service Independent Complaints Panels

Registered Nursery Inspectors Appeal Tribunal

Registered School Inspectors Appeal Tribunal

Residential Property Tribunal for Wales

School Admission Appeal Panels for Wales

School Exclusion Appeal Panels for Wales

Social Services Independent Complaints Panels

Special Educational Needs Tribunal for Wales

Valuation Tribunals in Wales



Y Cyngor Cyfiawnder Gweinyddol a  
Thribiunlysoedd Pwyllgor Cymru  
Administrative Justice & Tribunals Council  
Welsh Committee

Hyruyddo Tegwch a Chyfiawnder  
Promoting fairness and redress

# Administrative Justice & Tribunals Council Welsh Committee

ANNUAL REPORT 2010/2011





Y Cyngor Cyfiawnder Gweinyddol a  
Thribiunlysoedd Pwyllgor Cymru  
Administrative Justice & Tribunals Council  
Welsh Committee

Hyruyddo Tegwch a Chyfiawnder  
Promoting fairness and redress

# Administrative Justice & Tribunals Council Welsh Committee

ANNUAL REPORT 2010/2011

This Report is made to the Welsh Ministers

It is laid before the National Assembly for Wales by Welsh Ministers pursuant to paragraph 21 of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007

The AJTC and its Scottish Committee publish their own separate annual reports

November 2011

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Any enquiries regarding this publication should be sent to us at [enquiries@ajtc.gov.uk](mailto:enquiries@ajtc.gov.uk)

## Foreword

Since the creation of the Welsh Committee in July 2008, the administrative justice system in Wales has changed markedly.

From the very first, we argued for a single focal point for administrative justice in the Welsh Government. It was the key recommendation in our *Review of Tribunals Operating in Wales*, and we were very pleased to note the creation of an Administrative Justice and Tribunals Unit in March 2010. This year, we have started to see the administration of a number of Welsh tribunals come under the leadership of this Unit, and it is to be hoped that this trend will continue, helping to ensure independent and impartial delivery of administrative justice.

This year has also seen a real coming together of judiciary and administrators from a range of tribunals across Wales, working on issues of common interest and concern, such as training. This improved communication and working can only lead to a more integrated, joined-up tribunal system, and we believe this will be to the greater advantage of individuals in Wales.

Looking at the wider landscape, in Wales we now have a common complaints procedure for public service providers. This procedure promotes a clear and consistent approach towards complaints-handling across Wales, and it is to be hoped that all public service providers will adopt this approach. In addition, the AJTC published its report on 'Right First Time', which we hope will be used by decision-makers across Wales to improve the quality of original decision-making.

In my foreword to last year's Annual Report, I noted that the futures of the AJTC and its Committees were in doubt. Since then, the AJTC has been listed as a body to be abolished as part of the changes enacted under the Public Bodies Bill, and we face a period of uncertainty as we await the outcome of a Ministry of Justice consultation.

Administrative justice is clearly continuing to develop in Wales, and as ever there remain a number of risks. The Administrative Justice and Tribunals Unit must pursue its demanding work programme with diligence and determination, and there are a number of hurdles still to be overcome. In terms of non-devolved areas of administrative justice, the consequences of the recent merger of HM Courts Service and the Tribunals Service are as yet unknown. However, it is clear that over the coming months and years the new Service will be stretched by a high workload and financial constraints. In view of the current economic situation, it is at this time more important than ever that citizens have access to a fair and efficient system for the adjudication of disputes with the state.



Considering this wider context, it seems that the loss of the AJTC and this Committee will come at a critical time for administrative justice in Wales. Our real strength comes from our ability to look at the system in Wales as a whole, rather than focusing solely on devolved or non-devolved areas or distinguishing between complaints and appeals. We strive to represent the voice of the user, and as administrative justice in Wales develops, the First Minister will continue to need independent advice about the experience of the individual in Wales.

A handwritten signature in black ink, appearing to read 'Adrian Webb', written in a cursive style.

**Professor Sir Adrian Webb**  
Chair, AJTC Welsh Committee

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# Introduction

1. The Welsh Committee of the AJTC was established under the Tribunals, Courts and Enforcement Act 2007 and came into existence in 2008. The Committee has its own identity and we take responsibility for monitoring administrative justice in both devolved and non-devolved jurisdictions in Wales. We also contribute to the work of the AJTC as a whole, ensuring that the Council is aware of the implications of administrative justice policy on Wales and assisting with its project work.
2. In February 2010 the AJTC published its Corporate Plan for 2010-2013, outlining priorities for work over the coming years. In relation to Wales, we highlighted three main work strands. First, we considered that we would need to focus on taking steps to pursue and support the implementation of the recommendations made in our recently published *Review of Tribunals Operating in Wales* (the *Review*). Second, we wanted to encourage coherent policy and practice in administrative justice across devolved and non-devolved areas. Third, we wished to promote the concept of 'Right First Time' across decision-making bodies in Wales.
3. At the same time, the AJTC produced its Action Plan for 2010-2011. In it, the Welsh Committee sought to elaborate how we would start to develop our three work strands. Pursuing implementation of the recommendations made in the *Review* was to be our priority, and we would work with administrators within tribunals themselves and the Welsh Government along with members of the judiciary in order to achieve a better system of adjudication for Welsh citizens. We also planned to continue with our programme of regular visits to devolved tribunals to assess whether the service delivered to tribunal users matched up to the standards set out in the *Review*. In relation to developing a coherent policy for administrative justice, we would increase our number of visits to non-devolved tribunals and would support the development of a common complaints handling system across the public sector in Wales. We would also seek to investigate access to advice, guidance and representation across Wales. Finally, we would contribute actively to the AJTC project on 'Right First Time'.
4. This report also seeks to cover some of the work undertaken by this Committee after April 2011. We added a new priority for action, which was to monitor closely the impact on users in Wales of the April 2011 merger of HM Courts Service with the Tribunals Service. In view of the anticipated abolition of the AJTC and therefore of the Welsh Committee, we also stated that we would work with Welsh Government officials and stakeholders in the administrative justice system to seek another home for some of our advisory and supervisory tasks.

## Priority 1: Implementation of the recommendations made in the *Review of Tribunals Operating in Wales*

5. The Review was published in January 2010, and made 21 recommendations for change. The recommendations were listed under four categories – independence and impartiality; accessibility; efficiency and effectiveness and coherence.
6. Cabinet approved the implementation action plan in November 2010. The Welsh Government has chosen to pursue the core recommendations as a priority. The remainder, which offer areas for further work and reform, will be treated as special projects and will form part of the future work programme for the Administrative Justice and Tribunals Unit.

### Independence and Impartiality

7. Our first recommendation was that the Welsh Government establish a focal point for administrative justice in the Department for the First Minister and Cabinet. We hoped that this focal point would act as a catalyst for reform of tribunals, but would also help to ensure that development of administrative justice in Wales operated in a coherent and cohesive fashion. Following on from this, our second recommendation was that the Welsh Government transfer policy and administrative responsibility for devolved tribunals to this focal point.

#### Focal point

8. We were delighted when in March 2010 the Welsh Government agreed to create a post to manage the implementation of the recommendations, to develop the structure for the administration of tribunals and to take responsibility for the coordination of general policy and practice guidelines.
9. The Administrative Justice and Tribunals Unit has now been able to appoint a Tribunal Operations Manager to support the head of the Unit and to work to identify, develop and implement improvements to business processes, standard operating models and procedures across the Administrative Justice and Tribunals Unit. This is a welcome step, and we commend the decision to allocate funding to allow the creation of this important post.
10. Due to internal restructuring within the Welsh Government, the Administrative Justice and Tribunals Unit has subsequently been transferred to the Permanent Secretary's Division. We have been assured by the First Minister that democratic accountability for the Unit will remain in his hands, and that he will continue to take an active interest in administrative justice matters.

## Transfer of responsibility

11. Following a scoping exercise by the Administrative Justice and Tribunals Unit, an Action Plan for implementation was approved by the Welsh Cabinet in November 2010. The Action Plan outlined that in keeping with recommendation 2, staff working to support tribunals but based within policy divisions would transfer, with relevant budgets, to the Administrative Justice and Tribunals Unit.
12. In practical terms, this is not an easy process as management arrangements vary from tribunal to tribunal. Therefore, the arrangements for each devolved tribunal have been subject to an internal review, gathering information on finances and other resources. The recommendations made by the audit department following the review must be implemented before a transfer can be completed. In addition, steps have been taken to standardise the grading and nomenclature of staff due to transfer into the Unit.
13. We were pleased to meet with the audit team before they began their investigations, and we commend the processes by which the Administrative Justice and Tribunals Unit has sought to ensure consistency across tribunal administration.
14. On 1 April, the Special Educational Needs Tribunal for Wales, the Registered Inspectors of Schools Appeal Tribunal and the Registered Nursery Education Inspectors Appeal Tribunal all transferred to the Administrative Justice and Tribunals Unit. This constituted a real landmark in the development of administrative justice in Wales, and set the precedent for a demonstrably independent and impartial system of adjudication.
15. Over the course of 2011-2012, it is anticipated that the Adjudication Panel for Wales, the Forestry Committee for Wales, the Mental Health Review Tribunal for Wales and the Residential Property Tribunal will all transfer into the Administrative Justice and Tribunals Unit. Following a review over the summer, the administration of the Agricultural Land Tribunal will also transfer into the Unit over the next twelve months.
16. There are outstanding difficulties in relation to the transfer of the administration of the Valuation Tribunals for Wales, School Admission Panels and School Exclusion Panels. One difficulty is that the Welsh Government does not currently provide administrative support for the tribunals and panels. We understand that scoping papers have been commissioned to move the process along. In terms of the Valuation Tribunals for Wales, an in-depth review of costs and other considerations will be undertaken during autumn/winter 2011. A decision as to how to proceed will then be taken by the Permanent Secretary.
17. While we recognise the difficulties relating to these transfers, we strongly urge that all possible steps are taken to resolve these issues and to transfer the tribunals and panels into the Administrative Justice and Tribunals Unit with as little delay as possible. We consider their transfer to be essential not just for the sake of the reputation of independent justice in Wales, but in order to ensure that users benefit from the use of standardised rules and procedures

across the country and across tribunals. In our visits over the past year, we have had concerns relating to the independence and impartiality of admission and exclusion hearing panels. We have also noted repeatedly some anomalies in certain procedures of the Valuation Tribunals, requiring legislative change. Administration from a central unit would provide the opportunity to remedy these problems. In addition, transfer of these jurisdictions would also assist with meeting further recommendations concerning rationalisation of tribunals, which we hope will be possible in view of the new legislative powers granted to the National Assembly.

18. Independent Review of Determinations Panels for both adoption and fostering are currently outsourced to the British Association for Adoption and Fostering. Their status will be reviewed when the contract ends in 2013. The Fire-fighter Board of Medical Referees is also currently contracted out, and transfer is not expected in the near future. Independent Social Services Complaints Panels are currently under review. One option under consideration is to alter the process for making complaints about social services in accordance with the Public Services Ombudsman for Wales' recommendations for a common complaints system across the public sector in Wales. A consultation is expected, and the Welsh Committee looks forward to submitting a response.

## Accessibility

19. Without being an advocate, the Committee seeks to represent the voice of the user of the administrative justice system. Consequently, the Review included a series of recommendations aimed at ensuring tribunals in Wales are accessible. We have been pleased to note some progress on these fronts, although we remain concerned that following abolition of the AJTC these types of issue will drop off the radar of administrators and politicians.

## Information

20. We noted that further work needed to be conducted into determining which methods are the most effective at delivering information to users, and recommended that all information provided is clear, comprehensive and accessible.
21. We understand that the Administrative Justice and Tribunals Unit is currently working on developing a tribunals website. We welcome any attempts to ensure that tribunal information is easily accessible and hope that this work will be done with the user in mind. We suggest that the Unit might find it sensible to involve stakeholders such as advice bodies before launching the final website.

## Procedures

22. We suggested that tribunal procedures should be enabling and take account of the fact that there is often an inequality of arms between the government and tribunal user. We recommended that judicial leaders and administrators work together to ensure tribunal forms and procedures are clear and simple for users to understand.

23. It was with pleasure that we recently had the opportunity to review draft Regulations for the Special Educational Needs Tribunal for Wales (SENTW). The Regulations were intended to consolidate and overhaul the existing four sets of regulations relating to SEN and disability discrimination appeals. The Regulations were long and it might be helpful to produce a quick-reference guide, but were clearly drafted with users in mind. This is evidenced not only through the use of language but also through provisions allowing child appellants to be accompanied by 'case friends'. This user-focus is to be commended, and we hope that these Regulations will be the basis for any future harmonised procedures to be used across devolved tribunals.

## Efficiency and Effectiveness

24. Our research for the *Review* revealed that the resources and administrative support available to Welsh tribunals varied significantly. We also observed that there was little consistency in the approach taken to training and appraisal of tribunal members. These issues can have direct consequences on users, and in terms of public administration it is proper to ensure the most effective use of the taxpayer's resources. Therefore, in addition to achieving independence and impartiality for tribunals in Wales, the transfer of administrative staff into a central unit would help to achieve greater efficiency and effectiveness across tribunals in Wales.

25. Concerning administrative resources, as noted above, the transfer into the Administrative Justice and Tribunals Unit has already started, and will continue into 2011-2012. It is expected that the Administrative Justice and Tribunals Unit will have a strategic and operational hub in Cardiff along with a further operational hub in Llandrindod Wells. It is hoped that the internal audit process noted earlier in this report will mean that inconsistency will be reduced and that tribunals will now have a clear blueprint on how to increase capacity and improve operations. As other tribunals transfer into the Unit, it is to be hoped that consideration will be given to the best use of resources available. It is encouraging that the Tribunal Operations Manager has established a tribunal reform Working Group to consider best practice and provide a vehicle for exchange of information and action relating to tribunal reform in Wales.

26. Concerning training and appraisal, this issue has been taken up by the Welsh Tribunals Contact Group. The group is chaired by Judge Elisabeth Arfon Jones, and has a varied membership, including representatives from the administration and judiciary of both devolved and non-devolved tribunals operating in Wales.

27. In the *Review*, we advocated the creation of a group where judicial leaders and administrators from each devolved tribunal would be able to meet. While we do not feel that the Contact group entirely matches this description, we very much welcome it as a positive vehicle for change in Wales. A representative of the Committee attends meetings of the Contact group, and we have provided the Contact group with details of the questions we asked of tribunals during the *Review*. We look forward to seeing all Welsh

tribunals work closer together to ensure a more consistent and comprehensive approach to training, and hope that in due course this group will also take up other issues of common interest or concern such as hearing venues.

## Coherence

28. We did not want the Review only to look backwards and remedy the difficulties and inconsistencies caused by the piecemeal development of the administrative justice landscape; we hoped instead that it could signal the start of a new, coherent approach to administrative justice in Wales. As part of this, we observed that guidelines were needed to ensure that tribunals in Wales did not continue to develop in an ad hoc and unstructured way.

### Welsh Language Tribunal

29. The National Assembly passed the Welsh Language (Wales) Measure 2011, providing for the creation of a Welsh Language Tribunal. This will be the first tribunal created in Wales since the establishment of the Administrative Justice and Tribunals Unit, and we consider this to be an important moment, creating an opportunity to demonstrate to Welsh citizens and observers in other parts of the UK that the principles enshrined in our Review are being put into practice.
30. The Measure gave us cause for concern on two points, with both of these points relating to a more general worry that an impression could be conveyed that Wales does not take seriously the need to ensure the independence from government of judicial and adjudicatory posts. We were also concerned that it was not immediately apparent that the messages of the Review had been fully received and understood.
31. Our first concern was the mechanism by which judges would be appointed to the Tribunal. We were disappointed that the Measure failed to include an explicit reference to the use of an impartial and independent appointments process for the selection of tribunal members. In paragraph 71 of the Review, we suggested that an open and impartial process could be achieved using either a judicial appointments mechanism such as the Judicial Appointments Commission, or through a Welsh Government public appointments mechanism.
32. Following meetings with the First Minister and officials, we have been reassured that the Welsh Government respects absolutely the constitutional need to ensure that the judiciary remains independent. We look forward to future discussions to determine the most appropriate mechanism for securing independent, fair and impartial appointments.
33. Our second concern was that prior to the passing of the Measure there was some debate as to whether the Measure was compatible with the legislation governing both the Public Services Ombudsman for Wales and the Parliamentary and Health Service Ombudsman.



34. In order that these Ombudsmen can fulfil their statutory obligations, and to ensure public confidence in the integrity of their schemes, it is imperative that these offices are seen to be independent from government. In addition, any incompatibilities between pieces of legislation could complicate the way in which Wales manages its own affairs in future.
35. These matters underline the fact that there remains work to be done before it can be said that administrative justice in Wales operates in a consistent and coherent fashion. It is essential that we get the individual components of the system right, such as ensuring independent appointments to tribunals. We must also ensure that administrative justice is treated as a system, and that the links between tribunals, ombudsmen and complaints are understood and respected.
36. We understand that legislative changes may be necessary in order to alter the current and varied appointment mechanisms for tribunal judiciary and members in Wales. However, we urge the Welsh Government to prioritise this work, and to ensure that there is a clear precedent – that demonstrably protects the independent of the judiciary – for all tribunals to follow.
37. We will continue to encourage the Welsh government to seek a resolution to the difficulties caused by the Measure, and hope that a practical solution can be found.

## Priority 2: Encouraging coherent administrative justice policy and practice

38. As noted above, ensuring coherence in the development of administrative justice was one of the key aims of the Review. However, devolved tribunals do not operate in a vacuum. Administrative justice in Wales also encompasses non-devolved tribunals, ombudsmen, complaints-handling and original decision-making.

### Visits

39. As a Committee, we gather much of our information through our visits and engagement programme. It helps us to see administrative justice from the perspective of the user, serving to alert us to areas where there are examples of good practice or where there might be issues that need to be resolved. Following each visit, we send a report of the visit to the tribunal judge and President, and we follow up any systemic issues – relating to procedure or policy – that we feel are detrimental to the effective delivery of administrative justice.

### Letter to Local Authorities

40. In August 2010, we decided to write to all local authorities in Wales to share some of our general observations. All the issues noted had arisen out of visits to and requests for information from school admission appeal panels, although similar concerns had been noted at other tribunal hearings organised by local authorities.

41. Our first concern related to appeals made in the Welsh language. We noted that the Welsh Language Act 1993 places a duty on the public sector to treat English and Welsh on an equal basis when providing services to the public in Wales. As a result, all local authorities in Wales have a Welsh Language Scheme, which should set out standards for the handling of correspondence and meetings in the Welsh language. We were concerned that in practice, school admission appeals made in the Welsh language were not always being dealt with in an adequate fashion. It was worrying that we had seen, for example, instances where documents had not been translated for panel members. We considered that this type of occurrence poses a real risk to justice for the individuals concerned, and strongly recommended that all local authorities review their procedures.

42. We also noted that we have observed some confusion as to the legal position concerning venues for educational appeals. The Welsh Government's School Admissions Appeal Code (2009) states:

*Given the emphasis on independence in the appeals process, a neutral venue must be used for the appeal hearing. Funding delegated to admission authorities for appeals must cover expenses such as this, although Local Authorities may be able to provide a suitable venue, if schools prefer.*

43. We used the letter to explain that all education appeals should be held in accessible and comfortable venues that are independent of any of the parties to the hearing. We recognised that local authorities may wish to use their own buildings as venues, as this will often represent the best value for taxpayers. However, where such a decision is taken, we would expect that the building selected is not also used to house education staff. Similarly, we do not regard a County Hall to be an entirely neutral venue, and if a decision is taken to hold the meeting at a County Hall, steps must be taken to ensure that it is not located near to education staff offices.

44. The final issue we raised related to the use of clerks for appeals. Again, we looked at the relevant provisions in the Welsh Government's School Admissions Appeal Code:

*Local authorities and Governors should normally look outside their own staff for people who have relevant experience working as a professional committee clerk or legal advisor or who have experience in the conduct of enquiries or disciplinary hearings.*

45. The Code indicates that Local Authorities and school governors should try to look outside their own staff for clerks for hearings. This obligation is less stringent than the corresponding one about neutral venues, although it is clear that the Local Authority should still take all reasonable steps to try not to use their own staff. Appointment of an individual who works for the local authority as a clerk could risk creating a perception of bias.

46. We were pleased to receive a response from the majority of local authorities, outlining the procedures that they have in place. The issue was also discussed at the All Wales Admission Officer Group meeting. However, as noted earlier in this report, we remain concerned about the operation of education admission and exclusion panels, and consider that steps must be taken to ensure that administration of these panels is transferred to the Administrative Justice and Tribunals Unit as soon as possible.

### Venues for Mental Health Review Tribunals

47. The Mental Health Act Code of Practice for Wales sets out that hospital administrators must provide suitable accommodation for tribunal hearings, and explains that:

*The hearing room should be private, quiet, clean and adequately furnished....The patients should have access to a separate room in which to hold any private discussions that are necessary, for example, with their representative. Tribunal members must also be able to discuss their decision in private.*

48. We have visited a number of Mental Health Review Tribunal hearings over the past year. While some have entirely met these standards, we have had some concern about the suitability of other venues utilised.

49. We wrote to the President of the Tribunal to ask whether hospital administrators are routinely made aware of their obligations under the Code of Practice, and whether they are provided with more detailed room specifications to help them ensure that the rooms they select are fit for purpose. We were then able to discuss this

matter with administrators at the Tribunal. It was explained that while the President cannot make Practice Directions to this effect, the Tribunal was planning to provide all local health boards with more information on the standards that a room must meet before it can be used to hold hearings.

### **First-tier Tribunal (Social Security and Child Support)**

50. We have attended a number of Social Security and Child Support hearings. At one hearing, it was brought to our attention that the pro-forma papers provided to claimants contained a mistake that some might find confusing. We made a note of this in our visit report, which was sent to the President of the Social Entitlement Chamber.
51. Upon receipt of a copy of the visit report, the President wrote to us to say that he had asked for this issue to be investigated and, if necessary, remedied. We have since learnt that the Department for Work and Pensions has amended the form, removing this source of confusion for claimants.

### **Traffic Penalty Tribunal**

52. We were notified that the Traffic Penalty Tribunal had started to offer to appellants the option to conduct their appeal hearing via telephone, and we were pleased to be able to 'listen in' on a number of hearings.
53. At the end of one hearing, we noticed that after the adjudicator had left the call, one party and their representative remained connected to the telephone line and proceeded to hold a private discussion. We did not consider this to be appropriate, and have advised the tribunal to ensure that all parties disconnect simultaneously.
54. Despite this, on each occasion we considered that the hearings were well run and efficient. We also considered that the use of a telephone hearing was appropriate to the type of case involved. We commend this type of approach to other tribunals as an efficient and effective way of dealing with certain types of proceedings.
55. We were also impressed with the Traffic Penalty Tribunal's user-friendly website. In particular, the section that allows users to view videos showing them what to expect from the tribunal hearing is particularly helpful.

### **Valuation Tribunals**

56. As mentioned above, recent visits to Valuation Tribunals have caused us to notice an anomaly in their procedures. We were made aware that a high number of cases before the tribunal were there as a result of the agents for the appellants failing to return the appropriate paperwork after having agreed a settlement with the Listing Officer. This failure required the tribunal to consider the case and dismiss it. While we understood that it was necessary to close down each case formally, we wondered whether it would be possible to find a more proportionate and cost effective way of dealing with these cases, rather than convening a full hearing of the tribunal.

57. The Chief Executive of the Valuation Tribunal Service for Wales explained to us that legislative change would be necessary in order to alter the process for closing these types of case. We hope that in the near future we will see the transfer of these tribunals into the Administrative Justice and Tribunals Unit. In the meantime, we would like to suggest that it ought to be possible for the Valuation Tribunal for Wales to adopt a process not dissimilar to the telephone hearings conducted by the Traffic Penalty Tribunal. Since it is necessary that these cases are closed by a tribunal, it might be a more efficient use of time and money to hold these hearings via telephone rather than in person.

## Meetings

58. In addition to visiting tribunals, we have tried to engage with wider administrative justice issues by meeting with a number of stakeholders across the system.

### Head of Vulnerable Children Policy Team

59. Ms Davies, Head of the Vulnerable Children Policy Team in Wales joined us at our meeting in July 2010 to discuss Independent Review Panels for fostering and adoption decisions. In our 2009-2010 report, we noted that members had observed some early hearings held by these panels and had a number of deep concerns.

60. Ms Davies noted that the administration of the panels had since been outsourced to the British Association for Adoption and Fostering (BAAF), and that this meant that there was now a separation of policy-makers and decision-makers. She added that all panel members are provided by BAAF's external recruitment process and that the contract specifically excludes government lawyers from being a panel member.

61. We welcomed these steps to ensure greater impartiality and independence of the panels. However, we remained concerned that there was still some confusion surrounding the nature and role of these panels, as more recent visits to panel hearings had created the impression that members of the panel considered the hearing to be more akin to a case conference than a judicial process. We felt this confusion was not assisted by the Guidance provided. We were grateful to Ms Davies for agreeing to look into this issue further.

### Law Commission

62. At our October 2010 meeting, we were joined by the Public Law Commissioner, Frances Patterson QC, and members of her team who had been working on their recently launched consultation on Public Service Ombudsmen.

63. The consultation flowed from the Law Commission's earlier work on Administrative Redress, and, in respect of Wales, made proposals in relation to both the Parliamentary Commissioner for Administration and the Public Services Ombudsman for Wales.

64. We discussed a number of the proposals, and agreed to feed our comments into the consultation response to be prepared by the main AJTC. In that response, we advocated a wider-ranging review of public services ombudsmen and their relationship with the administrative justice system as a whole. In its final report, the Law Commission also recommended a wide-ranging review.

### **Social Fund Commissioner**

65. The Chair met with Karamjit Singh, the Social Fund Commissioner, to discuss the Welfare Reform Bill. The Bill proposed changes to the social fund scheme, including making provision for the abolition of the office of the Social Fund Commissioner and the Independent Review Service he leads.

66. The Committee was disappointed to note these changes, and wished to express its concern that the good practice and innovative approach to resolving disputes that had been developed by the IRS would be lost.

67. The Chair of the AJTC, Richard Thomas, is pursuing this issue on behalf of the AJTC as a whole, and has written to the Secretary of State for Work and Pensions to urge that steps are taken to retain the expertise contained within the IRS model and IRS staff.

68. It is anticipated that the Welsh Government will consult on how to replace the social fund scheme in Wales. The Committee looks forward to considering the Welsh Government's plans, and hopes that any decision-making mechanism will allow for a review of the decision, with continuing access to redress where necessary. We commend the AJTC's Principles for Administrative Justice and 'Right First Time' report as a useful starting point for policy-makers in this area.

### **Advice and Guidance Organisations**

69. In the Review we recommended that the Welsh Government conduct a review of the general and specialist advice available in Wales, looking at the quality of advice and identifying any gaps in its provision. We hoped that we would be able to assist with this project by starting an investigation into the availability and quality of advice, guidance and representation across Wales. It was anticipated that rather than conduct empirical research ourselves, we would be in a position to commission a partner to work with us on this mapping project. Unfortunately, due to financial constraints imposed on the organisation, it was not possible to begin this project.

70. We continue to see this as a significant matter, in particular as we are concerned that over the coming months and years the citizens of Wales will be significantly disadvantaged by cuts made to public services, including those to legal aid. Not only is advice and guidance of use to the individual concerned, but failure to ensure that individuals have access to legal advice can impose a burden on the state too, as tribunals may struggle to cope with unprepared and confused appellants.

71. We met with representatives from the Legal Services Commission, Consumer Focus and Citizens Advice Cymru to discuss these concerns. All three organisations agreed with our assessment, but they were not in a position to take the project forward.

72. We recognise that the Welsh Government has taken steps to improve access to advice, with a 2009 grant to Citizens Advice Cymru to create a single advice line. Separately, we commend the work of the Public Services Ombudsman for Wales, who as part of his common complaints signposting system will seek to provide an interactive list of the advice available.
73. However, there is still a paucity of information about the advice available to individuals in Wales. We hope that the Welsh Government will remain alert to the risk that this lack of information poses and we therefore repeat our recommendation that the Welsh Government undertakes a comprehensive review of advice and guidance provision in Wales as a priority.

## Consultations

74. In addition to those mentioned elsewhere in this document, over the past year we have responded to a number of formal consultation requests under Part 3 Schedule 7 of the Tribunals, Courts and Enforcement Act 2007.
75. We were asked about Regulations to amend the Contaminated Land (Wales) Regulations 2006. The amending Regulations would change all references to the Lands Tribunal to references to the Upper Tribunal. This was to reflect the fact that the Lands Tribunal was abolished in June 2009 and its functions transferred to the Lands Chamber of the Upper Tribunal. We were satisfied with the proposed amendments.
76. We were also asked to comment on the Marine Licensing (Civil Sanctions) (Wales) Order 2011 and the Marine Licensing (Notices Appeals) (Wales) Regulations 2011. In response to this request, we raised one query. Under both the Civil Sanctions Order (28(2)(b)) and the Notices Appeals Regulations (5(1)(b)), in cases that do not involve the commission of an offence, the First-tier Tribunal is left to set the burden of proof. It appeared to us to be constitutionally puzzling that determination of the burden of proof is not dictated and rather is left to the judiciary to decide. We asked whether there was any precedent or particular reason for this type of provision. We were told that the provisions were based on the Environment Civil Sanctions Order 2010 and simply reflected the language used in that Order. We did not consider that this was an adequate reason for leaving such an important matter undecided, and suggested that the provisions be amended.
77. We also commented on the Assembly Education Measure. We considered that the Measure provided an opportunity to make it compulsory for school governors to receive training on school admission and exclusion processes and appeals. We also noted that in England the Local Government Ombudsman in England has jurisdiction to investigate certain complaints about school related matters, such as admissions and allocations, school exclusions and transport. In Wales, there is no corresponding right of complaint to the Public Services Ombudsman for Wales. In view of the long-term impact that decisions concerning education can have on the child concerned, it is important that parents and children have recourse to an independent complaint handler where necessary. The Measure provided an opportunity to remedy this anomaly.

## Priority 3: Right First Time

78. In our Review, we identified improving original decision making as a priority for administrative justice. The main AJTC agreed, and one of its projects for 2010-2011 was to look at how to ensure decisions relating to individuals are 'Right First Time'. The report of the project was published in June 2011.
79. In the first instance, the Chair represented our Committee on the project group. As part of the project, he conducted a visit to the Principality Building Society, the largest wholly Welsh financial institution, to learn about their approach to handling complaints. While the visit did not constitute a formal case study in the report, the information gleaned from the visit helped to inform the group's understanding of the importance of complaints to organisations.
80. Following its publication, we have been keen to work out how the report and its recommendations can be adapted to fit the situation in Wales. At our meeting in June 2011 we held a preliminary discussion with representatives from the Welsh Government, and agreed to hold a further discussion in October 2011, where we will be joined by representatives of the Welsh Local Government Association.



# Appendix A:

## Membership of the Welsh Committee

### **Adrian Webb, Chair**

First Vice-Chancellor of the University of Glamorgan from 1992-2005. Chair, Pontypridd and Rhondda NHS Trust; Non-executive Director Welsh Assembly Government until March 2008. Chair of the Wales Employment and Skills Board and Wales Commissioner on the UK Commission for Employment and Skills. Member of the AJTC from May 2008 and Chair of the Welsh Committee from June 2008.

### **Gareth Lewis**

Member of the Employment Appeal Tribunal and an independent chairman for the National Assembly of retrospective reviews of decisions about funding continuing healthcare. He was previously a part-time Director of the Office of the Independent Adjudicator for Higher Education, Secretary of University College, Cardiff and Deputy Principal and Clerk to the Board of the Royal Welsh College of Music and Drama.

### **Bob Chapman**

Part-time management consultant working mainly in the legal sector and a member of the Board of Consumer Focus Wales. Following 25 years in advice work at Citizens Advice Bureaux and local authority Welfare Rights Units he joined the Legal Services Commission where he became the Acting Wales Director before taking early retirement.

### **Rhian Williams-Flew**

Registered social worker and qualified as a registered mental nurse. She is a Mental Health Act Commissioner for the Care Quality Commission, a Mental Health Act Reviewer for Healthcare Inspectorate Wales and a member of the First-tier Tribunal (Mental Health) in England. She was previously a freelance investigator of complaints made by social service users and carers and a Regulatory Inspector for the Commission for Social Care Inspection.

### **Peter Tyndall**

Public Services Ombudsman for Wales. *Ex Officio* member of the AJTC Welsh Committee. He was Chief Executive at the Arts Council of Wales from 2001 to 2008 and before that Head of Education and Cultural Affairs with the Welsh Local Government Association.

### **Ann Abraham**

UK Parliamentary Ombudsman and Health Services Ombudsman for England. *Ex officio* member of the AJTC and its Welsh and Scottish Committees. *Ex officio* member of the Commission for Local Administration in England.

## Appendix B: Costs of the Welsh Committee

### Welsh Committee

	2009-10	2010-11
Staff Costs <sup>1</sup>	50,479	32,664
Members' Retainers <sup>2</sup>	19,385	19,491
Members' Travel etc <sup>3</sup>	4,840	3,311
Meeting costs <sup>4</sup>	2,581*	1,240*
Conference costs <sup>5</sup>	4,101*	-
Administrative costs including office supplies, postage <sup>6</sup>	-	-
<b>Totals</b>	<b>81,386*</b>	<b>56,706*</b>

<sup>1</sup> Member of staff based in London acting as Secretary to the Welsh Committee and other administrative support.

<sup>2</sup> Members of the Welsh Committee receive a retainer of £6,408 based on 22 days work per year. The Committee Chairman receives a salary of £28,025 including his service on the AJTC and is accounted for in its Annual Report.

<sup>3</sup> Members' expenses for attending Committee meeting, visits to tribunals and other events.

<sup>4</sup> Cost of hiring rooms etc for meetings of the committee.

<sup>5</sup> Cost of the Welsh Committee Conference 'Administrative Justice in Wales: Citizens at the Centre'.

<sup>6</sup> Administrative costs are met by the AJTC and cannot be separately identified.

\* The expenditure under footnotes 4 and 5 is not specified separately within the costs table in the AJTC's Annual Report for 2010/11, but is included within the overall total for the AJTC's "other admin costs".

## Appendix C: Meetings and tribunal Visits

### Welsh Committee Meetings

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23 March 2010

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29 June 2010

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13 October 2010

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7 December 2010

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22 March 2011

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22 June 2011

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### Welsh Committee Tribunal Visits

May 2010	NHS Independent Complaints Panel	Carmarthan
May 2010	Agricultural Lands Tribunal	Gloucestershire
May 2010	Residential Property Tribunal	Colwyn Bay
May 2010	Education Admission Appeal Panel	Cardiff
June 2010	First-tier Tribunal Immigration and Asylum	Newport
June 2010	War Pensions and Armed Forces	Cardiff
July 2010	Mental Health Review Tribunal	Llandough
July 2010	Upper Tribunal Lands Chamber	Cardiff
September 2010	Employment Tribunal (Welsh speaking)	Kinmel Bay
September 2010	Adjudication Panel Wales (Welsh speaking)	Cardigan
October 2010	First-tier Tribunal Tax	Cardiff
October 2010	First-tier Social Security and Child Support	Swansea
November 2010	Valuation Tribunal	Pontypridd
November 2010	Independent Review of Determinations	Llandarcy
February 2011	First-tier Social Security and Child Support	Cardiff
February 2011	Mental Health Review Tribunal for Wales	Bridgend
February 2011	Mental Health Review Tribunal for Wales	Caerlon

February 2011	Traffic Penalty Tribunal	Cardiff
February 2011	First-tier SCS	Swansea
March 2011	Employment Tribunal	Kinmel Bay
March 2011	Employment Tribunal	Llanelli
March 2011	SENTW	Newport
March 2011	Valuation Tribunal	Powys
March 2011	First-tier Tribunal Immigration and Asylum	Newport
April 2011	Traffic Penalty Tribunal	Telephone
April 2011	Traffic Penalty Tribunal	Telephone
April 2011	Education Admission Appeal Panel	Cardiff
May 2011	Independent Review of Determinations	Llandrindod Wells
September 2011	First-tier Social Security and Child Support	Port Talbot

#### Stakeholder meetings and events

May 2010	Welsh Language Standing Committee
May 2010	New Legal Services Board
May 2010	Senior President's Conference
June 2010	Mr Justice Roderick Evans
March 2011	Justice Wales Network Seminar
March 2011	SENTW User Group
March 2011	Citizens Advice
April 2011	Welsh Tribunals Contact Group
April 2011	Lord Justice Pill
April 2011	Social Fund Commissioner
May 2011	Legal Services Commission
May 2011	Public Law Conference
June 2011	Welsh Tribunals Contact Group

## Inquiry into the establishment of a separate Welsh jurisdiction Response from Public Services Ombudsman for Wales (PSOW)



<p style="text-align: center;"><b>Response of the Public Services Ombudsman for Wales to the invitation to submit written evidence to the Inquiry by the Constitutional and Legislative Affairs Committee into the establishment of a separate Welsh jurisdiction</b></p>
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1. As Public Services Ombudsman for Wales (PSOW), I investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in my jurisdiction. I also consider complaints that members of local authorities in Wales have breached their Code of Conduct.
2. I appreciate the opportunity to respond to this consultation. I do so against the background of the complaints I consider about public services in Wales.
3. I would firstly wish to endorse the response of the Welsh Committee of the Administrative Justice Council of which I am an ex-officio member.
4. My role forms part of the administrative justice system in Wales, and my jurisdiction is a separate Welsh one. The majority of the complaints I consider are in respect of services operating within Welsh law. Increasingly, the laws concerned have been made by the National Assembly.
5. Although the work of my office parallels that of other public services ombudsmen in the UK, the separate legislative framework governing the work of the different offices does impact on the decisions made. Ultimately, where a service entitlement is different, then what constitutes maladministration or service failure will also differ. Equally, this will be the case where the legal framework within which a service is delivered and regulated is Welsh.
6. My jurisdiction is of course limited to devolved matters, and matters which are not devolved fall to the United Kingdom Parliamentary Ombudsman. In practice, both services work collaboratively and service users wishing to access redress are signposted to the appropriate ombudsman.
7. The existence of a separate Welsh jurisdiction for the Public Services Ombudsman illustrates the point made by the AJTC that much administrative law in Wales is already Welsh specific and increasingly made in Wales.
8. The fact that the Administrative Court now sits in Wales also reinforces the emerging trend.

9. This element of a Welsh jurisdiction undoubtedly brings benefits in practice. My office is familiar with the specifically Welsh legal context in which it operates. We are aware of emerging legislation in fields which are prominent in our work such as Health, Social Care, Housing and Planning, and are able to use the experience from our casework to contribute to the consultative process when new legislation is being introduced.
  
10. It would not be appropriate for me to comment on areas which fall outside the work of this office. However, within the administrative justice field it is evident that the early emergence of a separate Welsh jurisdiction is proving to be of benefit to justice in Wales, and that an extension of this to include Judicial Review, for example, would help to create a comprehensive and coherent system.

**Public Services Ombudsman for Wales**  
**February 2012**

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## **Inquiry into the establishment of a separate Welsh jurisdiction**

### **Response from Professor Gerry Maher QC**

I am Professor Gerry Maher QC. I am a professor at the Law School at the University of Edinburgh. One of my academic specialisms is International Private Law (IPL),<sup>1</sup> which will be the main focus of my comments.

#### 1. The meaning of jurisdiction

1.1 The term 'jurisdiction' as used in the expression separate Welsh jurisdiction is the same as that of 'legal system'. There is no reason to suppose that either of these terms has any one meaning or even a predominant meaning. I attach a paper<sup>2</sup> which examines a range of meanings which can be given to the idea of legal system. In part 5 of that paper I have discussed the idea of identity or separateness of a legal system, in that case the Scottish legal system. My conclusion is that this is not solely a matter of formal law but rather is bound up with and reflects the distinctiveness of a country's social, cultural and political systems.

#### 2. 'Jurisdiction' and International Private Law

2.1 Part 6 of the paper considers separate legal systems in the context of IPL. The first point to note is that the basic 'units' for this area of law are not states (in the sense of public international law) but 'countries'. IPL is concerned with three main issues:

(i) Jurisdiction.<sup>3</sup> This deals with the rules for determining the question of the courts of which country have the power to deal with legal proceedings. For example, the Scottish courts could have jurisdiction to hear a case involving a French citizen and a Spanish citizen because of a traffic accident which took place in Scotland.

(ii) Applicable law. This concerns the question of the law of which legal system (or country) is to be applied in deciding a particular case. This need not be the law of the country of the court. A court in England may have to apply German law in a dispute over a contract between a US company and Japanese company.

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<sup>1</sup> This area of law is also known as Private International Law and the Conflict of Laws.

<sup>2</sup> This paper will be published shortly in *MacCormick's Scotland* (2012), a collection of essays in memory of the late Sir Neil MacCormick.

<sup>3</sup> 'Jurisdiction' in this context means something quite different sense from the idea of jurisdiction which is being addressed in the Assembly's inquiry.

(iii) Recognition and enforcement of foreign judgments. An example of this issue is whether a court in Scotland would recognise as valid a divorce granted in Mexico or would allow for the enforcement in Scotland of a judgment granted by a court in Belgium for the payment of a sum of money.

2.2 It is not clear that the proposal being considered is intended to cover the topic of Wales as a separate legal system or country for purposes of IPL. If it does, then various issues would arise. One issue would be determining when the Welsh courts have jurisdiction to hear a civil case.

2.3 Another is deciding which law to apply to resolve a dispute in a Welsh court. If for example the 'foreign' law to be applied was English law, then the Welsh courts would have no judicial knowledge of English law which would have to be proved before a court in Wales by expert evidence. Note that legal systems can be different (IPL) countries even if the content of the law is broadly similar or even virtually identical. For example, although 'England and Wales' and Northern Ireland share a common law system of law, they are still separate countries for IPL purposes.

2.4 A further issue is the effect of a judgment given by a court in Wales in other countries in the United Kingdom and in other states (including the rest of the EU). Would an order in respect of the custody of a child granted by a court in Wales be automatically recognised elsewhere in the United Kingdom, throughout the EU etc? When would the courts in Wales recognise a foreign divorce which was not the result of judicial proceedings?, etc.

2.5 I should add that the solution to these issues is not difficult and is really a question of adapting existing rules which apply to the current country of 'England and Wales'. My point rather is to emphasise one major consequence of Wales being a separate country for IPL purposes.

### 3. The method for creating a separate legal system

3.1 Not all of the types of legal system discussed in my paper are based on legislation in respect of their separateness. Some are mainly theoretical constructs. My emphasis here is again on countries in the IPL sense. The separate nature of the Scottish legal system has some basis in the Treaty of Union of 1707, but as I argue cannot be solely based on that Treaty. As I also point out there is no clear basis for



explaining the historical development whereby in IPL some States (such as the UK and the USA) contain separate countries and others (such as Germany or Italy) do not.

3.2 The fact that States may have more than country or legal system is recognised in legal instruments on IPL, including international conventions<sup>4</sup> and EU regulations. This point may have some importance in respect of the legislative competence of the Assembly in legislating for a separate Welsh (IPL) country as this whole issue may impact on the international obligations of the United Kingdom. It may be that the Assembly would be minded to exclude IPL as an area for the separateness of the Welsh legal system but it is not clear why Wales should be a separate jurisdiction for some purposes but not all.

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<sup>4</sup> Such as those resulting from the Hague Conference on Private International law, of which the United Kingdom is a member.

## The Many Conceptions of a Legal System

Gerry Maher\*

Joseph Raz once wrote a book called *The Concept of a Legal System*, a work intended as an introduction to a general theory of legal system, and as seeking to elucidate the concept of a legal system.<sup>1</sup> However, it is not at all obvious that there is such a thing as *the* concept of legal system. Certainly, in legal discourse the term 'legal system' is used in a variety of contrasting ways. Different perspectives may give emphasis or priority to one or more of these different senses of legal system but it is wrong to assume that there is, or can be, only one concept involved. This paper will draw a sketch of some of the ways in which lawyers talk about legal systems. Whether or not there is a core aspect (or aspects) common to these different conceptions can be determined only once we get clear what each different conception involves. My argument is that there are clearly overlapping elements between some of these conceptions but there is no single common or unifying element; nor is there any good reason for privileging one conception as embodying the sole concept of a legal system.<sup>2</sup> That is, with one notable exception, personal rather than conceptual in nature. For what all, or at least most, of these conceptions share in common is that they attracted the attention of Neil MacCormick.<sup>3</sup>

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\* Most of this paper was written in Scotland but parts were also drafted in Hong Kong; two places, each a part of a larger State but each with its own legal system.

<sup>1</sup> Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1<sup>st</sup> edn, 1970; 2<sup>nd</sup> edn, 1980). At page 1 he states that the work involves the 'examination of the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon Law, or some other legal system).'

<sup>2</sup> Famously Wittgenstein in describing the idea of family resemblances wrote that 'Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don't say: "There *must* be something common, or they would not be called 'games' " – but *look and see* whether there is anything in common to all.' (Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1953), section 66 (emphases in original))

<sup>3</sup> In particular, Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005); *Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007); "Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102; Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (Dordrecht: D Reidel Publishing Co, 1986).

## 1. Teaching 'Scottish Legal System'

In Scottish law schools most teachers, and all students who study Scots law, are familiar with a course called Scottish Legal System or some very similar variant.<sup>4</sup> The same sorts of academic course are to be found elsewhere, English Legal System or Irish Legal System, and the like. The content of these courses is typically the same, covering such matters as:

- (i) the sources of law (statute, judicial precedent, custom, works of authority)
- (ii) the institutions of law (parliaments, government executive bodies, courts)
- (iii) the legal professions (advocates, solicitors, lay advisers)
- (iv) legal procedure (civil actions, criminal trial, tribunal hearings).

Many also deal with issues of legal reasoning; provision and funding of legal services; legal history; law reform.

One topic which has perhaps fallen out of fashion is the structure and branches of (a) law and of (b) legal study. The first deals with such matters as the distinctions between international and municipal law, and public and private law, and the subdivisions in each category (for example, public law as consisting of constitutional law, administrative law, criminal law,<sup>5</sup> private law as made up of law of persons, obligations, property, and adjective law). There are also subjects which cut across these divisions, such as commercial law and EU law. The second area is concerned with the branches and subjects of legal study itself, for example legal history, comparative legal studies, legal philosophy, sociology of law.

This subject is many ways different from all others in a (undergraduate) law degree. It is almost always taken at the very beginning of a student's course of study. But the subject is odd in that it does not replicate any subject or branch of the law used in legal practice, at least in the sense of comprising a legal category which may be the focus of legal argument or judicial decision.<sup>6</sup> As expressed in one of the first books on the Scottish Legal System, the subject (and the book):<sup>7</sup>

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<sup>4</sup> At present (2011) in Edinburgh Law School this class is called Legal Reasoning and Legal System, with no indication that either element is Scottish in focus.

<sup>5</sup> Many academics, and virtually all students, forget that on any definition of public law criminal law is par excellence part of that law.

<sup>6</sup> There are, of course, statutes and judicial decisions on the topics covered by Legal System courses, such as the provisions of the Constitutional Reform Act 2005 which established the Supreme Court of the United Kingdom but such laws are usually characterised as belonging to Constitutional Law rather Legal System. Likewise with case law. The case of *Jessop v Stevenson* 1988 J.C. 17, which involved an important issue of judicial precedent, is reported under the general headings of 'administration of justice' and 'procedure'.

<sup>7</sup> D. M. Walker, *The Scottish Legal System* (Edinburgh: W Green & Son, 1<sup>st</sup> edn, 1959), p v (emphasis in original). The passage is repeated in the preface to all subsequent editions, the last (8<sup>th</sup>) of which was published in 2001.

is intended not as a first or general introductory course on Scots Law itself, but as an attempt to tackle the problem of teaching the novice law student how to go about the study of law and an attempt to equip him [*sic*] to do so. It is an introduction to the *study*, not to the law itself.

So why are such academic courses generally named Legal System and why also 'Scottish'? These are issues generally not considered by the standard texts on the subject.<sup>8</sup> Yet again, the exception is Walker's *Scottish Legal System*. In an Introduction, missing from the first 3 editions, a legal system is described as a general name for the complex of institutions, ideas, techniques and methods, covered in the book.<sup>9</sup> It is Scottish in the sense that it 'exists in relation to the people living in Scotland.' What is more, the Scottish legal system coexists and interacts with social, political, economic and other systems in the community.

This definition is far from ideal. It fails to explain the nature of the academic subject as involving a 'legal system' but it does usefully suggest that what is taught in that course uses a range of conceptions of legal system (some of which will be examined below). Perhaps that is as far as this conception of Legal System can be taken. Law teachers group together diverse topics, some of which are, or involve, legal systems in other senses, which are seen as necessary or useful in introducing students to the study of law. The systematic or systemic nature lies precisely in that grouping together.

## 2. Legal systems and legal structures

A second sense of legal system has its home in analytical jurisprudence, in for example the writings of Kelsen, Hart and Raz.<sup>10</sup> What is important about laws, at least in their paradigmatic sense, is that they are related to each other in certain structural ways. Two issues are involved in this approach. What is the individual unit making up a single law (the form of the norm)? And secondly, what is the exact nature of the relationship between different norms? Legal theorists present quite different answers to these questions, but the conception of legal system remains much the same.

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<sup>8</sup> The issue is not mentioned in A. A. Paterson, T. StJ. N. Bates & M. Poustie, *The Legal System of Scotland* (Edinburgh: W Green & Son, 4<sup>th</sup> edn, 1999) who begin their book (p vii) by noting that a 'legal system is the product of its time' but do not explain what conception or conceptions of legal system is being talked about.

<sup>9</sup> 4<sup>th</sup> edition (1976), p 1.

<sup>10</sup> Especially, Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945); Hans Kelsen, *The Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2<sup>nd</sup> edn, 1994); J. Raz, *op. cit.* above at note 1.

For Kelsen, each legal norm has a fixed form, which rarely if ever corresponds to the form of laws enacted by legislatures or established by courts. Rather the point of legal science is to show the logical structure of every norm, which for Kelsen is an authorisation of a legal sanction to be applied whenever a certain form of conduct has taken place. But legal norms have other characteristics, the most important of which is their validity. A norm is valid if it is authorised by some other norm; that other norm in turn depends for its validity on yet another norm. This point is important for it stresses that every legal unit is linked in some way to others, and ultimately to a set of basic constitutional norms. To provide order and meaning to this multiplicity of laws legal science uses various logical principles, which can be summed up as the theorem of the basic norm. In a narrower sense the basic norm is a logical presupposition of any theorist trying to understand legal units as having validity but in a wider sense it also incorporates other principles such as that of non-contradiction, and *lex posterior derogat priori*.<sup>11</sup> Kelsen is clear on one point at least; to know and understand law we must interpret it as a meaningful ordering of legal norms.

A similar but looser conception of legal system is used by Hart. But one immediate point of difference is Hart's insistence that there need not be any one form of a law unit. Hart insists that rules can serve distinct social functions, such as those conferring powers and those imposing duties, and there is no theoretical gain in insisting that these distinctions should be collapsed into one form of law. Indeed, Hart's work combines a number of contrasting perspectives, some of which are focused on a sociological account of how law operates and the language used to capture its functions.<sup>12</sup> For example, in his discussion of secondary rules such as rules of change and rules of adjudication he can be seen as focusing on social-legal institutions such as legislatures and courts.

But it is equally the case that Hart also deploys a conception of legal system very much like Kelsen's. For Hart argues that a necessary feature of any legal system is a rule of recognition which sets out the criteria for the validity of all rules in a system and as such constitutes the unity and coherence of the system in question.

A more detailed version of a structural conception of a legal system is to be found in the writings of Joseph Raz. One key point in Raz's analysis is the presentation of a much richer model of the basic legal unit (what he calls the

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<sup>11</sup> This approach to the basic norm is most evident in the *Pure Theory of Law*, pp 201-208.

<sup>12</sup> Hart himself described *The Concept of Law* (at page v) as 'an essay in descriptive sociology.'

individuation of laws).<sup>13</sup> For example, he argues that individuated laws should make clear important connections between various parts of a legal system. A perhaps even more fundamental insight into the nature of a legal system is that not every legal unit in a legal system is necessarily a legal norm.<sup>14</sup> Raz argues that there are laws which are not themselves norms but which concern the existence or application of legal norms. This 'internal' relationship brings out the systemic nature of law. The structure of a legal system is based on the relationship between different types of legal unit.

What is point of conceptualising a legal system of this sort? For a start, it offers logical insight into a deeper structure of law. However, its value lies not just in clearer thinking in analytical jurisprudence. Many of the writers who have explored this conception of legal system, have also argued that it connects to wider inquiries about law. Even Kelsen, who insisted on the purity of legal science, pointed out that the value of seeing law as part of a legal science is that this perspective presents law as a meaningful system of basic legal units. The function of the 'pure' legal scientist is to give law a specific form of interpretation.

This approach is even more evident in other writers in the analytical tradition. Hart, of course, is renowned for his use of the internal perspective as a way of locating meaning to law.<sup>15</sup> Significantly, Raz, whose version of the analytical conception of legal system is highly sophisticated, linked his work in this area to the topics of his own later interest of law and practical reasoning.<sup>16</sup>

Note must also be made of a much more refined approach to this conception of legal system to be found in the writings of Neil MacCormick.<sup>17</sup> He argues for a version of the analytical approach but one which uses an 'institutional' sense of legal system. MacCormick accepted the idea of a basic legal unit as constituent parts of a legal system but argued that approaches such as those of Kelsen or Raz fail to locate what is truly systematic about law. Rather, legal rules are grouped into certain forms or institutions, which have a subject-matter unity; examples are ownership, promises, delicts, trusts, theft. Each such legal institution itself is made up of rules with different logical functions, namely rules which indicate how specific instances of

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<sup>13</sup> Raz, op cit at footnote 1, pp 140-147.

<sup>14</sup> See especially *ibid.*, pp 169-170.

<sup>15</sup> In *The Concept of Law*, Hart adopts the writings of Peter Winch (*The Idea of a Social Science* (London: Routledge and Kegan Paul, 1958)). Winch's work in turn derives much from Wittgenstein. However there is an argument that Hart's approach was influenced as much by Weberian notions of *Verstehen*. See further Nicola Lacey, *A Life of H. L. A. Hart* (Oxford: Oxford University Press, 2004), pp 229-231.

<sup>16</sup> Raz, op. cit, at note 1, 2<sup>nd</sup> edition, pp 210-216.

<sup>17</sup> MacCormick once wrote that it 'is one objective, perhaps the objective, of analytical legal philosophy to explain the structure of legal systems.' ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 121.

each concept is brought into being, rules indicating the legal consequences of each instance of the concept, and rules on how any specific instance comes to an end. For MacCormick such organising concepts are crucial to knowing the law and understanding its functions:<sup>18</sup>

The whole point of postulating the existence of instances of such concepts is that it enables us to achieve two potentially conflicting goals in the exposition of law. On the one hand, we can break down complex bodies of legal material into comparatively simple sets of interrelated rules; and yet on the other hand we can treat large bodies of law in an organised and generalised way, not just as a mass of bits and pieces.

What is to be noted about this institutional approach to law is that it uses the same general idea of legal system as, for example, in Kelsen, that is, an ordered relationship between components of each system. The radical difference is that for MacCormick the individual parts are to be seen as much more complicated in nature. But this difference is not simply one of identifying the appropriate analytical units. Rather for MacCormick, there is a major theoretical significance in using units of institutional fact as the building block of a legal system, namely that doing so captures a social reality about the significance of law as normative, that is as guiding social action.

### 3. A sociological conception of legal system

The works of Hart and MacCormick indicate a further sense of legal system. For Kelsen and Raz, a legal system is essentially a logical concept, used in explaining the structural properties of laws and legal units.

But a quite different idea is the sociological sense of legal system. In this sense the term 'legal system' refers to the operations of a number of social institutions which perform various roles and practices in relation to the making and application of standards that function as guides to general social behaviour. In other words, a sociological sense of legal system is concerned with special types of social action (institutionalised action) which has a certain subject-matter, namely law.

This sense can be called 'sociological' because it is concerned with the conditions for the existence of a particular mode of social action and social control. But this is a familiar conception of legal system for academic lawyers. When in the class of Legal System we teach the courts or the legal profession our concern is not only (or primarily) with the legal rules about how these institutions are constituted but

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<sup>18</sup> "Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 108.

more with how they actually operate and with the social and political dynamics of their operation.

Moreover, this sense of legal system is also a central one in legal theory and used not only by writers who are dealing with the social-legal studies (the sociology of the legal profession and the like) but also by jurists concerned with more theoretical aspects of law.

For example, much of Hart's writings on legal system combine both the analytical-logical sense with the sociological sense. In a celebrated passage in *The Concept of Law* Hart poses the question of what a society would be like that lacked 'a legislature, courts or officials of any kind.'<sup>19</sup> The purpose of constructing this model is to show those features of a modern legal system that distinguishes it from a simple regime of social rules. In such a regime there would be no easy way of introducing new rules or interpreting and enforcing existing ones. And the remedy is the introduction of institutions with precisely those functions. What he seems to be saying is that the characteristic mark of law (or a legal system) is the existence of such specialised institutions. The problem in reading Hart is that he tends to talk about rules (secondary rules)<sup>20</sup> rather than institutions. The outcome is that it is far from clear whether Hart has in mind a sociological notion of legal system or an analytical-logical one.

Hart seems to be putting forward two separate claims. One is that what constitutes a (or the) step from the pre-legal to the legal world is the development of these secondary rules the existence of which indicates the existence of specialised institutions. The other is that in every legal system there is always one fundamental rule which is the ultimate reason for the validity of all other rules of the system. But there is no necessary connection between these two claims. The importance of this point is that the two claims use different conceptions of legal system. Indeed one can argue without absurdity that legal standards are not 'systematic or 'systemic' in that it is simply not possible to arrange them in an ordered pattern without at the same time having to deny that 'legal systems' exist where we are referring to particular types of social roles and social action.<sup>21</sup>

A similar, though perhaps clearer, approach was taken by Neil MacCormick, who had always noted a distinction between the logical (or juristic) and the

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<sup>19</sup> *The Concept of Law*, p 89.

<sup>20</sup> He mentions rules of change, rules of adjudication and the rule of recognition.

<sup>21</sup> That Hart has moved in his discussion of the rule of recognition from a sociological to a structural perspective is evidenced by the fact that there is no social-legal institution that corresponds to the rule of recognition in the way that legislatures and courts correspond respectively to rules of change and rules of adjudication.



sociological senses of institutions.<sup>22</sup> In addition to the analytical idea of legal institutions which is used to explain structural properties of a legal system, there is a wide variety of social systems or institutions, a sub-category of which are legal institutions such as courts, police forces, the Faculty of Advocates and the like (what in total might be called a 'legal system'). But the ambiguity of the term legal institution is purely a linguistic one; the two ideas are conceptually distinct. He makes the point that social, or informal, rules (such as those involved with the practice of forming a queue) provide a way in which people can order their actions and interactions. A crucial aspect of these rules is that they provide reasons for assessing the correctness or appropriateness of how everyone acts, a situation MacCormick calls 'normative order'. But law is a special form of normative order, an institutional order. This sense of institution refers not to the rule-based categories necessary for understanding the structure of legal systems but on the existence of institutional agencies such as legislatures or courts, each with specialised roles within a legal system.<sup>23</sup>

It must be said, however, that as with Hart, MacCormick is never entirely clear whether he sees these agencies as in themselves forming a conception of legal system, that is in its sociological sense, or whether they are simply a subset of the special legal institutions which make up a logical sense of legal system.<sup>24</sup>

#### 4. Legal systems and legal doctrine

A further conception of legal order or legal system is concerned with the activity of legal exposition. The actual content of the law of any legal system is made up of laws derived from legal sources, usually at different levels such as statute, case law and

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<sup>22</sup> In talking of institutions and institutional fact he wrote: 'there are two quite distinct points to be made by the use of such words in relation to law, a philosophical and a sociological one; they depend upon different senses of the terms involved, which I suspect have often been more or less confused in discourse about law.' ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, at 108) Elsewhere he noted a further sense of institution, namely that used to describe a particular manner of exposition of the law (see *Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), pp 12-13). See further the discussion at section 4 below.

<sup>23</sup> 'There are distinct public institutions – "institutional-agencies" let us call them – charged with legislative functions, with adjudicative functions, with executive-administrative functions, and law-enforcement functions. Crucial to the coherent unity of the state [*sic*] to which these institutions belong is their effective co-ordination and balanced interaction in performing their functions.' (*Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), p 35). There is an irony that MacCormick refers to a state rather than a legal system. See the discussion of the identity of legal systems at section 5 below

<sup>24</sup> He does accept that there are legal 'institutions' which are primarily of concern to the sociology of law ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 110; 129) but he also analyses these institutions in term of the triadic structure (as consisting of institutive, consequential and terminative rules) used in the analytical sense (see *Institutions of Law*, pp 36-37).

so on. Moreover, these rules will develop and multiply over time. An important and specific task of the jurist is to describe these rules intelligibly, by presenting them in an ordered and coherent way.<sup>25</sup> Examples of this approach to legal ordering are legion, ranging from the work of the Roman law jurists to modern academic writings.

Indeed, the approach taken by Roman lawyers, as exemplified in the Institutes of Gaius and Justinian, created a tradition of legal exposition which had a profound influence on legal writing in many parts of Europe, including England and Scotland. The major characteristic of such institutional writings was the division of law into broad organising categories, most significantly the distinct branches of the law of persons, things and actions. This tripartite division had a profound historical influence and was reproduced as the general organising categories of works such as Stair's *Institutions of the Law of Scotland* and Blackstone's *Commentaries on the Laws of England* and on codifications such as French *Code Civil* of 1804 and the German *Bürgerliches Gesetzbuch* of 1900, both of which in turn influenced the development of legal codes throughout the world.

Stair's book deserves a special mention for the use made of a nuanced approach to the classical distinctions, for Stair advanced a further refinement whereby the focal element within each of the three broad branches of law of Scotland was the idea of rights.<sup>26</sup>

Furthermore the task of ordering and systematising laws has applied not only to general bodies of law but also to more specific subjects. At times this work is truly revolutionary, revealing a deep structure to a mass of seemingly unrelated rules which can now be seen to be as forming part of one subject. For example, *The Law of Restitution* by Lord Goff of Chieveley and Gareth Jones<sup>27</sup> introduced a general concept of unjustified enrichment into English law.

Two further examples can be seen in the writings of two of Neil MacCormick's colleagues at Edinburgh Law School. Prior to the publication of Gerald Gordon's book on *The Criminal Law of Scotland*<sup>28</sup> Scots criminal law had lost any sense of structure or cohesion. But this book changed the subject. It drew upon philosophical

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<sup>25</sup> In this discussion of legal system as legal ordering the focus is on juristic writings but a similar idea also applies to law making (especially codification) and to law reform. By statute the duty of the Law Commissions in the United Kingdom is 'to take and keep under review all the law with which they are respectively concerned with a view to its *systematic* development and reform.' (Law Commissions Act 1965, s 3(1).) (Emphasis added.)

<sup>26</sup> An analysis advanced by AH Campbell, *The Structure of Stair's Institutions* (Glasgow: Jackson, 1954), a writing which influenced certain themes in Hart's *The Concept of Law*. For further discussion of Stair's use of the classical division of law, see Stair, *The Institutions of the Law of Scotland* (Edinburgh University Press & University of Glasgow Press, 1981 edn, by D. M. Walker), 'Introduction by D. M. Walker, pp 17-20.

<sup>27</sup> 1<sup>st</sup> edition, 1966 (London: Sweet & Maxwell).

<sup>28</sup> 1<sup>st</sup> edition, 1967 (Edinburgh: W Green & Son).

writings (such as Ryle and Wittgenstein) and re-interpreted existing Scottish rules from the perspectives of Anglo-American writings on concepts such as mens rea and causation. A similar tale can be told of property law in Scotland. The rules governing such matters as rights in land or in corporeal and incorporeal moveables were generally known, but the rules were seen as disparate and lacking any unifying element. All this was changed with the publication of the work of Kenneth Reid, who pointed out that there is a unitary law of property, based on the fundamental distinction between real rights and personal rights.<sup>29</sup>

There may be some connections between this sense of legal system and others. Indeed, MacCormick and Weinberger once claimed that a 'structural theory furnishes legal dogmatics with schemata for the exposition of the substance of the laws.'<sup>30</sup> However, for this conception of legal system what is a key aspect of order and system is making sense of what legal rules and principles say, and something more than attention to structure alone is required. What gives order to a body of legal rules is substantive coherence. But here again this requirement is not too far removed from Neil MacCormick's legal theorising, for a key concept in his writings on legal reasoning is that of coherence.<sup>31</sup> For laws to guide conduct they must be ordered and for them to be ordered they must be expressed in terms of values. Although MacCormick's main concern was with judicial reasoning, his approach to coherence applies equally to the task of legal dogmatics. To revert to one of the examples mentioned earlier, Gerald Gordon could make sense of, and impose order on, Scottish rules of criminal responsibility by presenting them in terms of a mainly (though not entirely) subjective approach to mens rea.

##### 5. Legal system and identity: is there a Scottish Legal System?

It may seem obvious that there is such a thing as the Scottish Legal System. After all, as noted earlier, many law schools teach a course which has that name. Moreover, it is even more obvious that in Scotland there are legal institutions such as a parliament, courts, police forces and so on; and there are legal rules on all manner of topics, such as property, family law, criminal law and the like. But what does it mean

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<sup>29</sup> Stair Memorial Encyclopaedia, vol 18 PROPERTY (1993). Reid was the principal author of Part I of that title on General Law and wrote the introductory sections which set out the arguments for the internal coherence of the subject.

<sup>30</sup> Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (Dordrecht: D Reidel Publishing Co, 1986), p. 17.

<sup>31</sup> *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), ch 7; *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), ch 10, where he develops in some detail the idea of 'normative' coherence, as contrasted with 'narrative' coherence which is concerned with reasoning in fact-finding.

to say that there is a Scottish legal system, which has its own distinctive identity? The existence of legal institutions and of legal norms is not enough, for the same could be said about Glasgow or the Highlands, yet it does not make sense to talk about the Glasgow or the Highlands legal systems, at least in the sense of their having distinct identities.

For a long time these questions were given a short and simple answer: the identity of a legal system derived from the identity of a state, an approach which was buttressed by analytical jurisprudence such as Kelsen and Hart. But analytical jurisprudence gives rise to paradoxes when dealing with issues of the identity of legal systems. A key aspect of the analytical conception of legal system is that each rule of a system receives its ultimate validity from a fundamental rule or norm, which is (or concerns) a rule or set of rules of a constitution. So a theory of identity can be based on the premise that for each distinct basic norm or rule of recognition; there is a separate and distinct legal system made up of all the rules which derive from that norm or rule.<sup>32</sup> But in certain contexts this conclusion gives odd results. Assuming that there is a fundamental rule about the constitution of the United Kingdom means that there is a UK (British) legal system. But if that is so, then it would not make sense to talk about a Scottish (or indeed an English) legal system. This approach is unattractive for we intuitively at least want to be able to talk of both a UK and a Scottish legal system.<sup>33</sup>

But if it is the case that the analytical jurisprudence conception of legal system does not allow for the combined existence of a British legal system and a Scottish legal system, then the solution is to use a different sense of legal system in discussing identity. One possible candidate is a legal system in terms of its substantive (i.e. content-based) distinctiveness. Scots law, it is said, is distinctive and different from, for example, English law because of its adherence to principle (as opposed to rigid case law) and historical-conceptual links to Roman law. Certainly these characteristics of Scots law have for a long time been used in arguments about the distinctiveness of the Scottish legal system. But other systems also use or were historically influenced by Roman law, so some other criterion must provide the clue to identity. If anything, substantive similarities in the law point to the demarcation of

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<sup>32</sup> See on this form of argument, Neil MacCormick, "Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*"(1978) *Northern Ireland Legal Quarterly* 1, 15-18.

<sup>33</sup> Indeed the legislation setting up the Supreme Court of the United Kingdom states that 'Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.' (Constitutional Reform Act 2005, s 41(1).)

different legal families or cultures but not to specific units or legal systems within these categories.

A more fruitful approach is to look to the sociological sense of legal system. If it is the case that courts or the legal profession see themselves as having a distinct identity, and this was true of much of the history of Scotland from the 18<sup>th</sup> Century onwards, then this argues for a distinct identity of a Scottish legal system in that sense. The effect is to locate issues of the identity of the Scottish legal system in more general questions of Scottish identity and involves consideration of the 'Scottishness' of Scotland's political, educational, economic, and cultural systems.<sup>34</sup>

#### 6. Legal system as a 'country': the Scottish Legal System and international private law

A final sense of legal system is to be found in international private law (IPL). That subject lays down rules that, for example, specify the courts of which legal system have jurisdiction to try a case, or the laws of which legal system are to be applied in resolving a legal dispute. But IPL uses a distinctive conception of legal system. The IPL world is divided up not into states in the sense of public international law but into units known as legal systems or countries. But there is no obvious basis for the rules as to the identity of these countries. Thus for most IPL purposes,<sup>35</sup> there is no such thing as Britain or a British legal system; rather there are the separate countries of Scotland, England and Wales, and Northern Ireland. Likewise the USA is divided into the 50 countries of New York, Maryland and so on. A similar approach applies to the constituent parts of Canada and Australia. Yet Germany is one country for IPL purposes, as is Spain or Brazil.

Certainly this sense of legal system is recognised in IPL sources and instruments. For example, the Civil Jurisdiction and Judgments Act 1982 applied a modified version of the 1968 EC Brussels Judgments Convention to allocation of jurisdiction between the different 'parts' of the United Kingdom, which are defined as meaning England and Wales, Scotland and Northern Ireland.<sup>36</sup>

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<sup>34</sup> For a rudimentary statement of this argument, see G Maher, "The Identity of the Scottish Legal System" 1977 *Juridical Review* 21. For a detailed discussion of the distinctiveness of the Scottish political system as an aspect of a more general Scottish culture, see Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), chs 11 & 12. See also W. J. M. Mackenzie, *Political Identity* (Harmondsworth: Penguin Books, 1978), especially pp. 15-16; 170-172.

<sup>35</sup> There are occasional exceptions where for certain very specific issues the appropriate legal unit is the United Kingdom, Australia or Canada. See Dicey Morris & Collins, *The Conflict of Laws* (14<sup>th</sup> edn, 2006; Oxford: Oxford University Press), p 30.

<sup>36</sup> 1982 Act, section 16 and Schedule 4 as read with section 50. Many instruments which recognise that some States may have more than one IPL country provide that the State does

Furthermore many IPL conventions and EU regulations contain provisions like the following:<sup>37</sup>

*Non-unified legal systems*

(1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

The problem with these provisions is that they do not provide any criteria for determining which states have different countries in an IPL sense, but seem to take for granted that this phenomenon exists. Some versions hint more strongly at a content-based difference. For example the (EU) Rome I Regulation on contractual obligations states that:<sup>38</sup>

Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

But this provision cannot mean that there are different countries within one state only where the law of contract differs. Contract law in Northern Ireland is much the same as that in England and Wales, but these remain different IPL countries.

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not have to apply the provisions of the instrument in case involving conflicts only between those different countries. See, for example, Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations ([2008] OJ L177/6), article 22(2): 'A Member State where different territorial units have their own rules in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.'

<sup>37</sup> Hague Convention on Choice of Court Agreements (2005), article 25. Provisions of this sort are to be found in most of the conventions made under the auspices of the Hague Conference on Private International Law. See, for example, the 1980 Convention of International Child Abduction, articles 31 and 32.

<sup>38</sup> Rome I Regulation, article 22(1). See also Rome II Regulation (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ([2007] OJ L199/40), article 25. The provision in the Rome I Regulation was based on an earlier version of that instrument (The Rome Convention (1980)). An official report on that Convention simply explains the provision with an example: 'If, for example, in the case of Article 4, the party who is to effect the performance which is characteristic of the contract has his habitual residence in Scotland, it is with Scottish law that the contract will be deemed to be most closely connected.' (Giuliano-Lagarde Report (OJ C282 (31.10.80) 4, p 38.)

A further level of the analysis of this idea of a country is that some states (for example, Spain and China) that are themselves countries in the IPL sense have rules which deal with 'internal' conflict of laws. These provisions are usually referred to as involving 'inter-regional' conflict of laws and apply the same or a modified version of international IPL rules to issues between different autonomous areas within the State.<sup>39</sup> Although such areas are legal systems of sorts, for international IPL purposes they are not full countries in the way that Scotland or New York are. Their exact characterisation remains problematic.

Clearly, there is work still to be done on the conception of legal system used in IPL.<sup>40</sup> What may be surmised at this stage is that none of the other notions of legal system considered earlier in this paper is likely to be dispositive (or even perhaps of any use at all) in clarifying the meaning of a country for IPL purposes. But this should be no surprise. The subject of IPL has its own distinctive issues and problems, and uses a range of special concepts and principles in dealing with them. There is accordingly no theoretical or practical need for the conception of legal system which is appropriate to that subject to be identical to any other sense of legal system.

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<sup>39</sup> This has long been a feature of Spanish law and predates the more modern development of autonomous regions. See L Neville Brown, "The Sources of Spanish Civil Law" (1956) 5 *International and Comparative Law Quarterly* 364-377, 372-377. For discussion of the approach in China, see Guobin Zhu, "'Inter-Regional Conflict of Laws Under 'One Country, Two Systems' " (2002) 32 *Hong Kong Law Journal* 615-676.

<sup>40</sup> The pity is that IPL, despite the range of conceptual puzzles which the subject gives rise to, was an area of the law which Neil MacCormick did not appear to have much noted or discussed. For a brief treatment, however, see MacCormick, "The *Maastricht-Urteil*: Sovereignty Now" (1995) 1 *European Law Journal* 259, at 262-262.



Date	<b>February 2012</b>
Committee	<b>Judicial Policy Committee</b>
Document title	<b>Enquiry into the establishment of a separate Welsh jurisdiction</b>
Document type	<b>Response</b>
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Thank you for the opportunity to give our views on the establishment of a separate Welsh Jurisdiction. This response is from the Magistrates' Association for England and Wales.

We note that you are seeking views on the following specific matters as well as on any other matter relevant to the Inquiry:

- the meaning of the term 'separate Welsh jurisdiction'
- the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction
- the practical implications of a separate jurisdiction for the legal profession and the public
- the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system

### **Summary**

The 2011 referendum result did give the National Assembly extensive powers to make laws for Wales and we can understand that this has prompted a return to the debate on whether a separate Welsh jurisdiction is needed. However, the conclusion of the All Wales Convention Report in 2010 was that 'as more and more legislation is enacted in Wales over time, the case for a separate jurisdiction will strengthen'. We do not believe that the case is yet strong enough to necessitate a new inquiry.

### **The meaning of the term 'separate Welsh jurisdiction'**

Clearly the National Assembly has powers to make laws for Wales, but this does not automatically require a separate Welsh jurisdiction. There are degrees of separation — total devolution, greater autonomy within a common jurisdiction and others in between. Along the way there will be many fundamental issues to be debated, implemented and tested and it is essential that the process be one of evolution.



We have noted the '*significant developments in the administration of justice*' cited in the letter inviting comments but consider that these are rather overplayed. For example the letter implies that there is now a separate independent court administration in Wales – 'HMCS (Wales)'. We do not think that this is correct as HMCS (Wales) is a regional department of HMCTS which is part of the Ministry of Justice.

### **The potential benefits, barriers and costs of introducing a separate Welsh jurisdiction**

The formation of the various courts, as listed in the letter inviting comments, already provides an acknowledgement of the changed constitutional position of Wales following devolution. What further benefit will a separate jurisdiction bring? Just how cost-effective would that be? The scoping paper recognises that the last time the All Wales Convention posed this question, following wide consultation in 2010, it concluded that a separate legislation was not required at that time. The Convention also concluded that '*a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence, even if the Assembly were to acquire the substantial powers of the Scottish model*'. The further conclusion that '*the courts of England and Wales are fully competent to decide cases involving the laws of England and Wales, the laws of Wales only and European Union law*' remains true.

Thus we have to ask just what has radically changed since the publication of the All Wales Convention Report in 2010 to require a further inquiry now. Given everything else that is changing in the delivery of the administration of justice, and in light of the current economic situation, is this based on a pressing need to make the justice system in Wales more effective and efficient? If so, what is the basis of this?

The scoping paper purports to present arguments 'in favour' and 'against' but mostly repeats pre-2010 papers and views which have already been considered by the previous enquiry. We certainly do not accept the assertion of Winston Roddick that devolved control '*would bring justice closer to the people for whom the laws were made*'. Magistrates already provide that connection.

The magistracy of England and Wales has made great efforts to achieve greater consistency and commonality in sentencing — and this has been achieved partly though nationally devised training and guidelines. A separate jurisdiction would become responsible for training and sentencing guidelines which would require a Judicial College for Wales and a Sentencing Council (Wales). This would have implications for consistency of approach and outcome.

Currently Wales does not have a sufficiently well developed infra-structure to support a fully devolved separate jurisdiction. The issue of prisons is paramount; there is no prison facility in north Wales. The cost of developing a supportive infra-structure would be huge, even when times are good, and in the current climate of austerity beyond reach.

## **The practical implications of a separate jurisdiction for the legal profession and the public**

The public, ie. the electorate of Wales has expressed its desire to have law making powers vested in the National Assembly. However the public confidence in the administration and delivery of justice is low. The development of a separate jurisdiction must recognise this reality and incorporate greater public trust.

## **The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.**

We have considered the statements given in the scoping paper which cover this issue and, our views chime with those expressed by a former Lord Chancellor that;

*'It does not follow that, because there are different legal texts to be applied on each side of the border, there needs to be separate jurisdictions by virtue of those differences alone. Our courts are well used to considering bespoke texts, related to specific geographical areas or circumstances, and in areas ranging from public law to contract. What underpins a common jurisdiction is a common jurisprudence, system and procedure.'*

## CLA WJ 12

### **Inquiry into the establishment of a separate Welsh jurisdiction Personal Response (David Williams, Judge of the United Kingdom Upper Tribunal)**

#### A SEPARATE WELSH JURISDICTION?

1 This is a personal submission to the Committee. It is intended to provide the Committee with information about the extent to which tribunals form part of the justice system in Wales both in devolved and in reserved areas. A secondary intent is to suggest to the Committee that the experience of tribunals may assist in illustrating from current practical experience answers to issues raised by the Committee's call for evidence. As I am a salaried judge, this submission does not and is not intended to comment in any way on political issues or on directions for future policy. It should be taken as a personal opinion only. Nor is it intended to comment on matters of administration beyond my remit as a judge.

2 I am a salaried, transferred-in Judge of the Upper Tribunal sitting in the Administrative Appeals Chamber. I am also a transferred-in Judge of the First-tier Tribunal, sitting in the Tax Chamber, and a deputy Northern Ireland Social Security Commissioner. I am a member of the Welsh Government's Welsh Tribunals Contact Group. My permanent home is in Penllŷn, Gwynedd.

3 The focus of this submission is on the work of the Upper Tribunal (UT) and in particular its Administrative Appeals Chamber (AAC) and the tribunals from which appeals or judicial review go to that chamber. These include a number of Welsh devolved tribunals.

4 The report highlights what is in my view a highly complex network of interacting legislative, executive, and tribunal jurisdictions within the United Kingdom as a whole with an ongoing challenge about the extent to which any is "separate" from any other.

#### *The Upper Tribunal, the First-tier Tribunal, and Welsh devolved tribunals*

5 The tribunals, and chambers of tribunals, on which I focus are citizen-state tribunals. By this I mean that these judicial bodies deal with appeals by individuals (or companies) about decisions of public authorities conducting their public responsibilities and powers. The note does not deal with Employment Tribunals or the Employment Appeals Tribunal. They handle what are essentially party and party cases (although many cases are against public sector employers).

6 These citizen-state tribunals deal with issues fundamental to all Welsh people: social security and welfare (including the personal costs of housing), health, education and training, tax, information rights. In practical terms, they would form a large part of the administration of justice in a fully separate Welsh jurisdiction, as they do in Scotland (though the extent of devolution in Scotland is greater, and is also under review). The law is in all cases legislation and not common law.

7 For example, the social security and child support segment of the First-tier Tribunal Social Entitlement Chamber (a reserved tribunal) handles appeals against decisions about retirement pensions, disability allowances, employment and support allowance, child benefit, tax credits and housing and council tax benefits. This is a major caseload. The following are the 2010 statistics for Wales. The judiciary working within that jurisdictional stream in Wales consisted of the Regional Tribunal Judge and five other salaried judges, 36 fee paid judges, 52 medical expert members, 29 disability expert members and 1 financially qualified expert member. New full time judges and a full time medical member are being recruited. During the year 25,269 Welsh appeals were made to that stream of the tribunal of which 23,928 were listed for hearing. 17,374 appeals were cleared in the year. All demanded individual consideration. These were not multiple applications but individual benefit decisions based on personal circumstances. They are separate from the judiciary and caseloads of the other parts of the First-tier Tribunal and of the devolved tribunals.

8 During the same period the Mental Health Review Tribunal for Wales (a devolved tribunal) had a salaried full time judicial president, 24 fee paid legal members, 31 consultant medical members and 17 other specialist members. 2,700 applications were received, leading to 1,900 hearings. A typical hearing took ½ day. They took place in 43 psychiatric assessment centres in Wales. (Statistics are kept by the Administrative Justice and Tribunals Council and its Welsh Committee and by the tribunals).

9 The Upper Tribunal (UT) and First-tier Tribunal (FTT) were created by the Tribunals, Courts and Enforcement Act 2007, Part 1. Part 1 applies to all parts of the United Kingdom. The Act provides directly for the creation and status of a Senior President of Tribunals and Judges of the UT and FTT. It enables a Tribunal Procedure Committee chaired by a judge to create tribunal procedure rules for those tribunals and it enables measures to transfer areas of jurisdiction into the tribunals and to administer them. Administration is by the now-integrated HMCTS: Her Majesty's Court and Tribunal Service.

10 The UT is a superior court of record (section 3(5)). For the meaning of that as regards England and Wales, see the decision of the

United Kingdom Supreme Court in *R(Cart) v Upper Tribunal (Public Law Project intervening)* [2011] UKSC 28, and for a parallel decision about Scotland see *Advocate General for Scotland v Eba* [2011] UKSC 29. The FTT is a tribunal in the traditional administrative law sense in the United Kingdom. It is a judicial body independent of any government department or other public authority. Both are divided into a number of Chambers that exercise specific areas of jurisdiction. The current list of chambers and their main functions, to be found on the Ministry of Justice website, is attached to this note.

11 The terms of office of Judges appointed to the UT and FTT are in the 2007 Act. All are appointed through the Judicial Appointments Commission. They take the judicial oath and have guaranteed judicial independence but are answerable to the judicial discipline and complaints procedures that apply in their respective countries (for these purposes: England and Wales, Scotland, Northern Ireland). The Senior President of Tribunals is Sir Robert Carnwath CVO, a Lord Justice of Appeal recently appointed as a Justice of the Supreme Court. The judiciary of the UT includes seconded High Court Judges, Court of Session Judges, and Circuit Judges (acting as Chambers Presidents and as Judges of the UT).

12 HMCTS runs the main office of the UT Administrative Appeals Chamber (AAC) in London, and there is another office in Edinburgh. The core judiciary currently consists of a High Court Judge as its Chamber President (Sir Paul Walker) and 15 salaried judges, together with judges seconded from other jurisdictions and fee paid judges. Two salaried judges are based permanently in Edinburgh. Two salaried judges based in London have their main homes in Wales. Two others have homes in Wales. Much of the work of the AAC is done on the papers without hearings. It is a longstanding practice to hold any hearing of a Welsh case in Wales – usually at the Cardiff Civil Justice Centre – and HMCTS has an officer based there to help.  
*A separate Welsh jurisdiction?*

13 The jurisdiction of the UT (and of AAC in particular) illustrates the complexity of the issue of a separate Welsh jurisdiction in practice. For some areas of law the territorial jurisdiction of the UT is indivisibly the entire United Kingdom (for example, immigration and tax). For other areas of law it is divided in several different ways.

14 For example: the territorial jurisdiction for social security purposes is divided between Great Britain and Northern Ireland. This reflects the existence of two jurisdictions in the legislative sense as Northern Ireland has separate social security legislation. The territorial jurisdiction for war pensions is divided between England and Wales, Scotland, and Northern Ireland but the laws applied are the same for all four countries. The appellate jurisdiction over mental health issues is divided separately between all four countries in the United Kingdom;

this is of course a devolved function, so the laws applied in each of the four countries are that country's laws. But if appeals go to the UT then in every case they go to the one Chamber operating a single set of procedural rules with a single judiciary. At the same time the UT will base its decision on the substantive legislation operating in the relevant country and on the procedure rules of the tribunal below.

15 The picture becomes even more complex if aspects of the work of the FTT General Regulatory Chamber is considered. This is because in addition to the divided legislative competences just discussed there are also European Union legislative measures that apply to devolved areas of government.

16 For example, a European Union regulation or directive on environmental issues may require no national legislation to be directly applicable or effective in the United Kingdom (and therefore in Wales). While the Welsh Government may decide to enact legislation to make a regulation effective locally, none is needed in law. And any appellate body is obliged to comply with the European legislation, not the local legislation, if there is a conflict between the two raised before it. The European legislation may require an appeal mechanism against penalties imposed under the legislation. In such a case in Wales it is for the Welsh Government to decide how such appeals are handled, although the law considered in those appeals will be the European Union law. And in all cases the final court of appeal for any substantive point will in effect be the European Court of Justice. Here there are European jurisdictions (the legislative competence and that of the European Court) and a Welsh jurisdiction (administering the law and determining the appeal route) but no British, or English and Welsh, jurisdiction unless the Welsh government so decides.

17 The AAC has long experience in handling the issues raised by separate jurisdictions in both the legislative and judicial senses in handling social security matters. It is also experienced in cooperating with multiple providers of administration. For example, the legislative provisions for social security for Northern Ireland are in identical terms to those for Britain. Where that is so, AAC and its predecessors the social security commissioners have long sought to ensure that the rules about social security benefits are applied consistently throughout the UK.

18 This is done both formally and informally. Formally, judges in England and Wales regard decisions of the Court of Session and the Court of Appeal of Northern Ireland as of the same effective precedent value as those of the Court of Appeal of England and Wales. And they seek through collegiality, common judicial development sessions, internal discussion, and the circulation of decisions to reach consistent interpretations of consistent laws throughout the United Kingdom.

19 Paper based work is shared between the London and Edinburgh offices to ensure efficient use of judicial time where there is no hearing. The Northern Ireland social security commissioners are judicial members of the Upper Tribunal while some judges of the Upper Tribunal are deputy Northern Ireland social security commissioners, again to ensure efficient use of judicial time. The result is that while in one sense there is both a divided legislative jurisdiction and a divided judicial jurisdiction within the United Kingdom for social security, the judiciary have long worked to ensure an undivided corpus of law as it works in practice.

20 At the same time, where there are separate legislative provisions in operation and separate tribunals below, the AAC respects and works within the separate national legislative provisions and procedures.

21 For example, AAC also deals with appeals from the Special Educational Needs Tribunal for Wales (SENTW). Here AAC works within the relevant Welsh provisions in United Kingdom Acts and the relevant Welsh legislation together with the Special Educational Needs Code for Wales. It will of course work from the new procedural rules for SENTW, and is working with SENTW to ensure their effective adoption at both levels of appeal. Any AAC hearings are held in Wales. Where appropriate, cases will be handled in Welsh. In so doing, AAC will apply the case law from the higher courts that remains appropriate to Wales under the terms of the Welsh substantive and procedural rules and will not apply judgments that are no longer appropriate. Its own decisions are, of course, subject to appeal to the Court of Appeal and in limited cases to judicial review.

22 These examples indicate, I suggest, no simple answer to the issue posed.

*Potential benefits, barriers and costs of a separate Welsh jurisdiction*

23 The note above indicates that any barriers caused by the formal separation of systems where there remains a common legislative obligation to citizens has resulted in a determined attempt by the judiciary to ensure that at the practical level any barriers do not operate to affect any rights that a citizen may expect from the state. But where the legislative obligations are different, then the differences are not seen as barriers but simply as differences.

24 The note also emphasises that there are currently many ways in which it can be said that there is already a separate Welsh jurisdiction at both the legislative and judicial levels. Indeed, the suggestions within the scoping paper behind the consultation will in practice make limited difference to much of the current framework within which UT and FTT work unless it is suggested that both become, or are replaced by, separately Welsh tribunals - as against English, Scottish, and

Northern Irish, or British, or United Kingdom tribunals. This is where any question of separate jurisdiction is, in practice, fundamentally different for tribunals as compared with the civil courts. We already confront on a daily basis the issue of dividing what we do between the four constituent nations of the United Kingdom, and of doing so in different ways for different provisions. The Committee may wish to explore with those who preside over and administer those systems the benefits, barriers, and costs that they as judges and administrators see as arising from this mesh of provision.

25 The other issue that must be considered is that of a separate tribunals judiciary. As noted above, the operative principle behind the appointment and transfer of tribunals judiciary into FTT or UT is that it is inclusive of any judge of any part of the United Kingdom where that is appropriate to the matter in hand. There are many examples of judges who, like me, hold appointments in more than one tribunal or chamber of a tribunal. The aim is to ensure appropriate specialist expertise of judges in specialist areas.

26 Any moves made towards growing a separate Welsh tribunal judiciary will reinforce existing concerns about the position of the tribunals judiciary in those Welsh tribunals that are already devolved. There must be strong concern if any separation of judicial competence serves to weaken the independence or the expertise, or both, of tribunal judges operating in Wales.

27 Judicial independence is fundamental to any consideration of the creation of a tribunals judiciary to deal with citizen-state appeals. The judiciary must be guaranteed their independence from any pressures in carrying out their duties within the terms of the judicial oath: "to do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will." That is not changed because the allegiance is to a separate jurisdiction within the United Kingdom. But it does require effective measures that deal with complaints about the judiciary and their protection from pressure from the parties (state as well as citizen) that are an essential part of the development of any such separate judiciary. This of course includes pensions and general welfare issues in accordance with standard UK practice for judicial office holders. And there must be ongoing opportunities for judges to develop their skills and careers. But there is already a Welsh tribunals judiciary and those problems already exist. This is not a new issue.

#### *Practical implications for the legal profession and the public*

28 I have no comment about implications for the professions. As to the public, I suggest that the key requirement of any effective citizen-state appeal (social security benefits, health, education, tax) is readily available access to a fair and efficient appeal system. If, as with social



security benefits, that is to be open fairly to all, then there can be no recovery of the costs of an appeal from an appellant with no income source whether or not he or she wins. So the cost is a central cost. That is an unavoidable practical implication regardless of any decision about providing legal aid and assistance.

*The operation of other small jurisdictions*

29 I have noted above how our judiciary have traditionally reacted to divided legislative and judicial jurisdictions where the underlying rules are the same. It may be that the more important practical issues are those of administering a separate tribunal justice system. That is a problem of which the Welsh Government already has experience, and the Committee may wish to ask those directly involved, including the tribunal presidents who all have administrative responsibilities.

30 The Committee may find material of value from those responsible for administering tribunals in Scotland and Northern Ireland, It may wish to note that the problem of dealing with citizen-state problems in smaller jurisdictions is equally present in the Channel Isles, the Isle of Man and other Crown territories. All have evolved answers to these issues. For example, the Isle of Man maintains a social security appeal tribunal and system modelled closely on the pre 2007 system applying in both Britain and Northern Ireland, as are its substantive laws. Northern Ireland has retained that system as there is no equivalent there of the 2007 Act. Jersey has a social security tribunal, though more loosely modelled on the United Kingdom examples. All have made provision for judicial independence.

David Williams

Judge of the United Kingdom Upper Tribunal

## **The First-tier Tribunal and Upper Tribunal jurisdictions**

### **First-tier Tribunal**

#### General Regulatory Chamber\*:

- Alternative Business Structures
- Charity\*\*
- Claims Management Services
- Consumer Credit
- Environment
- Estate Agents
- Gambling Appeals
- Immigration Services
- Information Rights
- Local Government Standards in England
- Transport

#### Health, Education and Social Care Chamber\*

- Care Standards
- Mental Health
- Special Educational Needs & Disability
- Primary Health Lists

#### Immigration and Asylum Chamber

- Immigration and Asylum

#### Social Entitlement Chamber\*

- Asylum Support
- Criminal Injuries Compensation
- Social Security and Child Support

#### Tax Chamber

- Tax
- MP Expenses

#### War Pensions and Armed Forces Compensation Chamber\*

- War Pensions and Armed Forces Compensation

### **Upper Tribunal**

The Administrative Appeals Chamber: this hears appeals from, or judicial review of, those Chambers marked \* above, save for charity appeals\*\* (which go to the Tax and Chancery Chamber). AAC also hears appeals from the Welsh Mental Health Review Tribunal and Special Educational Needs Tribunal for Wales.

Immigration and Asylum Chamber

Lands Chamber

Tax and Chancery Chamber

## CLA WJ 13

### **Inquiry into the establishment of a separate Welsh jurisdiction Personal response (Christopher Morton, Circuit Judge)**

#### **Consultation on a separate legal jurisdiction for Wales.**

1. Submission of Christopher Morton, Circuit Judge at Cardiff Crown Court from 1992 to 1993 and at Swansea Crown Court from 1993 to 2008. Previously a barrister at Swansea from 1968 to 1992.
2. Main submissions.
  - A separate legal jurisdiction should be created for Wales.
  - It should be done in the near future.
  - It should be created with a view to a degree of permanence, anticipating events and not incrementally and in reaction to events.
3. The contents of the National Assembly Scoping Paper should be taken as having been read by me. I deal only with courts. I believe tribunals can be separately dealt with and any changes therein brought in at a different stage.
4. **Political views.** Political or emotional views may well form the foundation for any opinion on the extent to which Wales should be legally distinct from England. Because of my previous job I try to avoid any submission based on any political argument or emotion. In trying to do that an obvious danger has to be born in mind. It is this. A supporter of Welsh self government (ranging from devolved powers to full independence) might start with the premise that there should be a separate jurisdiction and only then seek out those arguments that support the creation of such a jurisdiction. Conversely anyone whose starting point is an antipathy for self government of any sort may start with the opposite premise, and then see only those arguments that support his or her position. However whilst endeavouring to avoid any political argument I would argue that the political situation as it now exists concerning the government and running of Wales and the direction (if any) in which that situation is likely to move are fundamental factors that cannot be ignored.
5. **The relevant political realities as they presently stand.** Presently the Welsh electorate is surely, by a large margin, in favour of preserving the Union. On the other hand successive referenda have shown an increasing appetite for some devolution of powers.
6. **The way the tide is flowing.** I do not see the desire of the majority to preserve the Union disappearing in any time scale relevant

to this consultation. On the other hand it is my submission that the tide is inexorably, if slowly, flowing in the direction of more devolution and greater identity of Welsh institutions. Moreover I would suggest the tide is likely to continue to flow further in that direction. Apart from what referenda indicate there are other indications of the direction of the tide. As time passes more and more legislation will be enacted in Wales. Then there is there is the “broad agreement” referred to in paragraph seven of the Scoping Paper, namely “that there has been a clear trend in establishing a separate legal personality for Wales since devolution”. In support of an argument that the tide is likely to continue to flow I would submit that, whilst it may or may not have been a desirable step to take, devolution in its present precise form is an unstable creature. The reasons for saying this are twofold. First there is the direction of the political tide itself. Secondly, unless powers are devolved to an English assembly, the so called “Mid Lothian” question remains unanswered. If powers are devolved to England then that is surely a step towards a federal system.

**7. What is meant in this submission by the use of the term a separate jurisdiction?**

In outline I mean a body of criminal and civil courts of first instance and an Appeal Court (Criminal and Civil) with exclusive jurisdiction in Wales and which mirrors those that now exist for England and Wales, subject to the Supreme Court which will (ignoring any Appeals to the European Court of Human Rights) remain the final domestic appeal court for each part of the UK, apart from appeals on Scottish criminal matters.

**8. The practical implications for the legal profession.**

Some who oppose a separate legal jurisdiction point out, correctly in my view that the legal profession can easily deal with laws with limited geographical application, such as those that only apply to Wales, without there being a separate jurisdiction. They have to do it now and should be able to continue do so as Welsh legislation continues to issue from Cardiff Bay. What I would suggest is that whether or not there is a separate jurisdiction this part of a lawyer’s task will be the same. Legislation with geographical limitation will continue to be passed, but the general law each side of the border will remain the same for the reasons set out below.

9. There are already legal professional bodies, branches of professional bodies or professional associations that exist on an all Wales basis, or which could easily be adapted to such a basis. If a separate jurisdiction is to affect such bodies it would surely only be to enhance the standing of such bodies and their members.

**10. Divergence of the law and conflicting decisions between courts each side of the border.**

Under a separate jurisdiction, as defined in brief outline above, the general law each side of the border would remain the same. Only the appeal courts in the present jurisdiction of England and Wales are courts of precedent. Whilst decisions of an appeal court in another jurisdiction are not binding precedent in another, the difference between persuasive authority (which they may be) and binding precedent is surely going to be of minimal significance to whether or not there should be a separate jurisdiction for Wales. At present all binding case-law in Wales is contained in decisions of the higher courts of England and Wales. Following the setting up of a separate jurisdiction the contribution to further authoritative decisions on new points of law common to both jurisdictions is likely to be numerically much greater from England than from Wales, simply because of the disparity in the sizes of the jurisdictions. Be that as it may, in my view, there will be little enthusiasm for the courts in Wales or England not following what would otherwise have been a binding precedent had it been a decision in the same jurisdiction. If such a clash were contemplated, a court could decide it better to follow the decision in the other jurisdiction, leaving the matter to proceed if need be to the Supreme Court. However if a clash occurs, then again there would be the Supreme Court to sort out the divergence. In short, to adopt the First Minister's, vocabulary (paragraph 5 of the Scoping Paper), I envisage a jurisdiction in Wales with an almost identical legal system and almost identical laws as England running parallel to that in England and with easy access between those jurisdictions.

**11. Effect on the public.**

A separate Welsh jurisdiction surely has the potential to be closer to and more aware of the specific needs of Wales which may vary from those in England. In other words it should be better able to serve the needs of the public throughout Wales.

**12. Logic.** One size does not fit all, but a separate Welsh jurisdiction would achieve a measure of consistency between the constitutional positions of the constituent countries of the UK. This point and the point made in the preceding paragraph are ones already made by the former Counsel General and which I simply endorse. (See again paragraph 5 of the Scoping Paper.)

**13. Cross border enforcement and other problems as envisaged by the Rt Hon Jack Straw MP.,QC** (as quoted in paragraph 6 of the Scoping Paper).

I have already dealt with alleged difficulties arising out of "post-separate jurisdiction" decisions of English Courts being only persuasive. Problems of cross border enforcement are surely capable of resolution given a desire on all sides to eliminate any such barriers or at least to minimise their effect. I do not see why a single professional body (such as the Law Society or Bar Council) might not continue to exercise professional regulation each side of the border, if

that is what is desired. In short I do not see that such arguments against a separate jurisdiction are “overwhelming” as claimed. There are a lot of practical implications of a separate jurisdiction. They will need careful and detailed thought, but I would not describe them as “enormous”.

14. **Costs.** I have no expertise in this field. I simply make these possibly superficial points. The personnel, administration and buildings for all courts of first instance already exist. Is this a basis for arguing that a separate jurisdiction would not of itself increase cost at this level?

15. A Welsh Court of Appeal would be new creature. Its creation must involve expenditure. Could a reduction in the workload of the English Court of Appeal due to no longer having to handle Welsh appeals lead to a financial saving? If so it could properly be set off against the cost creating a Welsh court of Appeal. Would cross border sitting by judges at this level be acceptable, and if so could that be used to reduce cost?

16. **The Northern Irish situation.** I am no expert on this. I simply observe that Northern Ireland has criminal, civil and appeal courts which closely and in detail mirror those in England and Wales. The more a separate Northern Irish jurisdiction can be said to work satisfactorily, the more support there is for the arguments I put forward. Of course the converse also applies.

17. **Incremental or gradual evolution of a Welsh jurisdiction.** If it is accepted that a separate Welsh jurisdiction is desirable, will eventually evolve or will in due course become necessary, I would argue for a pro-active and forward looking approach. Moreover I would say the time has now come for the creation of a substantial Welsh jurisdiction. It is the next logical step. I do not readily see a suitable area of jurisdiction short of creating that outlined in paragraph 7 hereof which could be singled out as the first small increment and used as a trial or pilot for more jurisdiction at a later date. Even if there is such a modest pilot, it could be argued that to proceed that way is merely to slow down an inevitable process. The Northern Ireland model can be treated and used as a pilot module.

Christopher Morton

12 February 2012

CLA WJ 14

**Inquiry into the establishment of a separate Welsh jurisdiction  
Personal Response (Professor R. Gwynedd Parry, LLB, PhD, FRHistS,  
Barrister)**

**This was received in the medium of Welsh and has been translated by  
the National Assembly for Wales**

**Inquiry into the establishment of a separate Welsh jurisdiction**

**Evidence to the National Assembly for Wales Constitutional and  
Legislative Affairs Committee**

by

**R. Gwynedd Parry<sup>1</sup>**  
January 2012

## **PREFACE**

1. The evidence here submitted is based on research sponsored by the Coleg Cymraeg Cenedlaethol and will be published as a volume entitled, *Cymru'r Gyfraith: Sylwadau ar Hunaniaeth Gyfreithiol* by University of Wales Press in summer 2012.

## **TERMS OF REFERENCE**

2. The Committee's Terms of Reference are set out in paragraph 8 of the scoping paper.

Evidence is requested on the following matters:

- the meaning of the term “separate Welsh jurisdiction”;

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<sup>1</sup> Gwynedd Parry started his career as a barrister in Swansea in 1993, and remains a member of the profession with tenancy in the Temple Chambers. Cardiff. He was appointed Professor of Law and Legal History at Swansea University in 2011, and is the director of the Hywel Dda Research Institute within that university. He is a fellow of the Royal Historical Society (FrHistS).

- the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;
- the practical implications of a separate jurisdiction for the legal profession and the public;
- the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.

## SUMMARY

3. In the evidence here submitted, I shall:

- Define the phrase 'a separate Welsh jurisdiction' by reviewing the historical background and current position of the justice system in Wales.
- Recommend that the establishment of a separate jurisdiction on the Northern Ireland model would require the creation of the following institutions:
  - A High Court in Wales;
  - A Court of Appeal in Wales;
  - A Welsh judiciary under a Lord Chief Justice for Wales (to ensure consistency within the British constitution);
  - a Welsh legal profession
  - National Assembly for Wales control over the Police and Prisons in Wales
- Consider some of the benefits/barriers/costs/implications of a separate Welsh jurisdiction.
- Discuss the development and current position of the Northern Ireland jurisdiction for comparison.
- Recommend that a commission consisting of constitutional and legal experts be established to discuss the matter, similar to the Richard Commission which laid the foundations for legislative devolution to Wales. It should be tasked with gathering and submitting detailed evidence and putting forward options (having considered models in other devolved and/or federal countries around the world) and, where appropriate, making recommendations for legislation.
- Put forward some options for the reform of the justice system in Wales within the current single unified jurisdiction.



## Defining “a separate Welsh jurisdiction”

### Historical Background

4. The question asked here is what is the meaning of the term “a Welsh jurisdiction”, or, rather, what should it be. In examining the current situation an appreciation of the historical background is also necessary.
5. *Constitutional and Administrative Law*, that text originally written by Professor Owen Hood Phillips<sup>2</sup>, contains a paragraph which sums up the legal status of Wales within the constitution.

‘The Statutum Walliae, passed in 1284 after Edward I had defeated Llewelyn ap Griffith, declared that Wales was incorporated into the Kingdom of England. Henry VIII completed the introduction of the English legal and administrative system into Wales. This union was effected by annexation rather than treaty. The Laws in Wales Act 1536 united Wales with England, and gave to Welshmen all the laws, rights and privileges of Englishmen. Welsh constituencies received representation in the English Parliament. An Act of 1542 covered land tenure, courts and administration of justice. References to “England” in Acts of Parliament passed between 1746 and 1967 include Wales. The judicial systems of England and Wales were amalgamated in 1830.’<sup>3</sup>

6. The process by which Welsh legal tradition was displaced and Welsh courts incorporated into the administration of the English courts happened gradually. The influence of native laws and legal structures declined following the conquest in 1282, and the Statute of Rhuddlan in 1284, and it could be said that the Tudor reforms in the first half of the sixteenth century were merely one more step in a process which had been ongoing for centuries.<sup>4</sup>
7. The reforms of the nineteenth century, with the abolition of the Court of Great Sessions in 1830, completed the work which had begun with the Statute of Rhuddlan in 1284, and ensured the demise of a Welsh legal identity. Between those two milestones, two important Acts were passed, ‘The Act for Law and Justice to be Ministered in Wales in Like Form as it is in this Realm 1535-36’ and ‘The Act for Certain

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<sup>2</sup> Published for the first time in 1952. Owen Hood Phillips (1907-1986) held the Barber Chair in jurisprudence at Birmingham University for a number of years and was the chief authority of his day on constitutional law. It is believed he may have had family roots in Pembrokeshire.

<sup>3</sup> See O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, 8th Edition, (London: Sweet & Maxwell, 2001), p. 16.

<sup>4</sup> See Thomas G. Watkin, *The Legal History of Wales*, (Cardiff, University of Wales Press, 2007), chapter 6.

Ordinances in the King's Dominion and Principality of Wales 1542-43'. These are the "acts of union" which established the governance and legal structures which formed the basis of Wales's status within the constitution .<sup>5</sup>

8. In general, it could be said that the principal effect of these reforms was the incorporation of Wales into England. The governance and public administration of the Welsh counties now almost completely mirrored that of English shires. The same was also true of the administration of justice in the courts. The notable exception was the Court of Great Sessions , established by the 1542 Act. The Court of Great Sessions was based on the principality's old law courts established following the conquest of Edward I, and which operated under the presidency of the king's justices. A justice or judge would be appointed to preside on the Great Session circuit, with each circuit comprising of three counties.<sup>6</sup> The Court of Great Sessions would be sit twice a year in each county, with each sitting lasting about six days. Despite administering English law, the Court of Great Sessions was a Welsh institution with wide jurisdiction over criminal, civil and Chancery cases as well as summonses relating to property.<sup>7</sup>
9. The Court of Great Sessions remained a feature of the distinct system existing in Wales until its abolition in 1830, when it was replaced by the English Assizes.<sup>8</sup> The Assizes were established in England in the eighteenth century, and each shire had an operational centre for the Assizes (usually the county town) to receive the king's judges.<sup>9</sup>
10. The Court of Quarter Session was introduced in Wales following the 1536 and 1543 Acts of Union,<sup>10</sup> and undertook a variety of legal and administrative functions. Each county had its quarter session court, which would sit four times a year. This court of law dealt with criminal matters as well as operating as the county's administrative forum, with responsibility for local government up until the establishment of county councils in 1888.<sup>11</sup> The Quarter Session court was the middle court within the hierarchy of trial courts of the criminal

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<sup>5</sup> For an overview of the Tudor reforms and their legal implications see Watkin, chapters 7 and 8.

<sup>6</sup> As the thirteenth county, Monmouthshire was included in the Oxford Circuit, thus creating uncertainty, which continued until quite recently, over its Welsh status.

<sup>7</sup> See Watkin, p. 146.

<sup>8</sup> See John Davies, *History of Wales*, (London: Penguin, 2007) (Revised Edition)p. 332. The Court of Great Sessions was established following the Tudor reforms as part of the process by which the legal system established under the Edwardian conquest, with its distinction between the courts of the Principality and the legal position in the Marches, was replaced.

<sup>9</sup> The Court of Great Sessions established under the Acts of Union was abolished in 1830 and replaced with the Assizes, thus incorporating Wales within a centuries-old English system.

<sup>10</sup> See the history of the establishment of the quarter session courts in some areas and counties of Wales in W.

Ogwen Williams, *Calendar of the Caernarvonshire Quarter Sessions Records, Volume 1 1541-1558* (Caernarfon: Caernarvonshire Historical Society, 1956), and Keith Williams Jones, *A Calendar of the Merioneth Quarter Sessions Rolls, Vol I:1733-65* (Dolgellau: Meirionethshire County Council, 1965).

<sup>11</sup> Local Government Act 1888. During this period the Court of the Quarter Session would be responsible for supervising the repair of roads and bridges and for all the needs of local government.

legal system of this period. It was in this forum that those cases which merited being tried by jury but were not serious enough to be tried in the Court of Great Sessions and, later, the Assizes, were tried.<sup>12</sup>

11. Below the Quarter Session courts were the magistrate courts (petty sessions). The vast majority of minor criminal cases were heard in the magistrates courts. Lay magistrates administered justice in all cases until the post of stipendiary magistrate was created in the middle of the eighteenth century to replace the corrupt magistrates in London during that period.<sup>13</sup> Appointed from the ranks of qualified solicitors, the practice of having a stipendiary magistrate spread to populous areas outside London during the nineteenth century. Unlike a lay magistrate, a stipendiary magistrate could hear cases on his own rather than as a member of a bench. Despite this, lay magistrates were the norm in Wales, with only handful of stipendiary magistrates to be found in the industrial areas of south Wales.
12. With the abolition of the Court of Great Sessions in 1830 Wales lost its legal identity almost entirely.<sup>14</sup> Two circuits, the North Wales and Chester circuit and the South Wales circuit, were established during the nineteenth century to serve the Assizes (with Monmouthshire as part of the Oxford circuit). Only as recently as 1945 did the north and south become united as the Wales and Chester Circuit (with the exception of Monmouthshire, which remained part of the Oxford circuit until 1971), and thereby reviving some form of unified Welsh courts administration.<sup>15</sup>
13. I say almost entirely. As Professor Thomas Watkin demonstrated in his masterly volume, *The Legal History of Wales*, even during the nineteenth century the particular requirements of Wales, and especially those of the Welsh language, forced the legal system in Wales to operate differently from that in England. There were specific provisions for the appointment of judges proficient in Welsh, and the

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<sup>12</sup> The Court of the Quarter Session was abolished in 1971, and incorporated into the Assizes within a unified Crown Court which was created following recommendations by Lord Beeching in his report, *Report of the Royal Commission on Assize and Quarter Sessions, Cmnd 4153 of 1969* (London: HMSO, 1969). Weaknesses identified in the report in respect of the work of the quarter sessions included the fact that they were too local in their organisation, they were overdependent on lay and part-time judges, which therefore resulted in unreasonable delay in dealing with cases, and a lack of consistency in sentencing.

<sup>13</sup> See, Sir Thomas Skyrme, *History of the Justices of the Peace*, (Chichester: Barry Rose, 1991); also, Peter Seago, Clive Walker and David Wall, 'The Development of the Professional Magistracy in England and Wales', *Criminal Law Review*, [2000], 631-651.

<sup>14</sup> The abolition of the Court of Great Sessions also undermined the Welsh nature of the judiciary in Wales, including the use of Welsh: see Mark Ellis Jones, '“An Invidious Attempt to Accelerate the Extinction of our Language”: the Abolition of the Court of Great Sessions and the Welsh Language', *Welsh History Review*, 19(2) (1998), 226-264.

<sup>15</sup> The way in which a Welsh identity was re-established within the courts system during the seventeenth and twentieth century is analysed in detail by Sir John Thomas, 'Lord Morris of Borth y Gest Lecture 2000 – Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, the Welsh Language and Parochialism', in Thomas Watkin (ed.), *Legal Wales: Its Past, Its Future* (Cardiff: The Welsh Legal History Society, 2001) pp. 113-165.

language was an important catalyst for recognising Wales's legal distinctiveness.

14. The unification of the circuit at the end of the second world war came about partly due to the growth of the legal profession in Wales. The Bar had had a permanent presence in Wales since the nineteenth century, when the first chambers were established in Swansea and Cardiff. During the early period there was no more than a handful of practising barristers in any of the chambers. Over the course of the twentieth century, that presence increased gradually and, then dramatically after the government increased legal aid to clients at the end of the 1960's. The development of the legal profession in Wales created an impetus towards establishing its own Welsh organisational structure.
15. It is possibly the reforms at the beginning of the 1970's which revitalised the process whereby some of the Welsh identity in the administration of justice lost in 1830 could be recaptured. This is when the three-tiered system of criminal courts, i.e. the petty sessions, the Quarter Sessions and the Assizes, was abolished and the current system of magistrate courts and Crown Courts was established.<sup>16</sup> The reforms were introduced following the recommendations of a Royal Commission chaired by Lord Beeching.<sup>17</sup> Following the Beeching Report, the Crown Court, as part of the Supreme Court of Justice, displaced the Assizes and the quarter session courts, with the magistrates courts remaining separate.<sup>18</sup> Later on Sir Robin Auld produced his report, which led to the creation of a unified criminal court comprising magistrates courts.<sup>19</sup>
16. Beeching's reforms had Welsh implications. In Wales, political pressure and lobbying behind the scenes ensured that the new system would be managed within an administrative unit of the Wales and Chester Circuit (with modifications) with its head office in Cardiff.<sup>20</sup> This was an important step as it recognised, to a certain extent, that Wales was a legal unit for the administration of justice. The law now had a Welsh personality, at least in terms of court administration, and Cardiff acted as a head office for that purpose. From now on, circuit committees and meetings would discuss courts policy from a Welsh perspective and give Wales a voice in debates at a wider level. As a result, the idea of Wales as a legal entity could evolve gradually.

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<sup>16</sup> Beeching's recommendations were put into law by the Courts Act 1971.

<sup>17</sup> The Beeching Report, *Report of the Royal Commission on Assize and Quarter Sessions*, (London: HMSO, 1969) (Cmnd 4153), p. 36

<sup>18</sup> The Courts Act 1971, ss. 1 & 4, the Supreme Court Act 1981, s. 1.

<sup>19</sup> The Auld Report, *A Review of the Criminal Courts of England and Wales by the Rt. Hon. Sir Robin Auld, Lord Justice of Appeal*, (London: HMSO, 2001), Chapter 3, paragraph 31.

<sup>20</sup> See Sir William Mars-Jones, 'Beeching- Before and After on the Wales and Chester Circuit' 'Beeching- Before and After on the Wales and Chester Circuit', *Cambrian Law Review*, 4 (1973), 81-93.

17. Further developments in England and Wales were a means, although often indirect, of nurturing the concept of a Welsh legal identity. Following the introduction of the provisions of the Administration of Justice Act 1970, the High Court could sit outside London. Over time, Birmingham, Manchester and Cardiff would operate as devolved centres of the High Court. Legal devolution was beginning to take hold as a policy in the administration of justice, which operated the principle of bringing the courts of justice closer to the people.
18. Over time, the Court of Appeal started to sit outside London, and as a result Cardiff became one of its regional centres. Other developments during the last quarter of the twentieth century, to a certain extent, were a further sign of the changed climate. The Lord Chief Justice of England began to refer to himself as the Lord Chief Justice of England and Wales (or Wales and England, as he is described on a wall in Swansea Crown Court ), a symbolic development perhaps, but one which brought about a change in attitude towards Wales in legal circles.
19. Later on, a Mercantile Court for Wales was set up, with its head office in Cardiff. During the years before political devolution there was a gradual devolution of the administration of the legal system. The concept of a Welsh administration for the courts and the legal profession grew. While the sum and substance of the law remained English to a large extent, the administration had some influence in making its administration more Welsh.
20. Of course, following the creation of the National Assembly , the creation of Welsh legal structures received a significant boost. The Government of Wales Act 2006, in recognising the National Assembly for Wales as a legislature, raised further questions regarding the administration of justice in Wales. The justice system had to respond and adapt to the new constitution and develop structures in keeping with contemporary Wales. With Wales facing a future where Welsh laws will become increasingly divergent from those in England, the need for the legal system to deal appropriately with this divergence will become apparent.

### **The Justice System in Wales today**

21. The judiciary responded positively and progressively to the development of devolution in Wales, and legal structures and

arrangements were adapted so that they could operate appropriately within the bounds of the constitution and the current jurisdiction.<sup>21</sup>

22. The need for an intrinsically Welsh expression of the legal system in Wales is what lies at the heart of the phrase 'Legal Wales'. The phrase crystallizes the concept of restoring a Welsh legal identity. For Sir Roderick Evans, Legal Wales, in order to reach its full potential, includes these elements:

‘(a) the repatriation to Wales of law making functions; (b) the development in Wales of a system for the administration of justice in all its forms which is designed to serve the social and economic needs of Wales and its people; (c) the development of institutions and professional bodies in Wales which will provide a proper career structure for those who want to follow a career in Wales in law or in related fields; (d) making the law and legal services readily accessible to the people of Wales; (e) the development of a system which can accommodate the use of either the English or Welsh language with equal ease so that in the administration of justice within Wales the English and Welsh languages really are treated on a basis of equality.’<sup>22</sup>

23. Following devolution, Wales became an administrative legal unit within the jurisdiction of England and Wales in terms of courts administration. One of the most significant changes in advancing Welsh legal unity was the creation of Her Majesty's Court Service in Wales in 2005. At that juncture, the four Welsh Magistrates' Courts Committees came together with the former Wales and Chester Circuit to form an unified administration. Subsequently, in 2007, Cheshire became part of the Northern Circuit, and administration with Wales ceased. Legal unity had now been achieved insofar as the administration of the courts in Wales was concerned.

24. As a result, the post of Presiding Judge for Wales was created, along with a Welsh judiciary and magistracy. Other Welsh legal institutions have subsequently developed, including the Association of Judges in Wales and the Wales Bench Chairs Forum.<sup>23</sup> Other specific posts were established within the judiciary, such as the Chancery Judge and the Mercantile Judge to oversee the work of the courts in specialist legal fields. The legal profession itself was also responding

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<sup>21</sup> ‘What the judiciary can do, and can legitimately do, in the context of Wales is to respond to the fact of devolution and the changes that have already taken place and are now embedded within the constitution.’: Address by Lord Judge, Legal Wales Conference, Cardiff, 9 October 2009.

<sup>22</sup> Sir Roderick Evans, ‘Legal Wales- The Way Ahead’, Law Society Lecture, National Eisteddfod of Wales, Swansea, 2006, pp. 3-4.

<sup>23</sup> ‘to treat Wales as a unit for the purpose of administering the courts in Wales was a very significant event...treating Wales as an entity for these purposes has provided for the first time for many hundreds of years the opportunity not only to administer the courts in Wales on an all-Wales basis but also to plan for and develop a justice system in Wales suitable for our needs’. Sir Roderick Evans, ‘Devolution and the Administration of Justice’, The Lord Callaghan Memorial Lecture 2010, Swansea University, 19 February 2010.

to the changes by creating national specialist associations such as the Wales Public Law and Human Rights Association, and the Wales Commercial Law Association. In the meantime, laws at Westminster had also created legal and quasi-legal posts specifically for Wales.<sup>24</sup>

25. The establishment of the Administrative Court in Cardiff in 1998 was possibly one of the most significant early developments in promoting Wales's legal needs following devolution. Thereafter, it would be possible for judicial reviews relating to the actions of the Welsh Assembly to be resolved in Wales. This court was established without the need for legislation - it was a wholly administrative decision. The establishment of the Administrative Court in Wales happened in response to the argument that cases challenging administrative or political decisions taken in Wales should, wherever possible, be handled and heard in Wales, that enabling the people of Wales to hold their Government to account in their own country. More recently, the Administrative Court itself confirmed and supported the importance of ensuring that legal cases relating to Wales were heard in Wales on a regular basis.<sup>25</sup>
26. However, when the Administrative Court in Wales was set up, it did not include an office in Wales to manage and administer the business of the court. This meant that there was no Welsh office to ensure that Welsh cases were processed and listed in Wales, and heard in the Welsh Administrative Court. Documentation was discussed and managed from an office in London, which significantly undermined the effectiveness of the Welsh Administrative Court. However, in due course, the problem was resolved. In April 2009, a permanent administrative office was established in Cardiff for the Administrative Court. One prominent judge concluded: 'one of the lessons to be learned from this experience is that the decentralisation of a court can not succeed unless it is accompanied by the necessary infrastructure to ensure its proper functioning.'<sup>26</sup>
27. The Administrative Court was not the only legal forum to suffer from the lack of an appropriate organisational structure in Wales. However encouraging the visits of the Court of Appeal (the civil and criminal division) to Wales since 1998 were, in promoting the aim of legal devolution, it did not have an office in Wales to ensure that the court's work was arranged and managed effectively. Appeals are sent to London for processing, and the administration there is not sufficiently conscientious in trying to ensure that the Court of Appeal, when sitting in Wales, hears appeals from Wales (the whole purpose of legal devolution!). The same can be said of the High Court.

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<sup>24</sup> See: Children's Commissioner for Wales Act 2001; Public Services Ombudsman (Wales) Act 2005; Commissioner for Older People (Wales) Act 2006.

<sup>25</sup> See *National Assembly for Wales v. Condrón* (2006) EWCA Civ 1573; also, *R (Deepdock Limited & others) v Welsh Ministers* (2007) EWCH 3347 (Admin).

<sup>26</sup> Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

Administration is still centred in London and this hampers the effectiveness of the system and impinges on the principle of ensuring that Welsh cases and appeals are determined in Wales.<sup>27</sup>

28. As Sir Roderick Evans noted:

‘If sittings of the Court of Appeal and Administrative Court in Wales are to be efficient, arrangements for the running of these courts must be strengthened. At the very least the arrangements for identifying cases from Wales and listing them in Wales must be improved but this is unlikely to be sufficient. What are needed, in my view, are offices in Cardiff to support the work of these courts. These would not only ensure the efficient disposal of work from Wales in Wales but also create in Wales the jobs and career structures connected with this work.’<sup>28</sup>

29. Specifically Welsh tribunals were established, such as the Special Educational Needs Tribunal for Wales and the Mental Health Review Tribunal for Wales, developments which derived directly from the devolved powers of the Welsh Assembly. The need to ensure the independence of the Welsh tribunals by guaranteeing an arms length relationship between them and the Assembly Government and its departments is often emphasised.<sup>29</sup> Since it is governmental decisions in Cardiff which are being challenged before these tribunals, it must be ensured that the tribunals are independent and appear to be free from any political interference. It is also essential to create independent and transparent processes for the appointment to devolved tribunals.

30. There has been some concern regarding the administration of Welsh tribunals, with a patchwork of different tribunals and devolved tribunals being administered by various departments of the Welsh Assembly Government and local authorities, and non-devolved tribunals administered by the UK Tribunals Service or departments of the UK Government. The UK Tribunals Service does not treat Wales as an administrative unit, which is inconsistent with the general pattern of court administration.

31. Indeed, this need reinforces the argument for the establishment of a unified, independent, wholly Welsh system for the administration of justice.<sup>30</sup> By creating a unified administration for the courts and

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<sup>27</sup> ‘Is it acceptable that only a small proportion of Wales’ appellate work is heard in Wales and that all the administration of those cases together with the jobs, career structures and economic benefits arising from it are centred in London?’, Sir Roderick Evans, ‘Devolution and the Administration of Justice’, above.

<sup>28</sup> Sir Roderick Evans, ‘Legal Wales- The Way Ahead’, above, p. 11.

<sup>29</sup> See Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales* (Law Society Lecture, National Eisteddfod of Wales, Blaenau Gwent a Heads of the Valleys 2010), pp. 18-19.

<sup>30</sup> ‘There should be further decentralisation of the institutions of the law to Wales in recognition of Wales’ constitutional position and its position in the present jurisdiction.’ Sir Roderick Evans, ‘Devolution and the Administration of Justice’, above.



tribunals, it will be possible to develop a more integrated and effective system in terms of administration and use of resources. Hand in hand with this it would be necessary to establish a Judicial Appointments Commission specifically for Wales to ensure the independence and credibility of the system of judicial appointments.<sup>31</sup> Indeed, the debate on the administration of justice in Wales raises wider questions with regard to the administration of Wales in general, including the civil service.

32. It is important to remember the context of this debate. The referendum on the 3rd March 2011 confirmed and developed the role of the National Assembly for Wales as a primary law maker, or legislature, for Wales. Other provisions of the Government of Wales Act 2006 had already ensured the constitutional separation of the Welsh Government and the National Assembly.
33. Referring to the legal implications of devolution, Carwyn Jones noted, This has resulted in the need for justice institutions that are managed locally, respond to the needs of Wales and which are familiar with the law as it applies to Wales. The Welsh Assembly Government would welcome further steps in this direction.<sup>32</sup>
34. Political devolution in Wales has stimulated a debate within the legal community on how the justice system should respond to constitutional change. There hasn't been such a debate for centuries, and it is a recognition of the importance of the constitutional changes and the legal nature and implications of that change. Above all, devolution has democratised Welsh governance and lawmaking. Following on from that it was entirely natural and sensible to recognise the need for appropriate legal systems and institutions to support the democratic process.
35. The meaning of a 'Welsh jurisdiction' may be summed up as follows: in a democratic constitution, where there is constitutional separation (however formal or informal) between the legislature and the government (or the administration), the judiciary has a function within the constitution. This is the third estate of the constitution. This holds true even in Britain, with its principle of parliamentary sovereignty, and where there is no official separation of power.<sup>33</sup>
36. Unlike Scotland and Northern Ireland, Wales does not have its own jurisdiction, despite having its own government and legislature.<sup>34</sup> In other words, Wales does not have its own legal system or judiciary. The Government of Wales Act 2006 contained no provisions for the

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<sup>31</sup> See Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>32</sup> Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

<sup>33</sup> See, O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, pp. 26-28.

<sup>34</sup> See comments by Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales*, above, p. 3.

creation of a Welsh justice system, at the same time as conferring additional legislative powers to the National Assembly. Wales remains part of the unified jurisdiction of England and Wales. As such, the development of the constitution in Wales is incomplete and inconsistent with the rest of the United Kingdom.

37. It is sometimes said that Wales is an emerging jurisdiction.<sup>35</sup> What exactly is a jurisdiction? Many have attempted to offer an academic definition of the principal characteristics of a jurisdiction when considering the Welsh position.<sup>36</sup> It could be said that the concept of 'jurisdiction' is not something definite or uniform, and jurisdictions may vary depending on specific circumstances. However among the expected characteristics the following are said to be the most obvious: a defined territory; a body of native law; legal institutions and a courts system. The first two characteristics don't require too much elaboration. The territorial boundaries of Wales are clear and Wales has its own legislature creating primary laws. What, then, of the legal institutions and the courts system? What further changes would be required before it could be said that Wales is a jurisdiction?

38. Creating a Welsh jurisdiction along similar lines to the other UK jurisdictions, especially Northern Ireland, would require the following institutions:

- A permanent High Court in Wales;
- A permanent Court of Appeal in Wales;
- A Welsh judiciary under a Lord Chief Justice for Wales (to ensure consistency within the British constitution);
- a Welsh legal profession
- National Assembly for Wales control over the Police and Prisons in Wales

## **Benefits/barriers/costs/practical implications**

### ***Barriers?***

39. The outcome of the March 2011 referendum did not effect any underlying difference to the administration of justice in Wales, since the administration of justice is not, to date, a devolved matter. The Government of Wales Act 2006 contained no provisions for the creation of a Welsh justice system, at the same time as conferring additional legislative powers to the National Assembly. The Assembly,

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<sup>35</sup> Timothy H. Jones and Jane M. Williams, 'Wales as a Jurisdiction', *Public Law*, [2004], 78 -101, on p. 101. The phrase, 'emerging jurisdiction' is used by them.

<sup>36</sup> See T. H. Jones and Jane M. Williams, above; also Sir Roderick Evans and Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Submission to the Richard Commission, 2003).

of course, can seek more powers, on a step-by-step basis, over aspects of the justice system. However, put simply, Wales remains part of the single unified jurisdiction of England and Wales.

40. The Report of the All Wales Convention concluded that the creation of a Welsh jurisdiction was not a prerequisite before moving to part 4 of the Government of Wales Act 2006, and the creation of a full legislature.<sup>37</sup> In other words, the creation of a jurisdiction was not a condition of additional legislative powers for the National Assembly. On the other hand, a jurisdiction is not necessarily dependent upon the existence of a legislative - after all, Scotland was a jurisdiction for centuries before the restoration of its parliament in 1999. Northern Ireland remained a jurisdiction during the period 1972-1999 after the first parliament had been abolished.
41. The principal arguments put forward against the establishment of a Welsh jurisdiction may be summed up by referring to them as technical legal arguments, the gradualism argument, the geographical and demographic argument and the historical argument. Jack Straw, as Lord Chancellor, may be said to have set out the arguments against the creation of a Welsh jurisdiction in a lecture to the Law Society in Cardiff some years ago.<sup>38</sup>
42. The technical legal arguments are numerous and raise technical difficulties enough to frighten a lay person without a legal background. For example, questions as to what would be the status of court judgements in England on Welsh courts, if Wales was a separate jurisdiction and vice-versa. In other words, how would such a change affect the way the principle of precedent operated, for example? As Straw asked: 'Would decisions of the English courts become merely persuasive in Welsh cases, rather than binding, for example? Would a separate legal profession need to develop, with its own systems of professional regulation? Could Welsh judgements be enforced against English defendants, or Welsh proceedings served in England?'<sup>39</sup>
43. We will consider the validity of these concerns shortly by referring to another jurisdiction within the United Kingdom. However it should be noted that the Supreme Court of the United Kingdom is the highest Court of Appeal for all UK jurisdictions, and it is here, normally, that complex legal questions which give rise to new and important legal precedent is determined. The Welsh jurisdiction would follow precedents set by the Supreme Court, and even if decisions of the English Court of Appeal become merely persuasive in Wales, that would not lead to any legal crisis. It is certainly true that Welsh judges would give due and proper consideration to English judgments, and

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<sup>37</sup> See *the Report of the All Wales Convention (Crown Copyright, 2009)*.

<sup>38</sup> The Lord Chancellor and Justice Secretary, the Right Honourable Jack Straw MP, 'Administration of Justice in Wales', Cardiff Law Society Lecture, 3 December 2009.

<sup>39</sup> Ibid.

follow them where they serve the interests of justice. That is the current practice within the jurisdictions of the UK, namely giving due and proper consideration to cross-jurisdictional judgements that offer a suitable precedent under the circumstances.

44. The straightforward response to many of these questions is that technical matters, including cross-jurisdictional enforcement of judgments, would be resolved in the same way as happens now between the jurisdictions of England (and Wales), Scotland and Northern Ireland. It would be possible to draw up an appropriate and suitable solution for Wales and its relationship with the other jurisdictions within the British state.
45. In addition to the technical concerns, Straw stressed the benefits of gradualism rather than trying to move too quickly. At the heart of this argument is constitutional pragmatism, i.e. that processes should be allowed to evolve naturally in response to the situation obtaining at that time. This argument encourages 'organic development of greater autonomy of the Welsh system, building on what has already happened over the past 10 years, but within a common jurisdiction.'<sup>40</sup> Such an attitude can of course be criticised for being essentially reactive and responding to change rather than offering a progressive vision and preparing for the future. As the evolution of Welsh democracy is certain to continue, and devolution is a journey which will not be reversed, a model for the administration of justice in Wales should be developed that looks to the future rather than merely responding to the present.
46. Another argument made against a Welsh jurisdiction is the geographical and demographic one. At the heart of this argument is the geographical and social proximity of Wales to England, and the nature of the Welsh landscape and demography. The people of north Wales are in close proximity to the cities of the North-west of England and have regular dealings with them. The people of mid Wales tend to turn to the towns and cities of the English Midlands for the purposes of commerce and shopping. Due to the size of the cities of south Wales, there is no similar tendency to turn to England, although there is quite a strong connection between the people of south Wales and the city of Bristol. Similarly, because of geographical reasons, people from north Wales do not have as much contact with the cities and people of south Wales. The border between Wales and England has been a political and cultural one, possibly, but not an economic one nor, to any great extent, a social one. This pattern is different from, say, Scotland, where there is an extensive, sparsely-populated area either side of the border between Scotland and England, and over a

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<sup>40</sup> Ibid.

hundred miles separating the main population centres of the North of England and the central belt of Scotland.<sup>41</sup>

47. Of all the arguments put forward for treating Wales differently from Scotland and Northern Ireland, the historical argument has the greatest prominence. When referring to the position of Scotland, Jack Straw noted, 'It is because the history of relationships and developments in and between Wales and England are so profoundly different than those between Scotland and England that parallels with Scotland are unlikely to be appropriate. The most important difference is that the Scottish judicial system never became part of the English system, even after the Act of Union in 1707. Its judicial institutions and professions, along with many other aspects of its national life, stayed completely distinct. For reasons everybody understands, that has not been the case in Wales.'<sup>42</sup>

48. This argument emphasises a lack of tradition and a lack of legal history. Another argument put forward is that of sustainability: i.e. that Wales is too small to be a separate jurisdiction from England. With regard to the arguments that Wales has insufficient legal tradition and institutions or population to support a Welsh jurisdiction, Sir Malcolm Pill made some interesting observations about Cardiff's ability to serve as a capital city and centre for any Welsh jurisdiction:

'It is a city that has developed comparatively recently and has neither the population nor prestige, nor the legal traditions of Edinburgh or Belfast. Meeting with Scots and Northern Ireland lawyers makes one aware of our comparative lack of pedigree and experience in this field...a tradition of judicial separateness, and of dealing with a devolved administration, requires skills which cannot, however, cannot be acquired in a moment'.<sup>43</sup>

49. While accepting the accuracy of the statement that Scotland has a legal culture and native legal system which survived the Act of Union 1707, and therefore, that the historical argument has some validity in comparing Wales and Scotland, is that really the case when comparing Wales and Northern Ireland?

## Northern Ireland

50. In order to consider the validity of some of the arguments against a Welsh jurisdiction, and determine what a Welsh jurisdiction

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> See the address by Sir Malcolm Pill, Legal Wales Conference, Cardiff, 9 October 2009.

would offer to Welsh public life, one must consider the legal structures found in the other devolved nations of the United Kingdom. Scotland and Northern Ireland both have the legal structures and institutions associated with the concept of a jurisdiction. Do they offer models for the needs of a prospective Welsh jurisdiction?

51. Northern Ireland provides an interesting comparison on a number of levels. Firstly, its size: Northern Ireland has a population of approximately 1.7 million, while Wales has a population of approximately 3 million. More people live within the boundaries of the old Glamorganshire and Monmouthshire than in the whole of Northern Ireland. From a historical perspective, Northern Ireland was not a jurisdiction with indigenous legal institutions before 1920. Indeed, Northern Ireland did not exist as a political entity before 1920 and, in terms of the administration of justice, the nine counties of Ulster were merely an area of the Irish jurisdiction within the United Kingdom.
52. Northern Ireland was created in response to a political crisis between 1920 and 1925 as a compromise between the nationalist aspirations of the (Catholic) majority of Irish people and the minority (usually Protestant) desire to remain as part of the United Kingdom.<sup>44</sup>
53. The campaign by a unionist minority for separation of Ulster was in response to the majority support in Ireland for self government.<sup>45</sup> It was possibly in 1916 that it was first suggested that the six counties of the province of Ulster might be exempt from the arrangements for the rest of Ireland - initially the idea was that they would be governed directly from London.<sup>46</sup> At the time the long-term future of the excluded six counties had not been decided. In the aftermath of the First World War, when the Irish situation once again reached the top of the political agenda, a plan was put forward whereby the whole of Ireland would have some form of self-rule, but split into two areas with two separate legislatures. It was during this key period between 1918 and 1920, which led to the Government of Ireland Act 1920, that the essential elements of the new constitution were created.<sup>47</sup>
54. The Government of Ireland Act 1920 created two jurisdictions with considerable self-government - Southern Ireland in the south (in 1922, this entity was superseded by the creation of the Irish Free State following the ceasefire at the end of the Irish Civil War), and Northern Ireland in the north-east. The six counties were to form the Protestant province in Ulster. Northern Ireland was to get a bicameral legislature

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<sup>44</sup> The history of the creation of Northern Ireland can be found in Jonathan Bardon's *A History of Ulster* (Belfast: Blackstaff Press, 1992), pp. 466-509.

<sup>45</sup> See D. George Boyce, 'Northern Ireland: The Origins of the State', in Peter Catterall and Sean McDougall, *The Northern Ireland Question in British Politics* (London: MacMillan, 1996), pp. 11-28.

<sup>46</sup> *Ibid*, p. 14

<sup>47</sup> An analysis of the 1920 constitution can be found in A. G. Donaldson's 'The Constitution of Northern Ireland: its Origins and Development', *University of Toronto Law Journal*, 11(1) (1955), 1-42.

(two houses, a house of commons and a senate, similar to Britain) and its own government. In February 1920, the unionists there insisted that they should have a separate jurisdiction with their own judges, which is what came to pass.<sup>48</sup> What had been established was a form of devolution: 'the scheme of the Act of 1920 was to place matters that pertained only to Northern Ireland within the legislative competence of the new Parliament and to reserve matters which concerned the United Kingdom as a whole.'<sup>49</sup>

55. The original aim was to establish a council for the whole of Ireland to discuss all-Ireland matters, and that this council would engender a spirit of unity and co-operation within Ireland. It was hoped that the council would pave the way for an united Ireland under a single parliament and jurisdiction in due course. In addition, there would be Irish representation at Westminster, as the 1920 model was a form of devolution rather than actual self-government, and political sovereignty would remain in London. Therefore, the constitutional vision underpinning the Government of Ireland Act 1920 was that of two Irelands as devolved regions of the United Kingdom and part of its empire, with officers of the crown, under the leadership of the Lord Lieutenant of Ireland, operating from Dublin Castle. However, as a political solution the 1920 Act was deficient as Free Ireland rejected British interference and Northern Ireland had no desire for self-government or Dublin interference.

56. In the meantime, in 1921, some control over the police in the province was placed in the hands of the Northern Irish government. Control of the police in the province was a contentious subject, particularly the behaviour of the 'Specials', a force of Protestant volunteers established in 1920 to keep the peace and counter the Irish Republican Army, which was waging a war of rebellion against the 1920 constitution. In March 1922, when the Irish Royal Constabulary was abolished,<sup>50</sup> the Royal Ulster Constabulary was created.<sup>51</sup>

57. By 1922, the divide between Northern Ireland and the rest of Ireland was deepening as dissatisfaction with the 1920 constitution among Irish republicans led to war. A number of politicians in Southern Ireland opposed the 1920 constitution, which they felt kept too much authority in the hands of the British parliament and government. The Council of Ireland never came into being, and the original plan of cooperation between the two regions disintegrated.

58. In 1922, a new agreement between Britain and Ireland created the Free Irish State, ensuring that the six counties in the north-east

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<sup>48</sup> See, D. George Boyce, 'Northern Ireland: The Origins of the State', p. 19.

<sup>49</sup> See Lord MacDermott, 'The Supreme Court of Northern Ireland- two Unusual Jurisdictions', *Journal of the Society of Public Teachers of Law*, 2 (1952), 201-213, on p. 202.

<sup>50</sup> See Constabulary (Ireland) Act 1922.

<sup>51</sup> See Constabulary (Northern Ireland) Act 1922

could remove themselves from the provisions of the new state and remain a part of the United Kingdom. Under this constitution the Irish Free State was given dominion status, which meant it was now seceding from the United Kingdom. It had similar status to Canada, Australia, New Zealand and would have no representation in Parliament. However, Northern Ireland remained a part of the United Kingdom, with its parliament subject to the Westminster parliament. The post of Lord Lieutenant was abolished and a Governor General for Northern Ireland was appointed. The terms of this treaty had far-reaching significance for the future of Ireland. According to one expert, 'The Government of Ireland Act envisaged an eventual untied Ireland within the United Kingdom; but the Treaty resulted in the secession of the Irish Free State from the United Kingdom and, from a Unionist perspective, in the artificial partition of the British Isles'.<sup>52</sup> By 1925, Northern Ireland was an entirely separate constitutional entity from the rest of Ireland- the divide was a constitutional reality with long-term implications.

59. What legal institutions did Belfast, an important industrial city and provincial centre, have prior to 1920? Belfast had grown quickly as an important industrial city during the nineteenth century. The population doubled from 87,000 to 175,000 between 1851 and 1871.<sup>53</sup> By the turn of the twentieth century, it had public institutions and a borough government in keeping with its status.<sup>54</sup> By 1911, the population had grown to 400,000. However, in terms of its legal institutions, Belfast was no more than a regional centre for the North Eastern circuit. It had solicitors and barristers just like any other large city in the Kingdom. It was comparable in size to Cardiff. However, at the turn of this century Cardiff had many more national and legal institutions and structures to sustain a jurisdiction than Belfast did in 1920.
60. On 25 August 1921, it was announced that the Supreme Court of Judicature of Northern Ireland would come into existence on 1 October 1921. The Supreme Court had a Court of Appeal and a High Court of Justice, and in July 1921 a head of the Supreme Court, the Lord Chief Justice of Northern Ireland, was appointed.<sup>55</sup>
61. Following the establishment of the courts machinery, other institutions normally associated with a full, independent and self-contained jurisdiction gradually developed. Since the sixteenth century, Irish barristers had been based in Dublin, at King's Inn. King's Inn was established following the abolition of one of the city's monasteries, when the crown gave a lease of land and buildings in the north of the city to the Chief Justice of Ireland. From then on, it was

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<sup>52</sup> See Thomas Hennessey, *A History of Northern Ireland 1920-1996* (Basingstoke: Macmillan, 1997), p. 22.

<sup>53</sup> Jonathan Bardon, *A History of Ulster*, p. 326.

<sup>54</sup> Jonathan Bardon, *A History of Ulster*, pp.386-400.

<sup>55</sup> See David Harkness, *Northern Ireland since 1920* (Dublin: Helicon, 1983), p. 18



possible for Irish barristers to complete their training and be received by the profession without having to join the Inns of Court in London.

62. With the creation of the Northern Ireland jurisdiction in 1920 the north-east of Ireland now formed a separate jurisdiction from the rest of Ireland, and, therefore the status and identity of the province's barristers had to be considered, and provision made for their regulation and representation. Initially an agreement was drawn up with the King's Inns authorities in Dublin that a committee of Bar leaders in Belfast would be responsible for the education and discipline of the profession there. Prospective Northern Irish barristers would now receive their training in Belfast. Following the opening of the new courts in Belfast in October 1921, they were called to the bar in Belfast rather than Dublin. Despite this, barristers trained in either Dublin or Belfast had the right to appear in courts throughout Ireland.<sup>56</sup>
63. This agreement between the barristers of Belfast and Dublin continued up to 1926. when it was decided that an entirely independent centre for barristers in Northern Ireland, the 'Inn of Court of Northern Ireland' would be established. Rooms were obtained in Belfast for this inn of court, and a legal library was bought by Sir Denis Henry, the first Law Chief Justice, who died in 1925.<sup>57</sup> Similarly, the Law Society of Northern Ireland was established in 1922 for the governance of the solicitors' profession within the province. The Law Society set up its own law school for training and preparing students who wished to join the profession.
64. In addition, there was an academic response to the new constitutional and legal situation which came into being in 1920. There had been a legal department at Queen's University, Belfast since its establishment in 1848. It was an academic faculty and it was stated that 'the aim of the teaching in the Faculty is to give students, through the reading of law subjects, what can truly be called a university education'<sup>58</sup> Despite this, the academic department had a key role to play in providing training and education to the province's prospective lawyers and barristers, and a close partnership developed between the Faculty and the Inn of Barristers and the Law Society to facilitate this. In 1973, following the Armitage Report on legal education and training in the province, an Institute for Professional Legal Studies was established at Queen's University to provide vocational education for students wishing to practise the law. Students would attend the

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<sup>56</sup> The account is given by J. Ritchie, 'The Inn of Court of Northern Ireland: Its Foundation, Development and Functioning', *Northern Ireland Legal Quarterly*, 15 (1964), 463-469; also, J. A. L. MacLean, 'The Honourable Society of the Inn of Court of Northern Ireland', 23(1) (1972), *Northern Ireland Legal Quarterly*, 90-94.

<sup>57</sup> Ritchie, *ibid*, t. 466.

<sup>58</sup> J. L. Montrose, 'Legal Education in Northern Ireland', *Journal of Legal Education*, 5 (1952), 18-25, on p. 22.

Institute after completing their degree (LLB usually), and the academic part of their education.<sup>59</sup>

65. A unified course was offered to prospective solicitors and barristers, but with some variation to reflect the differing training needs of the two branches of the profession. This is significant and highlights a difference between the situation in Northern Ireland and that of England and Wales, where vocational education for the two branches of the profession is separate. The comparatively small numbers in the legal profession in Northern Ireland, together with limited resources, meant that a joint vocational course was the most sensible way of providing vocational legal education.
66. In England and Wales, separate provision remains for those who wish to become solicitors and those who wish to practise at the Bar. With training contracts and pupillages in short supply, the Northern Ireland model may offer greater flexibility and ensure that doors are not shut too early for students, so that they have the option of becoming a solicitor or a barrister upon completing their vocational education.
67. In 1936 the *Northern Ireland Legal Quarterly*, an academic legal magazine, was established by academics at Queen's University, Belfast. The first edition explained why such a publication was necessary: 'Since the constitutional changes in 1920 there has been a marked divergence in the law and practice in Northern Ireland from that of England and the Irish Free State...the profession in Northern Ireland is faced with the fact that there is a considerable and growing volume of law and practice in regard to which resort to existing textbooks and other legal literature is no longer helpful...this journal will in an appreciable degree helps its readers to keep in touch with legal developments peculiar to Northern Ireland.'<sup>60</sup>
68. The need to provide a source of information and commentary on Northern Irish laws was important. However, there was also a need for a wider approach, and there was an recognition of the importance of maintaining past connections and avoiding complete separation: '...the profession in Northern Ireland is bound by many ties and traditions to that wider community with which it formerly had closer association, and that although a progressive divergence must be anticipated in the respective legal systems, yet there is in these systems an underlying unity so great that it is appropriate and important that constant touch should be kept with the developments in law and practice in the wider community, and with the ideas inspiring such developments'<sup>61</sup>

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<sup>59</sup> See J. H. S. Elliott, 'The Queen's University of Belfast: The New Institute of Professional Legal Studies', *International Bar Journal*, 9 (1978), 63-67.

<sup>60</sup> See editorial, *Northern Ireland Legal Quarterly*, 1 (1936), p. 4.

<sup>61</sup> *Ibid.*

69. The Government of Ireland Act 1920, which had defined the constitutional position of Northern Ireland for over seventy years, was repealed when the Northern Ireland Act 1998 (which implements the terms of the Good Friday agreement) came into force. The 1998 Act was passed with the aim of promoting peace. Its main provision was the creation of the Northern Ireland Assembly, thus restoring the legislature abolished in 1972 when the Northern Ireland Parliament was adjourned and direct rule from London imposed. There have been further Acts subsequently, such as the Northern Ireland Act 2006, to develop the current constitution, and also acts dealing with the administration of the courts. There were further reforms to the jurisdiction with the Justice (Northern Ireland) Act 2002. However, the model established in 1920 remains in effect the basis for the jurisdiction of Northern Ireland in terms of administration.
70. The courts of Northern Ireland are administered by the Northern Ireland Court Service established in 1979 under the Justice (Northern Ireland) Act 1978. The Court Service operates as a dedicated civil service for Northern Ireland and provides administrative support for the province's courts, tribunals and judiciary. It is also responsible for overseeing the enforcement of court judgements through a central enforcement service provided by the Enforcement of Judgements Office. It provides support to the Secretary of State for Northern Ireland and other ministers of the Crown, in complying with their statutory duties with regard to the administration of justice in Northern Ireland.
71. The Constitutional Reform Act (United Kingdom) of 2005 created the Supreme Court of the United Kingdom as the highest Court of Appeal for the courts of Northern Ireland. The Supreme Court took over the former function of the Appeal Committee of the House of Lords, which, since the 1920 Act, had been the main court of appeal for the province. Following these changes in London the title of the jurisdiction of Northern Ireland had to be altered somewhat, and it was known as the Supreme Court of Judicature up until 1 October 2009. It is now called the Court of Judicature of Northern Ireland.
72. Northern Ireland is represented on the Supreme Court of the United Kingdom by virtue of its status as a jurisdiction. The current member is Lord Kerr, the former Lord Chief Justice of Northern Ireland.
73. The current constitution of the jurisdiction in Northern Ireland was finally settled by the Justice (Northern Ireland) Act 1978. The Court of Judicature of Northern Ireland consists of the Court of Appeal, which sits in the Royal Courts of Justice in Belfast. The Court of Appeal comprises the Lord Chief Justice, who is the Presiding Officer of the Court of Appeal, and three Lord Justices of Appeal. High Court Judges are also entitled to hear appeals relating to criminal matters. The

Court of Appeal hears criminal appeals from the Crown Court and civil matters from the High Court (including Judicial Reviews). The Court of Appeal may also hear appeals on points of law from county courts, magistrate courts and some tribunals.

74. The High Court also sits in the Royal Courts of Justice in Belfast. It is made up of the Lord Chief Justice (the Presiding Officer of the High Court), three Lord Justices of Appeal together with ten High Court Judges and two part-time High Court Judges. The High Court has three divisions, the Chancery Division, the Queen's Bench Division and the Family Division, to deal with the wide range of matters that come before it.
75. Of the other courts, the Crown Court has complete authority over indictable offences. These are serious criminal offences. The Lord Chief Justice is the Presiding Officer of the Crown Court and Lord Justices of Appeal, High Court Judges and County Court Judges are entitled to sit in the Crown Court. The Crown Court sits throughout Northern Ireland. The County Courts hear civil cases involving damages claims of less than £15,000. There are 17 county court judges and four district judges hearing cases in these courts. They have extensive powers to hear cases dealing with marital property or compensation for criminal damage. The magistrates courts, which include salaried judges and lay members, hear less serious criminal cases, young offender cases and some cases involving family matters. The Coroner's Court is led by a High Court Judge, together with a Senior Coroner and two other Coroners. Other quasi-legal officers include Social Security Commissioners and Child Support Commissioners.
76. As part of the responsibilities of the Northern Ireland jurisdiction, the province's police and prisons come under the authority of the Northern Ireland Assembly. The former Royal Ulster Constabulary was abolished to all intents and purposes in November 2001 when the Police Service of Northern Ireland was established in accordance with the Good Friday agreement. The Northern Ireland Policing Board ensures independent oversight of the police.<sup>62</sup> The Northern Ireland Prison Service is an agency within the UK Department of Justice, and was established in 1995. It is responsible for the province's prisons, and forms a network of agencies with responsibility for criminal justice in the province. The Secretary of State for Northern Ireland is responsible for the service, which is administered by a Director General.
77. This therefore is the historical background and current position of the jurisdiction of Northern Ireland. How is the history and experience of Northern Ireland useful to Wales? Every situation is

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<sup>62</sup> See: <http://www.psnj.police.uk/>

different, and it is futile searching for a firm precedent to be replicated exactly. However, the example of Northern Ireland suggests that a jurisdiction is sustainable in circumstances where the population is comparatively small. It is not necessary to look to Northern Ireland even in order to confirm the truth of that statement - the Isle of Man, for example, where the population is far less, proves the point (although the constitutional position of the Isle of Man differs as it is not part of the United Kingdom).

78. Northern Ireland provides a useful comparison due to its tradition of common law. It does not possess the same degree of separateness in terms of principles and legal tradition as seen in Scotland. If Wales became a jurisdiction it too would continue the common law tradition in the same way.

79. In their response to the Richard Commission in 2003, Sir Roderick Evans and Professor Iwan Davies demonstrated that Wales produces enough legal work compared with Northern Ireland to justify the need for a Welsh courts structure, and in particular a high court and a court of appeal.<sup>63</sup> Therefore, there is no valid argument against a Welsh jurisdiction in terms of demography. The Northern Ireland example also demonstrates how history is often manipulated to deny Wales its own legal structures.

80. Belfast and Northern Ireland did not have legal centres of any significance prior to the 1920 constitutional settlement. A new jurisdiction was created overnight. The creation of the Northern Ireland jurisdiction in 1920 was essentially an act of political will. The experience in Northern Ireland also shows that a jurisdiction can be a strong symbol of identity, and that a legal identity is a prerequisite for democratic identity to prosper.

81. In addition, the experience of the province is proof of the fact that creating a new jurisdiction does not mean a complete divorce from the former jurisdiction, and that it does not necessarily lead to isolation in terms of the administration of justice. As Carwyn Jones noted in a lecture some years ago: In terms of the legal profession, I believe it is important that there is ease of movement between Wales and England. It's quite possible we can learn lessons from how the system operates in Northern Ireland. There, any member of the profession can apply to practise in England and Wales.<sup>64</sup> The creation of a Welsh jurisdiction would not deprive the legal profession in Wales of opportunities to work in England.

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<sup>63</sup> Sir Roderick Evans and Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Submission to the Richard Commission, 2003).

<sup>64</sup> See Carwyn Jones, *Law in Wales: The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 15.

82. Even following the establishment of a Welsh jurisdiction, there would be a close relationship between it and the English jurisdiction and the other UK jurisdictions. Appropriate legal principles would be adopted across the jurisdictions, in response to the need for cooperation on a state level on some legal matters, which would ensure that the establishment of a Welsh jurisdiction would not be an act of isolation nor entail complete separation.

## Benefits

### *The Constitutional Argument*

83. Following the development of the role of the National Assembly as a legislature, divergence between Welsh and English law is bound to increase.<sup>65</sup> This will require a Welsh judiciary and legal profession specialising in Welsh law and capable of providing accurate and intelligent legal solutions.<sup>66</sup> As the Lord Chief Justice, Lord Judge, said, the fundamental question to be asked of a legal jurisdiction or system is: 'does the citizen have the ability to hold the executive of the day, or any of the large and weightier authorities to account before an independent judge who will give the relief or redress which the law permits, or to require them to act lawfully?'<sup>67</sup>

84. In considering the argument for a Welsh jurisdiction, Winston Roddick asked, 'What are the arguments for devolving the administration of justice?' His answer:

'In my opinion, the principal argument is that including responsibility for the administration of justice as part of a devolution settlement which devolves full law making powers makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction? Secondly, it would be internally logical, consistent and coherent. Thirdly, it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales and fourthly it would bring justice closer to the people for whom the laws were made.'<sup>68</sup>

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<sup>65</sup> See Timothy H. Jones, John H. Turnbull and Jane M. Williams, 'The Law of Wales or The Law of England and Wales', *Statute Law Review*, 26(3) (2005), 135-145.

<sup>66</sup> Timothy H. Jones and Jane M. Williams, 'Wales as a Jurisdiction', p. 101.

<sup>67</sup> An Address by Lord Judge, Legal Wales Conference, Cardiff, 9 October 2009.

<sup>68</sup> Winston Roddick, *The Development of Devolution and Legal Wales* (Annual Lecture of the Welsh Legal Affairs Centre, Aberystwyth University, 28 November 2008), p. 16.

85. There is a mature argument for the creation of a separate jurisdiction because it is necessary if Wales is to operate in a way that is constitutionally valid, and consistent with the pattern generally found within the British state. Indeed, this pattern of having a legal jurisdiction and regional legislature is seen in devolved and federal countries throughout the world, such as Australia and Canada. I would call it the constitutional argument.
86. This is possibly the most important argument. The core of the argument is that for democracy in Wales to mature and operate in accordance with democratic and constitutional standards seen in devolved regions and nations world-wide, Wales's own legal structures need to be consistent with those standards. The main role of the jurisdiction and its judges would be to allow the individual to hold the executive and legislature to account and provide remedies where the law is not upheld. The important constitutional role of the judiciary is to provide oversight of the actions of the legislature and government, in order to ensure that it behaves in accordance with international law and human rights standards. This has now become one of the most important constitutional roles of the judiciary within the British constitution.<sup>69</sup>
87. Of course, it may be possible to provide a legal remedy where there is a failure to uphold the law within the current system, and some would insist that the current unified jurisdiction is quite capable of dealing with judicial reviews of decisions of the Welsh Assembly and Government. However this is not in keeping with the purpose and spirit of devolution, which aims to bring government and justice closer to the people.
88. In transferring government and legislative powers from London to Cardiff, devolution has established a different pattern of governance for Wales. If justice in Wales is controlled by processes and systems centred mainly in London, i.e. retaining the same system which existed prior to devolution, this runs counter to the aims of devolution and appears to disregard the message of devolution. Some might regard it as English interference in Welsh democracy and legislative autonomy, which would ultimately undermine confidence in the legal system.
89. On the other hand, in establishing a Welsh jurisdiction, the constitution would be more holistic from a Welsh and British perspective. In recognising a Welsh jurisdiction a constitutional situation would arise whereby a Welsh judiciary would hold the

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<sup>69</sup> Bogdanor quotes Dicey as follows: 'In his *Introduction to the Study of the Law of the Constitution*, Dicey detected "three leading characteristics of completely developed federalism- the supremacy of the constitution- the distribution among bodies with limited and co-ordinate authority of the different powers of government- the authority of the courts to act as interpreters of the constitution".' Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999). p. 294. The role of the courts as an interpreter of the constitution is crucial in a democracy.

National Assembly and the Welsh Government to account. After all, that is the case in Northern Ireland and Scotland.

### ***The Efficiency Argument***

90. Divergence between Welsh and English legislation will undoubtedly grow in the coming years, which will heighten the need for a separate justice system. After all, if there is a body of law which is different for Wales, then there must be a legal system which can cope with that specifically Welsh context.<sup>70</sup> As Carwyn Jones noted:

When considering the need to locate more justice institutions in Wales, the Welsh Assembly Government is of the opinion that that has to be done within the context of increasing divergence between Welsh and English law, and also with reference to the bilingual nature of the legislation made by the Welsh Assembly Government and the National Assembly for Wales.<sup>71</sup>

91. A Welsh jurisdiction would obviously be able to plan for the legal needs of Wales in a comprehensive manner. The way has already been paved by the establishment of a unified administration for the courts in Wales. The culture change within the legal community means there is now an expectation that justice policy should be drawn up on a Wales-only basis.<sup>72</sup> The call for a prison in North Wales was an example of this culture change, and a recognition of the particular needs of Welsh-speaking prisoners who face prejudice in English prisons.<sup>73</sup>
92. Wales is the only country in the United Kingdom which has no control over criminal justice (again, unlike Northern Ireland and Scotland, and, indeed, the Isle of Man and the Channel Islands which are under British protection). *One Wales*, which set out governmental policy between 2007-11, expressed the Welsh Government's desire to see the devolution of the criminal justice system. In the short term, parts of the criminal justice system will undoubtedly be devolved.

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<sup>70</sup> As Sir Roderick Evans noted, 'There can be no doubt that if the Assembly were to acquire the increased powers available under Part 4 of the act there would be an increase in Welsh legislation and an increase in the potential for the law in Wales in relation to devolved matters to differ from the law in England.': see Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>71</sup> Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

<sup>72</sup> 'we need a justice system which serves the whole of Wales – a system which provides a service which is reasonably accessible wherever you live in Wales and which is available to you in either Welsh or English. The system should be tailored to meet the needs of Wales and should be capable of providing work and good career structures in Wales for those who work in it.' See Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>73</sup> Sir Roderick Evans, 'Legal Wales- Possibilities for the Future', A Lecture at Bangor University, 22 February 2008, p. 18-21.



Welsh Ministers are already operating in some areas of the criminal justice system. This includes the police, young offenders, drugs-related crime, and health and education services for prisoners. There is a strong possibility that Welsh Ministers will take responsibility for policing and the Offender Management Service, including prisons. Indeed, the Government in Cardiff Bay may become responsible for the funding of HM Courts Service in Wales in the near future, which would be an crucial step towards advancing the needs of Wales in providing Welsh policies for Welsh courts.

93. However, these matters could only be administered within an entirely Welsh structure under a full jurisdiction. By creating a High Court, a Court of Appeal and a Welsh High Court, under a Lord Chief Justice for Wales, focus and leadership would be provided for the legal system. It would also facilitate communication between the legal profession, the judiciary and the National Assembly as a legislature, which would reinforce the legal authority of the entire profession in Wales.

### ***The Economic Argument***

94. The scoping paper invites comments on the cost of establishing a Welsh jurisdiction. While I am not in a position to offer evidence on this, I would like to make some comments on the economic potential associated with creating a separate jurisdiction.
95. The establishment of a Welsh jurisdiction would allow the legal profession in Wales to develop its professional identity, possibly providing it with an economic boost. The development of this legal separateness has potential in terms of the development of legal expertise and skills to meet the needs of the constitution.<sup>74</sup>
96. Research by Swansea University has indicated that there is a lack of legal skills within the legal profession in Wales. There is an overdependence on traditional legal work in crime and family law work, which are highly dependent on state legal aid, while not enough work is being generated by the private sector. The lack of skills and range of legal expertise is particularly acute north of the M4 corridor.<sup>75</sup>
97. One harmful side-effect of this skills crisis is that substantial amounts of Welsh legal work is being exported to legal firms in England. Undoubtedly, remedying this deficiency, by developing the capacity of Welsh lawyers to provide high quality legal services, is

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<sup>74</sup> Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>75</sup> See Iwan Davies and Lynn Mainwaring, 'The Provision of Private-practice Legal Skills in Wales', *Wales Journal of Law and Policy*, 4(3) (2006), 290-98.

essential if the profession is to contribute to the economic regeneration of Wales and to operate effectively within the devolved legislative context. A Welsh strategy for the legal profession, which tackles the skills crisis while recognising the constitutional, demographic, linguistic and social context of Wales, is greatly needed. These matters require Welsh solutions, and the development of a Welsh jurisdiction may provide a means of paving the way towards a prosperous future for the profession. The development of a Welsh jurisdiction could therefore be regarded as an economic opportunity for the legal profession. It would challenge the profession to develop expertise in new areas based on Welsh legislation.<sup>76</sup> The economic opportunity is key to the debate, and, as has been noted, ‘the contribution to the economy of Wales which a fully developed legal system would make would be substantial’.<sup>77</sup>

98. Welsh Government support for the legal profession in Wales is important to the debate. By creating panels of Queen's Counsel and junior counsel to undertake advocacy and advisory work on behalf of the Welsh Government, the then Counsel General was aware of the importance of supporting the local profession. His message was warmly received: the Welsh Assembly Government wishes the legal profession in Wales to be aware that, whenever circumstances allow, it prefers to instruct local Counsel.<sup>78</sup>

99. There is also an opportunity for education and training providers and legal scholarship in Wales to contribute to the task of developing a Welsh jurisdiction, ensuring that there is expertise in Wales to meet the needs of the new jurisdiction.

100. The Bar in Wales could possibly set up a professional presence in the capital in keeping with its presence elsewhere in the United Kingdom? Before long we could see the day when the Bar has a centre in Wales?

### ***The cultural-linguistic argument***

101. It is not necessary to go into too much detail on the important relationship between the Welsh language and the administration of

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<sup>76</sup> ‘If Welsh lawyers sympathetic to the continuing process of devolution have learnt anything thus far, it is the need for them to make a greater contribution to the constitutional development of Wales’: see Timothy H. Jones and Jane M. Williams, ‘Wales as a Jurisdiction’, pp.78-101, and on p.1.

<sup>77</sup> Sir Roderick Evans, ‘Legal Wales- Possibilities for the Future’, A Lecture at Bangor University, 22 February 2008, p. 1.

<sup>78</sup> Carwyn Jones, *Law in Wales – The Next Ten Years*, p.13.

justice in Wales.<sup>79</sup> As the right to use Welsh in legal proceedings is confined to Wales,<sup>80</sup> this linguistic dimension is an additional element to the argument in favour of a Welsh jurisdiction.<sup>81</sup> According to Sir Roderick Evans:

I think...it is appropriate that the rights of Welsh speakers be confined to Wales. The political decision to so confine them, however, has an important consequence. If the right to use the language is to be meaningful, and if Welsh and English are to be treated on the basis of equality there must exist within the geographic area within which the statutory right applies all those institutions of the law in which legal proceedings take place and in which a Welsh speaker may want to exercise his statutory right to use the Welsh language.<sup>82</sup>

102. These comments are also an important reflection of the importance of Welsh nationhood to the debate, in particular its most significant national characteristic, its language. What is striking is the current composition of the judiciary in Wales, with a number of them able to speak Welsh and possessing a deep understanding of the social and legal needs of Wales. The fact that twelve circuit judges, ten district judges, fifteen deputy district judges and thirteen recorders can conduct cases in Welsh is a sign of respect towards the language and its speakers within the legal system.<sup>83</sup>

## CONCLUSIONS AND OPTIONS

103. On the 3rd March 2011, a democratic mandate for the new constitution set up by the Government of Wales Act 2006 was achieved, and the National Assembly now operates as a legislature with primary law making powers within devolved subjects. This was an important step towards achieving greater constitutional concordance within the devolved nations of the United Kingdom. This is the context of this debate.

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<sup>79</sup> For an insight into the legal system's positive attitude towards the Welsh language, see, Lord Judge, 'The Welsh Language: Some Reflections on its History', Inaugural Lecture of the Hywel Dda Institute, Swansea University, 21 June 2011.

<sup>80</sup> See *Williams v Cowell* [2000]1 W.L.R. 187

<sup>81</sup> 'Our linguistic make up is fundamentally different from that of England. We have two official languages and court proceedings in Wales are conducted in Welsh and English on a daily basis – often with both languages being used in the same case. Traditionally, it is in the more rural areas of Wales that the Welsh language has been at its strongest and unfortunately it is often in these areas that the local courts have been closed either because they are regarded as too small or the cost of maintaining them regarded as too high.'; see Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>82</sup> Sir Roderick Evans, 'Legal Wales- The Way Ahead', p. 7.

<sup>83</sup> See Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales.*, p. 21.

104. The arguments put forward in favour of the development of a Welsh jurisdiction do not stem from criticism of the current justice system, but rather from the need for an appropriate structural response within the legal system in Wales to the decision made by the people of Wales in March 2011.
105. On the other hand, it must also be acknowledged that legal bonds which have existed for centuries should not be severed lightly. As Rawlings said, ‘a centuries-long process of legal, political and administrative assimilation with a powerful neighbour cannot be wished away’.<sup>84</sup>
106. However, the argument for a legal jurisdiction is based primarily on the need to normalise the constitution in Wales by ensuring that there are Welsh legal institutions and structures that can operate within the constitutional context. In addition, such a development offers a democratic, legal, social and economic opportunity. Although the creation of a separate jurisdiction was not one of the conditions of the referendum vote in March 2011, the establishment of a jurisdiction is a sensible way forward and in keeping with the development of devolution in Wales today.
107. In a public lecture in 2006, Carwyn Jones recognised that the argument for a separate jurisdiction would intensify following an affirmative referendum vote in favour of a legislature. The development of a separate jurisdiction for Wales was recognised openly and publicly as one of the implications of such a decision. He said

I recognise that there is nothing within the Government of Wales Act 2006 in itself which creates a separate Welsh jurisdiction within the United Kingdom, and in my view there is currently no case for a separate jurisdiction. Nevertheless, if a situation arises whereby the Assembly has primary law making powers, it is inevitable, in my opinion, that we will have to have a debate on whether or not to retain a single unified jurisdiction for England and Wales. I'm not aware of anywhere else in the world which has a legislature with law making powers but no corresponding territorial jurisdiction.<sup>85</sup>

108. Of course, the development of a Welsh jurisdiction, and the exact nature of that jurisdiction, may depend on the way the present unified jurisdiction successfully meets the demands of the new constitution.<sup>86</sup> As Sir Roderick Evans said, ‘the ultimate decision may

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<sup>84</sup> See Richard Rawlings, ‘*Say not the Struggle naught Availeth*’: *The Richard Commission and After*, Annual Lecture of the Welsh Legal Affairs Centre, Aberystwyth University, 2004, p. 23.

<sup>85</sup> Carwyn Jones, *Law in Wales – The Next Ten Years*, pp. 14-15.

<sup>86</sup> ‘One factor which might prove influential in deciding whether Wales develops a separate structure from that in England will be the degree to which the present institutions of England and Wales are prepared to accommodate within an England and Wales jurisdictional structure the development in Wales of institutions,

be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.<sup>87</sup>

109. Whether Westminster legislation will be required will also depend on the answer to the question of how radical the next step towards creating a separate justice system for Wales will be? If a decision is taken to create a jurisdiction on the Northern Ireland model, with immediate effect, then the need for legislation would be more apparent. Of course, that depends on just how substantial the changes introduced are. Legislation would not be required to create minor structural changes to court administration. To date, no primary legislation has been required to devolve or reorganise the justice system in Wales, as in the case of the Administrative Court and the boundaries of the Circuit.

110. Would another referendum be required? Jack Straw was of the opinion, that 'Such a large and ambitious project would certainly require primary legislation, and there would inevitably be an expectation for it to be approved by a referendum.'<sup>88</sup>

111. However I am of the opinion that a referendum would not be required. A referendum was required to approve the role of the National Assembly as a legislature as that affected the law itself, the content of the law, and how and where primary legislation was made. But management of the legal system is an administrative and structural matter. The creation of a separate Welsh jurisdiction would not be enough to warrant a referendum. The argument over a separate jurisdiction is essentially an argument over the creation of new structures.

112. Therefore the development of a separate jurisdiction should be regarded as a by-product of the decision to create a legislature, as a necessary step to support the role of the legislature within the constitution, and in the context of the need for great concordance within the UK constitution. A further referendum will not be required to achieve this, and elected members in London and Cardiff might be expected to take the appropriate steps to establish the necessary legal structures. After all, was there a referendum prior to the establishment of the European Court of Justice or the International Criminal Court, developments which created important international legal

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bodies and organizations which meet the developing needs of Legal Wales. A lack of flexibility in this respect on the part of England and Wales institutions and a failure or refusal to respond positively to the legitimate expectations of Wales are likely to result in hastening the creation of a freestanding legal system in Wales along the lines of those which exist in Northern Ireland and Scotland rather than prevent it.' see Sir Roderick Evans, 'Legal Wales- Possibilities for the Future', p. 8.

<sup>87</sup> Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

<sup>88</sup> The Lord Chancellor and Justice Secretary, the Right Honourable Jack Straw MP, 'Administration of Justice in Wales', above.

jurisdictions? I am not aware of any precedent where a referendum has been held purely to establish a legal jurisdiction.

113. Before any legislation could be introduced to establish a Welsh jurisdiction on the Northern Ireland model, there would need to be clarity about legal, constitutional and economic implications. I believe that holding a comprehensive inquiry into the issue by means of a commission (such as the Richard Commission which laid the foundations for legislative devolution to Wales) would be beneficial. Such a commission could include constitutional and legal experts with a remit to gather detailed evidence and provide options and, where appropriate, recommendations for legislation. On the other hand, bearing in mind that the Silk Commission is currently examining constitutional arrangements in the wake of devolution, it may be in the competence of this commission to consider the argument for a separate jurisdiction as part of its remit.
114. As an alternative to developing an entirely separate jurisdiction, gradual improvements and changes to the administration of the current system not requiring legislation could be considered while at the same time retaining a single unified jurisdiction. For example, rather than establishing an entirely separate judiciary for Wales under a Lord Chief Justice, the post of Presiding Judge for Wales could be upgraded and designated as a Deputy Lord Chief Justice (Wales). The term of the office could be extended and more responsibilities for the courts and judiciary in Wales delegated. This suggestion was made by Lord Dafydd Elis-Thomas in his lecture at the National Eisteddfod some years ago. He suggested that the Presiding Judge for Wales should serve for a term of six years rather than four, as is currently the case, and that he should be referred to as The Lord President of the Courts in Wales.<sup>89</sup>
115. However it should be remembered that these comments were made before the constitutional developments following the March 2011 referendum. Such an idea may now no longer be ambitious enough to address the situation in Wales. Rather, an independent judiciary within a separate jurisdiction may provide the way forward.
116. If it is decided to adapt the single unified jurisdiction, at the very least permanent offices for the High Court and the Court of Appeal in Wales could be secured to deal with appeals from Wales and to ensure that they are heard in Wales.
117. The Welsh legal profession is gradually adapting to the constitutional changes, and the Law Society has its office in Cardiff. The Standing Committee of Legal Wales is a further example of the legal profession's response to the new constitutional context.

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<sup>89</sup> Dafydd Elis Thomas, in his lecture, 'Wales's New Constitution, National Eisteddfod of Wales, Bala, 2009.

Professional devolution should be encouraged and supported in order to ensure a presence in Wales. In addition, the establishment of a Legal Education Council for Wales would be a means of promoting legal scholarship within the universities which would provide due and proper consideration of Welsh law and the legal implications of devolution within the curriculum. The Education Minister in Cardiff is in a position to facilitate this development.

118. Ultimately, it is for elected members in Cardiff and London to decide to what extent, in what way and at what pace the legal system in Wales should be modified to meet the constitutional needs of Wales. While the support of the legal profession for any changes introduced is desirable, there is a duty on the legal community to fulfil the wishes of the people of Wales as expressed by democratic processes and elected representatives.

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**Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru  
Ymateb personol (Yr Athro R. Gwynedd Parry, LLB, PhD, FRHistS,  
Bargyfreithiwr)**

## **Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru**

**Tystiolaeth i Bwyllgor Materion Cyfansoddiadol a Deddfwriaethol  
Cynulliad Cenedlaethol Cymru**

gan

**R. Gwynedd Parry<sup>1</sup>**  
Ionawr 2012

### **RHAGARWEINIAD**

1. Mae'r dystiolaeth a gyflwynir yma yn seiliedig ar ymchwil a noddwyd gan y Coleg Cymraeg Cenedlaethol. Bydd ffrwyth yr ymchwil yn cael ei gyhoeddi fel cyfrol sydd yn dwyn y teitl, *Cymru'r Gyfraith: Sylwadau ar Hunaniaeth Gyfreithiol* gan Wasg Prifysgol Cymru yn ystod haf 2012.

### **CYLCH GORCHWYL**

2. Mae Cylch gorchwyl y Pwyllgor yn cael ei amlinellu ym mharagraff 8 y papur cwmpasu.

Gofynnir am dystiolaeth ar y pwyntiau canlynol:

- Ystyr y term "awdurdodaeth ar wahân ar gyfer Cymru";
- Manteision, rhwystrau a chostau posibl cyflwyno awdurdodaeth ar wahân ar gyfer Cymru;
- Goblygiadau ymarferol awdurdodaeth ar wahân ar gyfer y proffesiwn cyfreithiol a'r cyhoedd;

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<sup>1</sup> Dechreuodd Gwynedd Parry ei yrfa fel bargyfreithiwr yn Abertawe yn 1993, ac mae'n parhau'n aelod o'r proffesiwn gyda thenantiaeth yn Siambrau'r Deml, Caerdydd. Cafodd ei benodi yn Athro Cyfraith a Hanes Cyfraith ym Mhrifysgol Abertawe yn 2011, ac ef yw cyfarwyddwr Sefydliad Ymchwil Hywel Dda o fewn y brifysgol honno. Y mae'n gymrawd o'r Gymdeithas Hanesyddol Frenhinol (FRHistS).



- Sut mae awdurdodaethau bach eraill yn y Deyrnas Unedig yn gweithio, yn enwedig y rhai, megis Gogledd Iwerddon, sy'n defnyddio system cyfraith gyffredin.

## CRYNODEB

### 3. Yn y dystiolaeth a gyflwynir yma, byddaf:

- Yn diffinio'r ymadrodd "awdurdodaeth ar wahân ar gyfer Cymru" trwy fwrw golwg ar y cefndir hanesyddol a sefyllfa bresennol y system gyfiawnder yng Nghymru
- Yn argymhell y byddai sefydlu awdurdodaeth ar wahân yn unol â'r patrwm a geir yng Ngogledd Iwerddon yn gofyn am greu'r sefydliadau canlynol:
  - Uchel Lys yng Nghymru;
  - Llys Apêl yng Nghymru;
  - Barnwriaeth Gymreig dan arweiniad (er mwyn cysondeb o fewn y cyfansoddiad Prydeinig) Arglwydd Brif Ustus Cymru;
  - Proffesiwn cyfreithiol Cymreig
  - Rheolaeth Cynulliad Cenedlaethol Cymru dros yr Heddlu a Charchardai yng Nghymru
- Yn ystyried rhai o fanteision/rhwysrau/costau/goblygiadau awdurdod ar wahân i Gymru.
- Yn trafod datblygiad a sefyllfa bresennol awdurdodaeth Gogledd Iwerddon fel cymhariaeth.
- Yn argymhell y dylid sefydlu comisiwn i ystyried y mater, megis Comisiwn Richard a osododd y sylfaeni ar gyfer datganoli deddfwriaethol i Gymru, yn cynnwys arbenigwyr cyfansoddiadol a chyfreithiol. Dylid gosod arnynt y dasg o gasglu a chyflwyno tystiolaeth fanwl a chynnig opsiynau (gan ystyried modelau a geir mewn gwledydd datganoledig a/neu ffederal ar draws y byd) a, lle byddo hynny yn briodol, argymhellion ar gyfer deddfwriaeth.
- Yn cynnig rhai opsiynau ar gyfer diwygio'r system gyfiawnder yng Nghymru o fewn yr awdurdodaeth unedig bresennol.

## Diffinio "awdurdodaeth ar wahân ar gyfer Cymru"

## Cefndir Hanesyddol

4. Y cwestiwn a ofynnir yma yw, beth yw ystyr “awdurdodaeth i Gymru”, neu, yn hytrach, beth ddylai fod. Wrth edrych ar y sefyllfa bresennol, rhaid hefyd gwerthfawrogi'r cefndir hanesyddol.
5. Yn y testun hwnnw a luniwyd yn wreiddiol gan yr Athro Owen Hood Phillips, sef *Constitutional and Administrative Law*<sup>2</sup>, ceir paragraff sydd yn crynhoi statws cyfreithiol Cymru o fewn y cyfansoddiad.

‘The Statutum Walliae, passed in 1284 after Edward I had defeated Llewelyn ap Griffith, declared that Wales was incorporated into the Kingdom of England. Henry VIII completed the introduction of the English legal and administrative system into Wales. This union was effected by annexation rather than treaty. The Laws in Wales Act 1536 united Wales with England, and gave to Welshmen all the laws, rights and privileges of Englishmen. Welsh constituencies received representation in the English Parliament. An Act of 1542 covered land tenure, courts and administration of justice. References to “England” in Acts of Parliament passed between 1746 and 1967 include Wales. The judicial systems of England and Wales were amalgamated in 1830.’<sup>3</sup>

6. Proses araf fu'r broses o ddisodli'r traddodiad cyfreithiol Cymreig ac o ymgorffori llysoedd Cymru fel rhan o weinyddiaeth llysoedd Lloegr. Dirywiodd dylanwad y cyfreithiau a'r strwythurau cyfreithiol brodorol yn dilyn goresgyniad 1282, a Statud Rhuddlan 1284, a gellir dweud mai cam arall mewn proses a fu ar waith am ganrifoedd oedd diwygiadau'r Tuduriaid yn hanner cyntaf yr unfed ganrif ar bymtheg.<sup>4</sup>
7. Efallai mai diwygiadau'r bedwaredd ganrif ar bymtheg, gyda diddymu'r Sesiwn Fawr yn 1830, a gwblhaodd y gwaith a ddechreuwyd gyda Statud Rhuddlan 1284, ac a sicrhaodd ddifodiant hunaniaeth gyfreithiol Cymru. Rhwng y ddwy garreg filltir hynny, cafwyd dwy ddeddf bwysig, sef ‘The Act for Law and Justice to be Ministered in Wales in Like Form as it is in this Realm 1535-36’ a ‘The Act for Certain Ordinances in the King’s Dominion and Principality of Wales 1542-43’. Dyma'r ddwy “ddeddf uno” a sefydlodd strwythurau llywodraethu a chyfreithiol a fu'n sail i statws Cymru o fewn y cyfansoddiad.<sup>5</sup>

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<sup>2</sup> Llyfr a gyhoeddwyd am y tro cyntaf yn 1952. Roedd Owen Hood Phillips (1907-1986) yn dal Cadair Barber mewn Deddfeg ym Mhrifysgol Birmingham am flynyddoedd, ac yn bennaf awdurdod ar gyfraith cyfansoddiadol yn ei ddydd. Mae lle i gredu fod ganddo wreiddiau teuluol yn Sir Benfro.

<sup>3</sup> Gweler O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, 8fed Argraffiad, (Llundain: Sweet & Maxwell, 2001), t. 16.

<sup>4</sup> Gweler Thomas G. Watkin, *The Legal History of Wales*, (Caerdydd, Gwasg Prifysgol Cymru, 2007), pennod 6.

<sup>5</sup> Ceir trosolwg o ddiwygiadau'r Tuduriaid a'u hoblygiadau cyfreithiol yn Watkin, pennodau 7 ac 8.

8. Yn gyffredinol, gellir dweud mai ymgorffori Cymru o fewn Lloegr oedd prif effaith y diwygiadau hyn. Roedd llywodraeth a gweinyddiaeth gyhoeddus siroedd Cymru bellach yn ymdebygu bron yn llwyr i'r hyn a geid yn siroedd Lloegr. Felly hefyd yng nghyd-destun gweinyddu cyfiawnder yn y llysoedd. Yr eithriad nodedig oedd Llysoedd y Sesiwn Fawr, a sefydlwyd gan Ddeddf 1542. Roedd y Sesiwn Fawr wedi ei selio ar hen lysoedd barn y dywysogaeth a sefydlwyd yn dilyn concwest Edward y Cyntaf, ac a weithredai o dan lywyddiaeth ustusiaid y brenin. Penodid ustus neu farnwr i lywyddu ar gylchdaith y Sesiwn Fawr, gyda phob cylchdaith yn cynnwys tair sir.<sup>6</sup> Ceid cynulliad y Sesiwn Fawr ddwywaith y flwyddyn ym mhob sir, a phob cynulliad yn para am oddeutu chwe diwrnod. Er mai cyfraith Lloegr oedd y cynnwys, roedd y Sesiwn Fawr yn sefydliad Cymreig a chanddo awdurdodaeth eang dros achosion troseddol, sifil, Siawnsri ynghyd â gwysion yn ymwneud ag eiddo.<sup>7</sup>
  
9. Parhaodd y Sesiwn Fawr yn nodwedd o'r gyfundrefn neilltuol a fodolai yng Nghymru hyd nes ei diddymu yn 1830, a'i chyfnewid am y Brawdlys Seisnig.<sup>8</sup> Sefydlwyd y Brawdlys yn Lloegr yn y ddeuddegfed ganrif, ac yr oedd gan bob un o'r siroedd yno ganolfan weithredol i'r Brawdlys (fel arfer, y dref sirol) i dderbyn barnwyr y brenin.<sup>9</sup>
  
10. Cyflwynwyd y Llys Chwarter i Gymru yn sgil Deddfau Uno 1536 a 1543,<sup>10</sup> a chyflawnai amryw o swyddogaethau cyfreithiol a gweinyddol. Roedd gan bob sir ei lys chwarter, a byddai'r llys yn ymgynnull bedair gwaith y flwyddyn. Dyma'r llys barn a ddeliai gyda materion troseddol ynghyd â gweithredu fel fforwm gweinyddol y sir, gyda chyfrifoldeb dros lywodraeth leol hyd nes sefydlu'r cynghorau sir yn 1888.<sup>11</sup> Y Llys Chwarter oedd y llys canol o fewn hierarchaeth llysoedd prawf y gyfundrefn gyfreithiol droseddol yn y cyfnod yma. Dyma'r fforwm a brofai'r achosion hynny a haeddai eu profi gan reithgor ond nad oeddynt yn ddigon difrifol i'w profi yn y Sesiwn Fawr ac, yn ddiweddarach, y Brawdlys.<sup>12</sup>

<sup>6</sup> Fel y drydedd sir ar ddeg, gorfu cynnwys Sir Fynwy gyda Chylchdaith Rhydychen, a thrwy hynny greu'r ansicrwydd ynglyn a'i Chymreictod a barhaodd hyd yn gymharol ddiweddar.

<sup>7</sup> Gweler Watkin, t. 146.

<sup>8</sup> Gweler John Davies, *Hanes Cymru*, (Llundain: Penguin, 2007) (Argraffiad Diwygiedig)t. 332. Sefydlwyd Llys y Sesiwn Fawr yn sgil diwygiadau'r Tuduriaid fel rhan o'r broses o ddisodli'r drefn gyfreithiol a gafwyd yn dilyn goresgyniad Edward y Cyntaf, gyda'r gwahaniaeth rhwng llysoedd y Dywysogaeth a threfn gyfreithiol y Mers.

<sup>9</sup> Diddymwyd Llysoedd y Sesiwn Fawr, a sefydlwyd o dan y Deddfau Uno, yn 1830 a'u cyfnewid gyda'r Brawdlysoedd (*assizes*), gan ymgorffori Cymru o fewn y drefn Seisnig a fodolai ers canrifoedd cyn hynny.

<sup>10</sup> Gweler hanes sefydlu'r llysoedd chwarter yn rhai o ardaloedd a siroedd Cymru yn W. Ogwen Williams, *Calendar of the Caernarvonshire Quarter Sessions Records, Cyfrol 1 1541-1558* (Caernarfon: Cymdeithas Hanes Sir Gaernarfon, 1956), a Keith Williams Jones, *A Calendar of the Merioneth Quarter Sessions Rolls, Vol I: 1733-65* (Dolgellau: Cyngor Sir Feirionnydd, 1965).

<sup>11</sup> Deddf Llywodraeth Lleol 1888. Yn y cyfnod hwn byddai'r Llys Chwarter yn gyfrifol am oruchwylio trwsio'r ffyrdd a'r pontydd a gofalu am holl anghenion llywodraeth lleol.

<sup>12</sup> Diddymwyd y Llys Chwarter yn 1971, a'i ymgorffori gyda'r Frawdlys o fewn llys unedig sef Llys y Goron a grëwyd yn dilyn argymhellion yr Arglwydd Beeching yn ei adroddiad, *Report of the Royal Commission on Assize and Quarter Sessions, Cmnd 4153 of 1969* (Llundain: HMSO, 1969). Ymysg y gwendidau a nodwyd yn

11. Oddi tan y Llys Chwarter ceid llysoedd ynadon (*petty sessions*). Roedd y mwyafrif helaeth o fân achosion troseddol yn cael eu clywed yn y llysoedd ynadon. Ynadon lleyg fyddai'n gweinyddu cyfiawnder ym mhob achos hyd nes y daeth swydd yr ynad cyflogedig i fodolaeth yng nghanol y ddeunawfed ganrif i gymryd lle'r ynadon llygredig a oedd yn Llundain yn y cyfnod hwnnw.<sup>13</sup> Wedi ei benodi o rengoedd cyfreithwyr cymwys, lledodd yr arfer o gael ynad cyflogedig i ardaloedd poblog y tu allan i Lundain yn ystod y bedwaredd ganrif ar bymtheg. Yn wahanol i'r ynad lleyg, gallai'r ynad cyflogedig wrando ar achosion ar ei ben ei hun yn hytrach nag fel aelod o fainc. Er hyn, ynadon lleyg a geid yn gyffredinol trwy Gymru, a dim ond yn ardaloedd diwydiannol de Cymru y ceid dyrnaid o ynadon cyflogedig.
12. Gyda diddymiad y Sesiwn Fawr yn 1830, collodd Cymru ei hunaniaeth gyfreithiol bron yn llwyr.<sup>14</sup> Sefydlwyd dwy gylchdaith i wasanaethu'r Brawdlys yn ystod y bedwaredd ganrif ar bymtheg, sef cylchdaith y gogledd a Chaer, a chylchdaith y de (gyda Sir Fynwy yn rhan o gylchdaith Rhydychen). Dim ond mor ddiweddar â 1945 y cafwyd uno'r gogledd a'r de yn Gylchdaith Cymru a Chaer (ac eithrio Sir Fynwy, a barhaodd yn rhan o gylchdaith Rhydychen hyd at 1971), a thrwy hynny adfer rhyw lun ar weinyddiaeth unedig Gymreig ar gyfer y llysoedd.<sup>15</sup>
13. Bron yn llwyr, meddaf. Oherwydd, fel y dangosodd Yr Athro Thomas Watkin yn ei gyfrol feistolgar, *The Legal History of Wales*, hyd yn oed yn ystod y bedwaredd ganrif ar bymtheg roedd anghenion neilltuol Cymru, ac yn enwedig yr iaith Gymraeg, yn gorfodi'r system gyfreithiol yng Nghymru i weithredu yn wahanol i'r hyn a wneid yn Lloegr. Cafwyd darpariaethau penodol ar gyfer penodi barnwyr a chanddynt hyfedr o'r Gymraeg, a bu'r iaith yn gatalydd pwysig ar gyfer cydnabod arwahanrwydd cyfreithiol Cymru.
14. Roedd y weithred o uno'r gylchdaith ar ddiwedd yr ail ryfel byd yn rhannol oherwydd twf y proffesiwn cyfreithiol yng Nghymru. Roedd gan y Bar bresenoldeb parhaol yng Nghymru ers diwedd y bedwaredd

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yr adroddiad ynglŷn â gwaith y llysoedd chwarter oedd eu bod yn rhy leol yn eu trefniadaeth, eu bod yn rddibynnol ar farnwyr lleyg a rhan amser, ac felly fod hyn yn arwain tuag at oedi afresymol wrth ddelio gyda'r achosion, ac anghysondeb mewn dedfrydu.

<sup>13</sup> Gweler, Sir Thomas Skyrme, *History of the Justices of the Peace*, (Chichester: Barry Rose, 1991); hefyd, Peter Seago, Clive Walker and David Wall, 'The Development of the Professional Magistracy in England and Wales', *Criminal Law Review*, [2000], 631-651.

<sup>14</sup> Roedd diddymu'r Sesiwn Fawr hefyd yn tansilio Cymreictod y farnwriaeth yng Nghymru, gan gynnwys y defnydd o'r Gymraeg: gweler Mark Ellis Jones, '“An Invidious Attempt to Accelerate the Extinction of our Language”: the Abolition of the Court of Great Sessions and the Welsh Language', *Cylchgrawn Hanes Cymru*, 19(2) (1998), 226-264.

<sup>15</sup> Mae'r modd yr ail-sefydlwyd hunaniaeth Gymreig o fewn cyfundrefn y llysoedd yn ystod yr ail ganrif ar bymtheg a'r ugeinfed ganrif yn cael ei ddadansoddi yn fanwl gan Syr John Thomas, 'Lord Morris of Borth y Gest Lecture 2000 – Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, the Welsh Language and Parochialism', yn Thomas Watkin (gol.), *Legal Wales: Its Past, Its Future* (Caerdydd: Cymdeithas Hanes Cyfraith Cymru, 2001), tt. 113-165.

ganrif ar bymtheg, pryd y sefydlwyd y siambrau cyntaf yn Abertawe a Chaerdydd. Nid oedd mwy na llond dwrn o fargyfreithwyr yn cydymarfer mewn unrhyw siambrau yn y cyfnod cynnar. Yn ystod yr ugeinfed ganrif, tyfodd y presenoldeb hwnnw yn raddol, ac, yna, yn ddramatig yn y cyfnod ar ôl i'r llywodraeth gynyddu cymorth cyfreithiol i gleientiaid ar ddiwedd y 1960au. Oherwydd datblygiad y proffesiwn cyfreithiol yng Nghymru, cafwyd ysgogiad i gael trefniadaeth Gymreig ar ei chyfer.

15. Efallai mai'r diwygiadau ar ddechrau'r 1970au a roddodd egni newydd yn y broses o adfeddiannu peth o'r hunaniaeth Gymreig i weinyddu cyfiawnder a gollwyd yn 1830. Dyma'r cyfnod pryd y diddymwyd y system lle y ceid tair haen o lysoedd troseddol, sef y llysoedd ynadon, y Llys Chwarter a'r Brawdlys, gan sefydlu'r system bresennol lle ceir llysoedd ynadon a llysoedd y Goron.<sup>16</sup> Daeth y diwygiadau yn sgil argymhellion Comisiwn Brenhinol o dan gadeiryddiaeth yr Arglwydd Beeching.<sup>17</sup> Yn dilyn Adroddiad Beeching, byddai Llys y Goron, fel rhan o'r Goruchaf Lys Cyfiawnder, yn cymryd lle'r Brawdlys a'r llysoedd chwarter, gyda'r llysoedd ynadon yn parhau fel llysoedd ar wahân.<sup>18</sup> Yn ddiweddarach y cafwyd Adroddiad Syr Robin Auld, a arweiniodd at greu llys troseddol unedig a fyddai'n cynnwys llysoedd ynadon.<sup>19</sup>
16. Roedd gan ddiwygiadau Beeching ei oblygiadau Cymreig. Yng Nghymru, llwyddodd pwysau gwleidyddol a lobio y tu ôl i'r llenni i sicrhau y byddai'r system newydd yn cael ei reoli o fewn uned weinyddol Cylchdaith Cymru a Chaer (gydag addasiadau) gyda'i bencadlys yng Nghaerdydd.<sup>20</sup> Roedd hwn yn gam pwysig gan ei fod yn cydnabod, i raddau, Cymru fel uned gyfreithiol ar gyfer gweinyddu cyfiawnder. Bellach, roedd yna bersonoliaeth Gymreig i'r gyfraith, o leiaf o ran gweinyddu'r llysoedd, ac yr oedd Caerdydd yn gweithredu fel pencadlys ar gyfer y pwrpas hwnnw. O hyn ymlaen, byddai pwyllgorau a chyfarfodydd y gylchdaith yn trafod polisi'r llysoedd o safbwynt Cymreig ac yn rhoi llais Cymreig i drafodaethau ar lefel ehangach. O ganlyniad, roedd y syniad o Gymru fel endid cyfreithiol yn medru esblygu'n raddol.
17. Bu datblygiadau pellach yng Nghymru a Lloegr yn fodd i feithrin, er yn aml yn anuniongyrchol, y syniad o hunaniaeth gyfreithiol Gymreig. Gyda chyflwyno darpariaethau Deddf Gweinyddu Cyfiawnder 1970, gallai'r Uchel Lys ymgynnull y tu allan i Lundain. Ymhen amser,

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<sup>16</sup> Deddf Llysoedd 1971, a roddodd ffurf gyfreithiol i argymhellion Beeching.

<sup>17</sup> Adroddiad Beeching, *Report of the Royal Commission on Assize and Quarter Sessions*, (Llundain: HMSO, 1969) (Cmnd 4153), t. 36

<sup>18</sup> Deddf Llysoedd 1971, aa. 1 & 4, Deddf Goruchaf Lys 1981, a. 1.

<sup>19</sup> Adroddiad Auld, *A Review of the Criminal Courts of England and Wales by the Rt. Hon. Sir Robin Auld, Lord Justice of Appeal*, (Llundain: HMSO, 2001), Pennod 3, paragraff 31.

<sup>20</sup> Gweler Syr William Mars-Jones, 'Beeching- Before and After on the Wales and Chester Circuit' 'Beeching- Before and After on the Wales and Chester Circuit', *Cambrian Law Review*, 4 (1973), 81-93.

byddai Birmingham, Manceinion a Chaerdydd yn gweithredu fel canolfannau datganoledig ar gyfer yr Uchel Lys. Roedd datganoli cyfreithiol yn dechrau cydio fel polisi wrth weinyddu cyfiawnder, polisi a oedd yn gweithredu'r egwyddor o ddod a llysoedd cyfiawnder yn nes at y bobl.

18. Ymhen amser, daeth y Llys Apêl i ddechrau ymgynnull y tu hwnt i Lundain, ac, fel canlyniad, daeth Caerdydd yn ganolfan ranbarthol iddo. Roedd datblygiadau eraill yn ystod chwarter olaf yr ugeinfed ganrif a oedd, i raddau, yn arwydd pellach o'r newid hinsawdd. Dechreuodd Arglwydd Prif Ustus Lloegr gyfeirio ato'i hun fel Arglwydd Prif Ustus Lloegr a Chymru (neu Gymru a Lloegr, fel y caiff ei ddisgrifio ar fur yn Llys y Goron Abertawe), datblygiad symbolaidd efallai, ond un a fyddai'n sbarduno newid mewn agwedd tuag at Gymru o fewn byd y gyfraith.
19. Yn ddiweddarach, cafwyd Llys Mercantilaidd i Gymru gyda'i bencadlys yng Nghaerdydd. Yr hyn a welwyd yn y blynyddoedd cyn dyfod datganoli gwleidyddol oedd datganoli graddol yng ngweinyddiaeth y system gyfreithiol. Tyfodd y cysyniad o weinyddiaeth Gymreig ar gyfer y llysoedd a'r proffesiwn cyfreithiol. Os mai Seisnig oedd cynnwys a sylwedd y gyfraith o hyd i raddau helaeth, roedd gan y weinyddiaeth rhyw gymaint o ddylanwad ar Gymreigio'r ffurf o'i weinyddu.
20. Wrth gwrs, wedi dyfodiad y Cynulliad Cenedlaethol, cafodd y broses o greu strwythurau cyfreithiol Cymreig ysgogiad sylweddol. Roedd Deddf Llywodraeth Cymru 2006, wrth iddo gydnabod Cynulliad Cenedlaethol Cymru fel deddfwrfa, yn codi cwestiynau pellach ynglŷn â gweinyddu cyfiawnder yng Nghymru. Roedd angen i'r gyfundrefn gyfiawnder ymateb ac addasu i'r cyfansoddiad newydd, ac i ddatblygu strwythurau a fyddai'n briodol ar gyfer y Gymru gyfoes. Gyda Cymru yn wynebu dyfodol lle bydd deddfau Cymru yn gwahaniaethu fwyfwy oddi wrth deddfau a weithredir yn Lloegr, mae'r angen i'r gyfundrefn gyfreithiol ymdrin yn briodol a'r gwahaniaethu hwn yn amlwg.

### **Y System Gyfiawnder yng Nghymru heddiw**

21. Cafwyd ymateb cadarnhaol a blaengar i ddatblygiad datganoli yng Nghymru gan y farnwriaeth, a gwelwyd proses o addasu

strwythurau a threfniadau cyfreithiol fel eu bod yn gweithredu'n briodol o fewn terfynau'r cyfansoddiad a'r awdurdodaeth bresennol.<sup>21</sup>

22. Yr angen i gael mynegiant cynhenid Cymreig i'r system gyfreithiol yng Nghymru sydd wrth wraidd yr ymadrodd 'Cymru'r Gyfraith'. Mae'r ymadrodd yn crisialu'r cysyniad o adfer hunaniaeth gyfreithiol Gymreig. I Syr Roderick Evans, mae Cymru'r Gyfraith, o gyrraedd ei lawn botensial, yn cynnwys yr elfennau hyn:

'(a) rhoi'n ôl i Gymru'r swyddogaeth o lunio deddfau; (b) datblygu yng Nghymru drefn i weinyddu holl agweddau cyfiawnder, er mwyn gwasanaethu anghenion cymdeithasol ac economaidd Cymru a'i phobl; (c) datblygu yng Nghymru sefydliadau a chyrff proffesiynol a fydd yn rhoi strwythur gyrfa addas ar gyfer pobl sydd am ddilyn gyrfa yn y gyfraith neu mewn meysydd perthynol yng Nghymru; (ch) gwneud yn siŵr fod y gyfraith, a'r gwasanaethau cyfreithiol, o fewn cyrraedd hwylus i bobl Cymru; (d) datblygu trefn a fydd yn gallu ymdopi a defnyddio'r Gymraeg a'r Saesneg mor rhwydd â'i gilydd, fel bod y Gymraeg a'r Saesneg yn cael eu trin yn gyfartal wrth weinyddu cyfiawnder yng Nghymru.'<sup>22</sup>

23. Yn sgil datganoli, daeth Cymru yn uned gyfreithiol weinyddol o fewn awdurdodaeth Cymru a Lloegr ar gyfer gweinyddiaeth y llysoedd. Un o'r newidiadau mwyaf arwyddocaol wrth hyrwyddo unoliaeth gyfreithiol Gymreig oedd creu Gwasanaeth Llysoedd Ei Mawrhydi yng Nghymru yn 2005. Bryd hynny, daeth y pedwar Pwyllgor Llysoedd Ynadon Cymru at ei gilydd gyda hen Gylchdaith Cymru a Chaer i greu gweinyddiaeth unedig. Yna, yn 2007, aeth Swydd Gaer yn rhan o Gylchdaith Gogledd Lloegr, a rhoddwyd y gorau i'w gweinyddu ochr yn ochr â Chymru. Roedd bellach undod cyfreithiol mor belled ag yr oedd gweinyddu'r llysoedd yng Nghymru.

24. O ganlyniad i hyn, crëwyd swydd Barnwr Llywyddol i Gymru, a barnwriaeth ac ynadaeth Gymreig. Mae sefydliadau cyfreithiol Gymreig eraill wedi datblygu o ganlyniad, gan gynnwys Cymdeithas y Barnwyr yng Nghymru a Fforwm Cadeiryddion Mainc Ynadon Cymru.<sup>23</sup> Sefydlwyd swyddi neilltuol o fewn y farnwriaeth, megis y Barnwr Siawnsri a'r Barnwr Masnach, i oruchwylio gwaith y llysoedd mewn meysydd cyfreithiol arbennig. Roedd y proffesiwn cyfreithiol hithau hefyd yn ymateb i'r newidiadau hyn trwy greu cymdeithasau arbenigol

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<sup>21</sup> 'What the judiciary can do, and can legitimately do, in the context of Wales is to respond to the fact of devolution and the changes that have already taken place and are now embedded within the constitution.': Anerchiad yr Arglwydd Judge, Cynhadledd Cymru'r Gyfraith, Caerdydd, 9 Hydref 2009.

<sup>22</sup> Syr Roderick Evans, 'Cymru'r Gyfraith- Camu Mlaen', Darlith Cymdeithas y Cyfreithwyr, Eisteddfod Genedlaethol Cymru Abertawe, 2006, tt. 3-4.

<sup>23</sup> 'to treat Wales as a unit for the purpose of administering the courts in Wales was a very significant event...treating Wales as an entity for these purposes has provided for the first time for many hundreds of years the opportunity not only to administer the courts in Wales on an all-Wales basis but also to plan for and develop a justice system in Wales suitable for our needs'. Syr Roderick Evans, 'Devolution and the Administration of Justice', Darlith Goffa Yr Arglwydd Callaghan 2010, Prifysgol Abertawe, 19 Chwefror 2010.

enedlaethol megis Cymdeithas Cyfraith Gyhoeddus a Hawliau Dynol Cymru, a Chymdeithas Cyfraith Fasnach Cymru. Yn y cyfamser, roedd deddfau Llundain hefyd yn creu swyddi cyfreithiol a lled-gyfreithiol neilltuol ar gyfer Cymru.<sup>24</sup>

25. Efallai mai sefydlu'r Llys Gweinyddol yng Nghaerdydd yn 1998 oedd un o'r datblygiadau cynnar mwyaf arwyddocaol wrth hyrwyddo anghenion cyfreithiol Cymru yn sgil datganoli. O hyn ymlaen, byddai modd i adolygiadau barnwrol oedd yn ymwneud â gweithrediadau'r Cynulliad Cenedlaethol i'w datrys yng Nghymru. Sefydlwyd y llys hwn heb yr angen am ddeddfwriaeth- penderfyniad gweinyddol yn unig ydoedd. Yr oedd sefydlu'r Llys Gweinyddol yng Nghymru yn ymateb i'r ddadl y dylai achosion sy'n herio penderfyniadau gweinyddol neu wleidyddol a gymerir yng Nghymru gael eu trin a'u clywed yng Nghymru pan mae hynny'n bosibl, gan alluogi pobl Cymru ddwyn eu Llywodraeth i gyfrif yn eu gwlad eu hunain. Yn ddiweddarach, gwelwyd y Llys Gweinyddol ei hun yn cadarnhau ac yn ategu pwysigrwydd sicrhau bod achosion cyfreithiol sy'n ymwneud â Chymru'n cael eu clywed yn gyson yng Nghymru.<sup>25</sup>
26. Pa fodd bynnag, pan sefydlwyd y Llys Gweinyddol yng Nghymru, nid oedd yna swyddfa yng Nghaerdydd i reoli a gweinyddu busnes y llys. Golygai hyn nad oedd swyddfa yng Nghymru a fyddai'n sicrhau fod achosion Cymreig yn cael eu prosesu a'u rhestru yng Nghymru, a'u clywed yn y Llys Gweinyddol Cymreig. Roedd y ddogfennaeth yn cael ei thrafod a'i rheoli o swyddfa yn Llundain, ac roedd hyn yn tansilio tipyn ar effeithiolrwydd y Llys Gweinyddol Cymreig. Pa fodd bynnag, o'r diwedd, cafwyd ymateb i'r broblem. Yn Ebrill 2009, sefydlwyd swyddfa weinyddol barhaol yng Nghaerdydd ar gyfer y Llys Gweinyddol. Canfyddiad un barnwr blaenllaw oedd: 'one of the lessons to be learned from this experience is that the decentralisation of a court can not succeed unless it is accompanied by the necessary infrastructure to ensure its proper functioning.'<sup>26</sup>
27. Nid y Llys Gweinyddol fu'r unig fforwm cyfreithiol a ddioddefai o ddiffyg strwythur trefniadol priodol ar dir a daear Cymru. Er mor galonogol fu ymweliadau'r Llys Apêl (yr adran sifil a throseddol) a Chymru ers 1998, wrth iddo hyrwyddo'r nod o ddatganoli cyfreithiol, ni fu ganddo swyddfa yng Nghaerdydd i sicrhau fod gwaith y llys yn cael ei drefnu a'i reoli yn effeithiol. I Lundain yr anfonir apeliadau i'w prosesu, ac nid yw'r weinyddiaeth yno yn ddigon cydwybodol wrth geisio sicrhau fod y Llys Apêl, wrth ymgynnull yng Nghaerdydd, yn clywed apeliadau o Gymru (holl bwrpas datganoli cyfreithiol!). Gellir dweud yr un peth am yr Uchel Lys. Mae'r weinyddiaeth o hyd yn cael ei

<sup>24</sup> Gweler: Deddf Comisiynydd Plant Cymru 2001; Deddf Ombwdsman Gwasanaeth Gyhoeddus Cymru 2005; Deddf Comisiynydd Pobl Hyn Cymru 2006.

<sup>25</sup> Gweler *Cynulliad Cenedlaethol Cymru v. Condrion* (2006) EWCA Civ 1573; hefyd, *R (Deepdock Limited & Eraill) v Gweinidogion Cymru* (2007) EWCH 3347 (Admin).

<sup>26</sup> Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.



ganoli yn Llundain, ac y mae hyn yn atal effeithiolrwydd y system ac yn ymyrryd a'r egwyddor o sicrhau fod achosion ac apeliadau Cymru yn cael eu penderfynu yng Nghymru.<sup>27</sup>

28. Fel y dywedodd Syr Roderick Evans:

'Er mwyn i eisteddiadau'r Llys Apêl a'r Llys Gweinyddol yng Nghymru fod yn effeithlon, rhaid cryfhau'r trefniadau ar gyfer cynnal y llysoedd hyn. Y lleiaf sydd angen ei wneud yw gwella'r trefniadau ar gyfer dynodi achosion o Gymru a'u rhestru yng Nghymru, ond mae'n annhebygol y bydd hynny ynddo'i hun yn ddigon. Yn fy marn i, yr hyn sydd ei angen yw swyddfeydd yng Nghaerdydd i gefnogi gwaith y llysoedd hyn. Byddai'r rhain yn sicrhau bod y gwaith o Gymru'n cael ei gyflawni'n effeithlon yng Nghymru. Byddai hefyd yn creu yng Nghymru'r swyddi a'r strwythurau gyrfa sy'n gysylltiedig â'r gwaith hwn.'<sup>28</sup>

29. Sefydlwyd tribiwnlysoedd neilltuol Cymreig, megis Tribiwnlys Anghenion Addysg Arbennig Cymru a Thribiwnlys Adolygu Iechyd Meddwl Cymru, datblygiadau a oedd yn deillio'n uniongyrchol o bwerau datganoledig y Cynulliad Cenedlaethol. Mae'r angen i sicrhau annibyniaeth y tribiwnlysoedd Cymreig trwy warantu hyd braich rhyngddynt a Llywodraeth y Cynulliad a'i hadrannau yn un y pwysleisir yn aml.<sup>29</sup> Gan mai penderfyniadau'r Llywodraeth yng Nghaerdydd sydd yn cael eu herio gerbron y tribiwnlysoedd hyn, rhaid sicrhau fod y tribiwnlysoedd yn annibynnol ac yn ymddangos yn rhydd o unrhyw ymyrraeth wleidyddol. Mae creu prosesau annibynnol a thryloyw o wneud penodiadau ar gyfer tribiwnlysoedd datganoledig hefyd yn gwbl hanfodol.

30. Bu peth anesmwythyd ynglŷn â gweinyddiaeth tribiwnlysoedd Cymru. Ceir brodwaith o wahanol dribiwnlysoedd, gyda thribiwnlysoedd datganoledig yn cael eu gweinyddu gan wahanol adrannau Llywodraeth Cynulliad Cymru ac awdurdodau lleol, a thribiwnlysoedd nad ydynt wedi'u datganoli'n cael eu gweinyddu gan Wasanaeth Tribiwnlysoedd y Deyrnas Unedig neu adrannau Llywodraeth y Deyrnas Unedig. Nid yw Gwasanaeth Tribiwnlysoedd y Deyrnas Unedig yn trin Cymru fel uned weinyddol, ac y mae hyn yn anghyson â phatrwm cyffredinol gweinyddiaeth y llysoedd.

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<sup>27</sup> 'Is it acceptable that only a small proportion of Wales' appellate work is heard in Wales and that all the administration of those cases together with the jobs, career structures and economic benefits arising from it are centred in London?', Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>28</sup> Syr Roderick Evans, 'Cymru'r Gyfraith- Camu 'Mlaen', uchod, t. 11.

<sup>29</sup> Gweler Syr David Lloyd Jones, *Peirianwaith Cyfiawnder mewn Cymru sy'n newid* (Darlith Cymdeithas y Cyfreithwyr, Eisteddfod Genedlaethol Cymru, Blaenau Gwent a Blaenau'r Cymoedd 2010), tt. 18-19.

31. Yn wir, mae'r angen hwn yn cryfhau'r ddadl dros sefydlu gweinyddiaeth gyfiawnder unedig, annibynnol a chynhenid Gymreig.<sup>30</sup> Trwy greu gweinyddiaeth unedig ar gyfer y llysoedd a'r tribiwnlysoedd, mae modd datblygu system a fydd yn fwy integreiddiedig ac effeithiol o ran gweinyddu a'r defnydd o adnoddau. Law yn llaw a hyn, byddai angen sefydlu Comisiwn Penodiadau Barnwrol penodedig i Gymru i sicrhau annibyniaeth a chadarnhau hygyrdd y drefn o benodi barnwyr.<sup>31</sup> Yn wir, mae'r drafodaeth ynglŷn â gweinyddu cyfiawnder ar gyfer Cymru yn codi cwestiynau ehangach ynglŷn â gweinyddiaeth yng Nghymru yn gyffredinol, gan gynnwys y gwasanaeth sifil.
32. Mae'n bwysig ein bod yn cofio cyd-destun y drafodaeth hon. Roedd refferendwm y 3ydd o Fawrth 2011 yn cadarnhau ac yn datblygu swyddogaeth Cynulliad Cenedlaethol Cymru fel gwneuthurwr cyfreithiau primaidd, neu ddeddfwrfa, ar gyfer Cymru. Roedd y darpariaethau eraill yn Neddf Llywodraeth Cymru 2006 eisoes wedi sicrhau gwahaniaeth cyfansoddiadol rhwng Llywodraeth Cymru a'r Cynulliad Cenedlaethol.
33. Dywedodd Carwyn Jones, wrth son am oblygiadau cyfreithiol datganoli, 'Mae hyn wedi arwain at yr angen am sefydliadau cyfiawnder sy'n cael eu rheoli'n lleol, sy'n ymateb i anghenion Cymru ac sy'n gyfarwydd â'r gyfraith fel y mae'n gymwys i Gymru. Byddai Llywodraeth Cynulliad Cymru yn croesawu camau pellach i'r cyfeiriad hwn'.<sup>32</sup>
34. Mae datganoli gwleidyddol yng Nghymru wedi ysgogi trafodaeth o fewn y gymuned gyfreithiol ar sut y dylai'r gyfundrefn gyfiawnder ymateb i'r newid cyfansoddiadol. Ni fu trafodaeth fel yma ers canrifoedd, ac y mae'n gydnabyddiaeth o bwysigrwydd y newid cyfansoddiadol a natur a goblygiadau cyfreithiol y newid hwnnw. Yn anad dim, democrateiddio llywodraethu a deddfu ar gyfer Cymru a wnaeth datganoli. Yn ei sgil, roedd cydnabod yr angen am systemau a sefydliadau cyfreithiol priodol i gynnal y broses ddemocrataidd yn gwbl naturiol a synhwyrol.
35. Gellir crynhoi'r hyn a olygir fel 'awdurdodaeth i Gymru' fel hyn: mewn cyfansoddiad democrataidd, lle ceir gwahaniaeth cyfansoddiadol (waeth pa mor ffurfiol neu anffurfiol) rhwng y ddeddfwrfa a'r llywodraeth (neu'r weithrediaeth), y mae gan y farnwriaeth ei swyddogaeth o fewn y cyfansoddiad. Dyma drydedd ystâd y cyfansoddiad. Mae hyn yn wir hyd yn oed ym Mhrydain, lle y ceir yr

<sup>30</sup> 'There should be further decentralisation of the institutions of the law to Wales in recognition of Wales' constitutional position and its position in the present jurisdiction.' Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>31</sup> Gweler Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>32</sup> Carwyn Jones, *Y Gyfraith yng Nghymru: Y Ddeng Mlynedd Nesa*, (Darlith Cymdeithas y Cyfreithwyr, Eisteddfod Genedlaethol Cymru, Caerdydd a'r Cylch 2008).t. 12.

egwyddor o oruchafiaeth seneddol, a lle nad oes gwahaniaeth swyddogol rhwng y pwerau (separation of powers).<sup>33</sup>

36. Yn wahanol i'r Alban a Gogledd Iwerddon, nid oes gan Gymru ei hawdurdodaeth ei hun, er bod ganddi ei llywodraeth a'i deddfwrfa ei hun.<sup>34</sup> Hynny yw, nid oes gan Gymru ei system gyfreithiol na'i barnwriaeth ei hun. Nid oedd darpariaethau yn Neddf Llywodraeth Cymru 2006 ar gyfer creu system gyfiawnder i Gymru, law yn llaw a chynyddu pwerau deddfu'r Cynulliad Cenedlaethol. Mae Cymru yn parhau yn rhan o awdurdodaeth unedig Cymru a Lloegr. Yn hyn o beth, mae datblygiad y cyfansoddiad yng Nghymru yn anghyflawn ac yn anghyson a gweddill y Deyrnas Unedig.

37. Dywedir, weithiau, fod Cymru yn awdurdodaeth sy'n raddol ymddangos.<sup>35</sup> Beth yn union yw awdurdodaeth? Bu llawer yn ceisio cynnig diffiniad academiaidd o'i brif nodweddion wrth ystyried y sefyllfa yng Nghymru.<sup>36</sup> Gellir dweud nad yw'r syniad o 'awdurdodaeth' yn rhywbeth pendant, unffurf, a gall awdurdodaethau wahaniaethu gan ddibynnu ar yr amgylchiadau penodol. Ond ymysg y nodweddion y dylid eu disgwyl, dywedir mai'r rhai amlycaf yw: tiriogaeth ddiffiniedig; corff o gyfreithiau cynhenid; sefydliadau cyfreithiol a chyfundrefn llysoedd. Nid oes angen ymhelaethu gormod ar y ddwy nodwedd gyntaf. Mae ffiniau tiriogaethol Cymru yn glir ac mae gan Gymru ei deddfwrfa sydd yn creu cyfreithiau sylfaenol. Beth, felly, am y sefydliadau cyfreithiol a'r gyfundrefn llysoedd? Pa newidiadau pellach a fyddai eu hangen cyn y medrid dweud fod Cymru yn awdurdodaeth?

38. Er mwyn creu awdurdodaeth Gymreig a fyddai'n ymdebygu i awdurdodaethau eraill y Deyrnas Unedig, ac yn enwedig Gogledd Iwerddon, byddai angen y sefydliadau hyn i Gymru:

- Uchel Lys parhaol yng Nghymru;
- Llys Apêl barhaol yng Nghymru;
- Barnwriaeth Gymreig dan arweiniad (er mwyn cysondeb o fewn y cyfansoddiad Prydeinig) Arglwydd Brif Ustus Cymru;
- Proffesiwn cyfreithiol Gymreig
- Rheolaeth Cynulliad Cenedlaethol Cymru dros yr Heddlu a Charchardai yng Nghymru

## Manteision/rhwystrau/costau/goblygiadau ymarferol

<sup>33</sup> Gweler, O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, tt. 26-28.

<sup>34</sup> Gweler sylwadau Syr David Lloyd Jones, *Peirianwaith Cyfiawnder mewn Cymru sy'n newid*, uchod, t. 3.

<sup>35</sup> Timothy H. Jones a Jane M. Williams, 'Wales as a Jurisdiction', *Public Law*, [2004], 78 -101, ar t. 101.

Defnyddir yr ymadrodd, 'emerging jurisdiction' ganddynt.

<sup>36</sup> Gweler T. H. Jones a Jane M. Williams, uchod; hefyd Syr Roderick Evans a Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Cyflwyniad i Gomisiwn Richard, 2003).

## Rhwystrau?

39. Nid oedd canlyniad refferendwm Mawrth 2011 yn gwneud unrhyw wahaniaeth sylfaenol i weinyddu cyfiawnder yng Nghymru, gan nad yw gweinyddu cyfiawnder, hyd yma, yn faes sydd wedi ei datganoli. Nid oedd darpariaethau penodol yn Neddf Llywodraeth Cymru 2006 ar gyfer creu system gyfiawnder i Gymru, law yn llaw, megis, a chynyddu pwerau deddfu'r Cynulliad Cenedlaethol. Wrth gwrs, gall y Cynulliad geisio am fwy o bwerau, gam wrth gam, dros agweddau o'r system cyfiawnder. Ond, yn syml, mae Cymru yn parhau yn rhan o awdurdodaeth unedig Cymru a Lloegr.
40. Roedd Adroddiad Confensiwn Cymru Gyfan wedi dod i'r casgliad nad oedd creu awdurdodaeth i Gymru yn angenrheidiol cyn y byddai'n bosibl symud i ran 4 o Ddeddf Llywodraeth Cymru 2006, a chreu deddfwrfa gyflawn.<sup>37</sup> Hynny yw, nid oedd creu awdurdodaeth yn amod i atgyfnerthu pwerau deddfu y Cynulliad Cenedlaethol. Ar y llaw arall, nid yw awdurdodaeth o anghenraid yn ddibynnol ar fodolaeth deddfwrfa - wedi'r cwbl, roedd yr Alban yn awdurdodaeth am ganrifoedd cyn iddi adfer ei senedd yn 1999. Parhaodd Gogledd Iwerddon yn awdurdodaeth yn y blynyddoedd 1972-1999 wedi diddymu y senedd cyntaf (parliament).
41. Gellir crynhoi'r prif ddadleuon a glywir yn erbyn sefydlu awdurdodaeth i Gymru wrth gyfeirio atynt fel dadleuon technegol-gyfreithiol, y ddadl dros raddol-esblygiad, y ddadl ddaearyddol a demograffig, a'r ddadl hanesyddol. Efallai mai Jack Straw, pan oedd yn Arglwydd Ganghellor, lwyddodd i fynegi a chrynhoi'r dadleuon yn erbyn creu awdurdodaeth Gymreig mewn darlith i Gymdeithas y Cyfreithwyr yng Nghaerdydd rai blynyddoedd yn ôl.<sup>38</sup>
42. Mae'r dadleuon technegol-gyfreithiol yn niferus ac yn codi bwganod technegol a all godi braw ar leygwyr nad oes ganddynt gefndir cyfreithiol. Er enghraifft, codir cwestiynau ynglŷn â'r hyn fyddai statws dyfarniadau llys yn Lloegr ar lysoedd Cymru, petai Cymru yn awdurdodaeth ar wahân, a'r sefyllfa *vice-versa* hefyd. Hynny yw, sut y byddai'r fath newid yn effeithio ar y modd y byddai athrawiaeth cynsail yn cael ei weithredu, er enghraifft? Fel y gofynodd Straw: 'A fyddai penderfyniadau llysoedd Lloegr yn dod yn rhai perswadiol yn unig mewn achosion Cymreig, yn hytrach na rhai rhwym mewn cyfraith, er enghraifft? A fyddai angen datblygu proffesiwn cyfreithiol ar wahân, gyda'i systemau ei hun i reoleiddio'r proffesiwn hwnnw? A allai dyfarniadau Cymreig gael eu gorfodi yn erbyn diffynyddion Seisnig, neu a ellid cyflwyno achosion Cymreig yn Lloegr?'<sup>39</sup>

<sup>37</sup> Gweler *Confensiwn Cymru Gyfan, Adroddiad*, (Hawlfraint y Goron, 2009).

<sup>38</sup> Yr Arglwydd Ganghellor a'r Ysgrifennydd Gwladol dros Gyfiawnder, Y Gwir Anrhydeddus Jack Straw AS, 'Gweinyddu Cyfiawnder yng Nghymru', Darlith Cymdeithas y Gyfraith, Caerdydd, 3 Rhagfyr 2009.

<sup>39</sup> Ibid.

43. Yn y man, cawn ystyried dilysrwydd y gofidiau hyn trwy gyfeirio at awdurdodaeth arall o fewn y Deyrnas Unedig. Ond mae'n briodol nodi mai Goruchaf Lys y Deyrnas Unedig yw'r Llys Apêl uchaf ar gyfer llysoedd holl awdurdodaethau'r Deyrnas Unedig, ac yma, fel arfer, y bydd cwestiynau cymhleth cyfreithiol sydd yn esgor ar gysail cyfreithiol newydd a phwysig yn cael eu penderfynu. Byddai'r awdurdodaeth Gymreig yn dilyn y cyseiliau a osodid gan y Goruchaf Lys, a hyd yn oed os mai perswadiol fyddai statws penderfyniadau'r llysoedd apêl Seisnig yng Nghymru, nid yw hynny yn creu unrhyw argyfwng cyfreithiol o gwbl. Mae'n sicr y byddai barnwyr Cymru yn talu sylw dyledus a phriodol o ddyfarniadau Lloegr, ac yn eu dilyn lle bo hynny er lles cyfiawnder. Dyna'r arfer ar hyn o bryd o fewn awdurdodaethau y Deyrnas Unedig, sef talu sylw dyledus i ddyfarniadau traws-awdurdodaethol sydd yn cynnig cysail addas i'r amgylchiadau.
44. Yr ymateb syml a chryno i lawer o'r cwestiynau hyn yw y bydd materion technegol, gan gynnwys gorfodi dyfarniadau ar draws ffiniau awdurdodaethol, yn cael eu datrys yn yr un modd ag y maent yn cael eu datrys heddiw rhwng awdurdodaethau Lloegr (a Chymru), yr Alban a Gogledd Iwerddon. Bydd modd llunio datrysiad a fyddai'n briodol ac addas ar gyfer Cymru a'i pherthynas a holl awdurdodaethau eraill y wladwriaeth.
45. Yn ychwanegol i bryderon technegol, pwysleisiodd Straw fanteision symud gan bwyll bach yn hytrach na cheisio symud ymlaen yn rhy gyflym. Pragmatiaeth gyfansoddiadol sydd yn sail i'r ddadl hon, sef y dylid caniatáu i brosesau esblygu yn naturiol mewn ymateb i'r sefyllfa ar y pryd. Mae hon yn ddadl sydd yn annog, 'datblygiad mwy o hunaniaeth i'r system Gymreig yn organaidd, gan adeiladu ar yr hyn sydd wedi bod yn digwydd eisoes yn ystod y 10 mlynedd diwethaf, ond o fewn awdurdodaeth gyffredin.'<sup>40</sup> Wrth gwrs, gellir beirniadu'r math hwn o agwedd gan ei fod, yn ei hanfod, yn adweithiol ac yn ymateb i newidiadau yn hytrach nag yn cynnig gweledigaeth sydd yn flaengar ac yn paratoi i'r dyfodol. Gan fod esblygiad democratiaeth Cymru yn sicr o barhau, ac mai siwrnai di-droi'n ôl yw datganoli, dylid datblygu model o weinyddu cyfiawnder i Gymru sydd yn edrych ymlaen at y dyfodol yn hytrach nag ymateb i'r presennol yn unig.
46. Dadl arall yn erbyn awdurdodaeth Gymreig yw'r ddadl ddaeryddol a demograffig. Agosatrwydd daeryddol a chymdeithasol Cymru i Loegr, a natur tirwedd a demograffi Cymru yw sail ei ddadl. Mae pobl gogledd Cymru yn agos i ddinasoedd gogledd-orllewin Lloegr ac yn ymwneud â hwy yn gyson. Mae pobl y Canolbarth yn

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<sup>40</sup> Ibid.

dueddol o droi tua threfi a dinasoedd canolbarth Lloegr er mwyn masnachu a siopa. Oherwydd maint dinasoedd de Cymru, ni cheir yr un tueddiad i droi i Loegr, er bod cryn gysylltiad rhwng pobl y De a dinas Bryste. Ar yr un pryd, oherwydd rhesymau daearyddol, nid oes gan bobl y gogledd gymaint o gysylltiad gyda dinasoedd a phobl y de. Mae'r ffin rhwng Cymru a Lloegr yn un sydd yn bod yn wleidyddol a diwylliannol, efallai, ond nid yw'r ffin yn bod yn economaidd nac, i raddau helaeth, yn gymdeithasol. Mae'r patrwm hwn yn wahanol i, dyweder, yr Alban, lle ceir ardal eang a thenau ei phoblogaeth o boptu i'r ffin rhwng yr Alban a Lloegr, a thros gant o filltiroedd yn gwahanu prif ardaloedd poblog gogledd Lloegr a chanolbarth yr Alban.<sup>41</sup>

47. Ymysg y dadleuon a gyflwynir dros drin Cymru yn wahanol i'r Alban a Gogledd Iwerddon, y ddadl hanesyddol yw'r un amlycaf. Wrth gyfeirio at sefyllfa'r Alban, dywedodd Jack Straw, 'Gan fod hanes y cysylltiadau a'r datblygiadau o fewn a rhwng Cymru a Lloegr mor wahanol i'r rhai rhwng yr Alban a Lloegr, ni fyddai dwyn cymariaethau â'r Alban yn debygol o fod yn briodol. Y gwahaniaeth pwysicaf yw na fu system farnwriaeth yr Alban erioed yn rhan o system Loegr, hyd yn oed ar ôl Deddf Uno 1707. Mae ei sefydliadau barnwrol a'r proffesiwn cyfreithiol, ynghyd â llawer o agweddau eraill ar ei bywyd cenedlaethol, wedi parhau ar wahân. Am resymau sy'n ddealladwy i bawb, nid dyna fu'r achos yng Nghymru.'<sup>42</sup>

48. Dyma ddadl sydd yn pwysleisio diffyg traddodiad a diffyg hanes cyfreithiol. Dadl arall a glywir yw'r ddadl cynaladwyedd: hynny yw, fod Cymru yn rhy fach i fod yn awdurdodaeth ar wahân i Loegr. O ran y dadleuon nad oes yna'r traddodiad na'r sefydliadau cyfreithiol na'r boblogaeth i gynnal awdurdodaeth Gymreig, dywedodd Syr Malcolm Pill rai pethau diddorol ynglŷn â gallu Caerdydd i wasanaethu fel prifddinas a phencadlys unrhyw awdurdodaeth Gymreig:

'It is a city that has developed comparatively recently and has neither the population nor prestige, nor the legal traditions of Edinburgh or Belfast. Meeting with Scots and Northern Ireland lawyers makes one aware of our comparative lack of pedigree and experience in this field...a tradition of judicial separateness, and of dealing with a devolved administration, requires skills which cannot, however, be acquired in a moment'.<sup>43</sup>

49. Gan dderbyn cywirdeb y datganiad fod gan yr Alban ddiwylliant cyfreithiol a chyfundrefn gyfreithiol gynhenid a orosodd Deddf Uno 1707, ac, felly, fod gan y ddadl hanesyddol beth dilysrwydd wrth gymharu Cymru gyda'r Alban, a yw'r un peth yn wir wrth gymharu Cymru gyda Gogledd Iwerddon?

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Gweler anerchaid Syr Malcolm Pill, Cynhadledd Cymru'r Gyfraith, Caerdydd, 9 Hydref 2009.

## Gogledd Iwerddon

50. Er mwyn gwyntyllu dilysrwydd rhai o'r dadleuon yn erbyn yr awdurdodaeth Gymreig, ac er mwyn canfod yr hyn fyddai'r awdurdodaeth Gymreig yn ei gynnig i fywyd Cymru, rhaid ystyried y strwythurau cyfreithiol a geir o fewn cenedloedd datganoledig eraill y Deyrnas Unedig. Mae gan yr Alban a Gogledd Iwerddon y strwythurau a'r sefydliadau cyfreithiol a gysylltir gyda'r syniad o awdurdodaeth. Tybed a ydynt yn cynnig modelau ar gyfer anghenionr awdurdodaeth arfaethedig Gymreig?
51. Mae Gogledd Iwerddon yn cynnig cymhariaeth ddiddorol ar sawl lefel. Yn gyntaf, o ran ei maint: mae gan Gogledd Iwerddon boblogaeth o tua 1.7 miliwn, tra bod gan Gymru boblogaeth o tua 3 miliwn. Mae mwy o bobl yn byw o fewn ffiniau'r hen Sir Forgannwg a'r hen Sir Fynwy nag sydd yn byw yng Ngogledd Iwerddon i gyd. O'r safbwynt hanesyddol, nid oedd Gogledd Iwerddon yn awdurdodaeth a chanddi sefydliadau cyfreithiol cynhenid cyn 1920. Yn wir, nid oedd Gogledd Iwerddon yn bod fel endid gwleidyddol cyn 1920, ac, o ran gweinyddu cyfiawnder, nid oedd naw sir Ulster yn ddim ond ardal o awdurdodaeth Iwerddon o fewn y Deyrnas Unedig.
52. Ymateb i argyfwng gwleidyddol yn y cyfnod rhwng 1920 a 1925 oedd creu Gogledd Iwerddon, sef cyfaddawd rhwng dyheadau cenedlaetholgar mwyafrif pobl Iwerddon (a'r mwyafrif ohonynt yn Gatholigion) a dymuniad lleiafrif (Protestannaidd fel arfer) a oedd am aros o fewn y Deyrnas Unedig.<sup>44</sup>
53. Mewn ymateb i ddyhead y mwyafrif yn Iwerddon o blaid hunanlywodraeth y cafwyd ymgyrch gan leiafrif unoliaethol dros arwahanrwydd Ulster.<sup>45</sup> Efallai mai yn 1916 y cafwyd yr awgrym am y tro cyntaf y byddai chwech o siroedd talaith Ulster yn cael eu heithrio o'r drefniadaeth ar gyfer gweddill Iwerddon - ar y dechrau, y syniad oedd y byddant yn cael eu llywodraethu yn uniongyrchol o Lundain.<sup>46</sup> Bryd hynny, roedd dyfodol hir dymor y chwe sir neilltuedig heb ei benderfynu'n iawn. Ar ôl y rhyfel Byd Cyntaf, pan gododd sefyllfa Iwerddon i frig yr agenda gwleidyddol unwaith eto, cafwyd cynllun a oedd yn golygu y byddai Iwerddon gyfan yn cael ffurf ar hunanlywodraeth, ond wedi ei rhannu yn ddau ranbarth gyda dwy ddeddfwrfa ar wahân. Yn y cyfnod allweddol hwn rhwng 1918 a 1920,

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<sup>44</sup> Ceir hanes creu Gogledd Iwerddon yn Jonathan Bardon, *A History of Ulster* (Belfast: Blackstaff Press, 1992), tt. 466- 509.

<sup>45</sup> Gweler D. George Boyce, 'Northern Ireland: The Origins of the State', yn Peter Catterall a Sean McDougall, *The Northern Ireland Question in British Politics* (Llundain: MacMillan, 1996), tt. 11-28.

<sup>46</sup> *Ibid*, t. 14

a arweiniodd at Ddeddf Llywodraeth Iwerddon 1920, y lluniwyd elfennau hanfodol y cyfansoddiad newydd.<sup>47</sup>

54. Roedd Deddf Llywodraeth Iwerddon 1920 yn creu dwy awdurdodaeth a chanddynt raddau helaeth o hunanlywodraeth - sef Iwerddon Ddeheuol yn y de (yn 1922, crëwyd Gwladwriaeth Rydd Iwerddon i gymryd lle'r endid hwn yn dilyn y cadoediad ar derfyn y Rhyfel Cartref yn Iwerddon), a Gogledd Iwerddon yn y gogledd-ddwyrain. Roedd y chwe sir i ffurfio'r rhanbarth Protestannaidd yn Ulster. Roedd Gogledd Iwerddon i gael deddfwrfa bicameral (dau dy, tŷ'r cyffredin a senedd, yn ôl y patrwm Prydeinig), a'i llywodraeth ei hun. Yn Chwefror 1920, hawliodd yr unoliaethwyr yno y dylent gael awdurdodaeth ar wahân gyda'u barnwyr eu hunain, a hynny a fu.<sup>48</sup> Roedd yr hyn a sefydlwyd yn ffurf o ddatganoli: 'the scheme of the Act of 1920 was to place matters that pertained only to Northern Ireland within the legislative competence of the new Parliament and to reserve matters which concerned the United Kingdom as a whole.'<sup>49</sup>
55. Y bwriad gwreiddiol oedd y byddai cyngor yn cael ei sefydlu ar gyfer Iwerddon gyfan i drafod materion a oedd yn berthnasol i Iwerddon i gyd, a byddai'r cyngor hwn yn gyfrwng i feithrin ysbryd o undod a chydweithredu o fewn Iwerddon. Y gobaith oedd y byddai'r cyngor yn braenaru'r tir ar gyfer uno Iwerddon o dan un senedd ac un awdurdodaeth maes o law. Yn ogystal, byddai yna gynrychiolaeth o Iwerddon yn Senedd Westminster, gan mai ffurf ar ddatganoli, nid hunanlywodraeth gwirioneddol, oedd model 1920, ac roedd sofraniaeth wleidyddol yn parhau yn Llundain. Y weledigaeth gyfansoddiad o dan Ddeddf Llywodraeth Iwerddon 1920, felly, oedd y byddai'r ddwy Iwerddon yn rhanbarthau datganoledig o fewn y Deyrnas Unedig ac yn rhan o'i hymerodraeth, gyda swyddogion y goron, o dan arweiniad Arglwydd Raglaw Iwerddon, yn gweithredu o Gastell Dulyn. Ond, roedd Deddf 1920 yn cynnig ateb gwleidyddol diffygiol gan nad oedd Iwerddon rydd am ymyrraeth Prydain, ac nid oedd Gogledd Iwerddon am na hunanlywodraeth nac ymyrraeth Dulyn chwaith.
56. Yn y cyfamser, yn 1921, rhoddwyd rhywfaint o reolaeth dros yr heddlu yn y dalaith yn nwylo llywodraeth Gogledd Iwerddon. Roedd y modd y rheolid yr heddlu yno'n bwnc dadleuol, ac yn enwedig ymddygiad y 'Specials', sef llun o wirfoddolwyr Protestannaidd a sefydlwyd yn 1920 i gadw'r heddwch ac i wrthwynebu Byddin Weriniaethol Iwerddon, a oedd yn arwain y gwrthryfel yn erbyn cyfansoddiad 1920. Ym Mawrth 1922, pryd y diddymwyd

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<sup>47</sup> Ceir dadansoddiad o gyfansoddiad 1920 gan A. G. Donaldson, 'The Constitution of Northern Ireland: its Origins and Development', *University of Toronto Law Journal*, 11(1) (1955), 1-42.

<sup>48</sup> Gweler, D. George Boyce, 'Northern Ireland: The Origins of the State', t. 19.

<sup>49</sup> Gweler Yr Arglwydd MacDermott, 'The Supreme Court of Northern Ireland- two Unusual Jurisdictions', *Journal of the Society of Public Teachers of Law*, 2 (1952), 201-213, ar t. 202.



Cwnstablriaeth Frenhinol Iwerddon,<sup>50</sup> crëwyd Cwnstablriaeth Frenhinol Ulster.<sup>51</sup>

57. Erbyn 1922, roedd yr hollt rhwng Gogledd Iwerddon a gweddill Iwerddon yn dwysau wrth i anfodlonrwydd gyda chyfansoddiad 1920 ymysg y gweriniaethwyr Gwyddelig arwain at ryfela. Roedd nifer o wleidyddion yr Iwerddon Ddeheuol yn wrthwynebus i gyfansoddiad 1920, a oedd, yn eu barn hwy, yn cadw gormod o awdurdod yn nwylo senedd a llywodraeth Prydain. Ni ddaeth Cyngor Iwerddon i fodolaeth o gwbl, ac fe chwalwyd y cynllun gwreiddiol a ragwelai gydweithredu rhwng y ddau ranbarth.
58. Yn 1922, cafwyd y cytundeb newydd rhwng Prydain ac Iwerddon a greodd Wladwriaeth Rydd Iwerddon, cytundeb a sicrhaodd yr hawl i chwe sir y gogledd-ddwyrain i eithrio o'r darpariaethau ar gyfer y wladwriaeth newydd a pharhau yn rhan o'r Deyrnas Unedig. Roedd y cyfansoddiad hwn yn rhoi statws dominiwn i Wladwriaeth Rydd Iwerddon, a oedd yn golygu fod y Wladwriaeth Rydd bellach yn ymadael a'r Deyrnas Unedig. Roedd iddi statws tebyg i Ganada, Awstralia a Seland Newydd, ac ni fyddai ganddi hi gynrychiolaeth yn Senedd Llundain. Roedd Gogledd Iwerddon, fodd bynnag, i barhau yn rhan o'r Deyrnas Unedig, a'i senedd yn ddarostyngedig i senedd Llundain. Diddymwyd swydd yr Arglwydd Raglaw, a phenodwyd *Governor General*, sef Llywodraethwr-Cyffredinol ar gyfer Gogledd Iwerddon. Roedd arwyddocâd pellgyrhaeddol i ddyfodol Iwerddon o dan delerau'r cytundeb hwn. Meddai un arbenigwr, 'The Government of Ireland Act envisaged an eventual untied Ireland within the United Kingdom; but the Treaty resulted in the secession of the Irish Free State from the United Kingdom and, from a Unionist perspective, in the artificial partition of the British Isles'.<sup>52</sup> Erbyn 1925, roedd Gogledd Iwerddon yn endid cyfansoddiadol cwbl ar wahân i weddill Iwerddon-roedd y rhaniad yn realiti cyfansoddiadol ac iddo oblygiadau hir dymor.
59. Beth oedd y sefydliadau cyfreithiol yn Belffast, dinas bwysig ddiwydiannol a fyddai'n ganolbwynt y dalaith, cyn 1920? Roedd Belffast wedi tyfu yn gyflym fel dinas ddiwydiannol bwysig yn ystod y bedwaredd ganrif ar bymtheg. Dyblodd y boblogaeth o 87,000 i 175,000 rhwng 1851 ac 1871.<sup>53</sup> Erbyn troad yr ugeinfed ganrif, roedd ganddi sefydliadau cyhoeddus a llywodraeth fwrdeistrefol a oedd yn gydnaws a'i statws.<sup>54</sup> Erbyn 1911, roedd ganddi boblogaeth o 400,000. Er hynny, canolfan ranbarthol i gylchdaith gogledd dwyreiniol Iwerddon oedd Belffast o ran ei sefydliadau cyfreithiol. Roedd ganddi gyfreithwyr a bargyfreithwyr fel pob dinas fawr arall yn y Deyrnas.

<sup>50</sup> Gweler Constabulary (Ireland) Act 1922.

<sup>51</sup> Gweler Constabulary (Northern Ireland) Act 1922.

<sup>52</sup> Gweler Thomas Hennessey, *A History of Northern Ireland 1920-1996* (Basingstoke: Macmillan, 1997), t. 22.

<sup>53</sup> Jonathan Bardon, *A History of Ulster*, t. 326.

<sup>54</sup> Jonathan Bardon, *A History of Ulster*, tt. 386-400.

Gellir ei chymharu gyda Chaerdydd o ran maint. Ond mae gan Gaerdydd ar ddechrau'r ganrif hon lawer mwy o sefydliadau cenedlaethol a chyfreithiol, a strwythurau ar gyfer cynnal awdurdodaeth nag oedd gan Belfast yn 1920.

60. Ar 25 Awst 1921, cyhoeddwyd y byddai Goruchel Lys Barnweinyddiad Gogledd Iwerddon yn dod i fodolaeth ar 1 Hydref 1921. Roedd i'r Goruchel Lys ei Llys Apêl a'i Huchel Lys Cyfiawnder, a phenodwyd pennaeth ar y Goruchel Lys, sef Arglwydd Brif Ustus Gogledd Iwerddon, yng Ngorffennaf 1921.<sup>55</sup>
61. Gyda pheirianwaith y llysoedd wedi ei sefydlu, yn raddol fe ddatblygodd y sefydliadau eraill a gysylltir gydag awdurdodaeth gyflawn, annibynnol a hunangynhaliol. Ers yr unfed ganrif ar bymtheg, roedd gan fargyfreithwyr Iwerddon eu canolfan yn Nulyn, sef y King's Inns. Sefydlwyd y King's Inns yn dilyn diddymu un o fynachlogydd y ddinas, pryd y rhoddodd y goron les ar adeiladau a thir yng ngogledd y ddinas i Brif Ustus Iwerddon. O hynny ymlaen, roedd hi'n bosibl i fargyfreithwyr Iwerddon gwblhau eu hyfforddiant a chael eu derbyn i'r proffesiwn heb orfod ymuno ag Ysbytai'r Brawdlys yn Llundain.
62. Gyda chreu awdurdodaeth Gogledd Iwerddon yn 1920, bellach roedd y gogledd-ddwyrain mewn awdurdodaeth ar wahân i weddill Iwerddon, ac, felly, roedd yn rhaid ystyried statws a hunaniaeth bargyfreithwyr y dalaith, a chreu darpariaeth ar gyfer eu rheoleiddio a'u cynrychiolaeth. Ar y dechrau, daethpwyd i gytundeb gydag awdurdodau'r King's Inns yn Nulyn y byddai pwyllgor o arweinwyr y Bar ym Melffast yn gyfrifol am addysg a disgyblaeth ar gyfer y proffesiwn yno. Cai darpar-fargyfreithwyr Gogledd Iwerddon eu hyfforddiant ym Melffast o hyn allan. Ar ôl agor y llysoedd newydd ym Melffast yn Hydref 1921, caent eu galw i'r Bar ym Melffast yn hytrach nag yn Nulyn. Er hynny, roedd gan fargyfreithwyr a gawsant eu hyfforddi yn un a'i Dulyn neu Felffast yr hawl i ymddangos yn llysoedd Iwerddon gyfan.<sup>56</sup>
63. Parhaodd y ddealltwriaeth hon rhwng bargyfreithwyr Belfast a Dulyn hyd at 1926, pryd y penderfynwyd sefydlu canolfan cwbl annibynnol ar gyfer bargyfreithwyr Gogledd Iwerddon, sef yr 'Inn of Court of Northern Ireland'. Cafwyd ystafelloedd ym Melffast ar gyfer yr Ysbyty cyfraith hwn, a phrynwyd llyfrgell cyfraith y diweddar Syr Denis Henry, yr Arglwydd Prif Ustus cyntaf, a fu farw yn 1925.<sup>57</sup> Yn yr un modd, sefydlwyd Cymdeithas Cyfraith Gogledd Iwerddon yn 1922 ar gyfer llywodraethu proffesiwn y cyfreithwyr yn y dalaith. Sefydlodd y

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<sup>55</sup> Gweler David Harkness, *Northern Ireland since 1920* (Dulun: Helicon, 1983), t. 18.

<sup>56</sup> Ceir yr hanes gan J. Ritchie, 'The Inn of Court of Northern Ireland: Its Foundation, Development and Functioning', *Northern Ireland Legal Quarterly*, 15 (1964), 463-469; hefyd, J. A. L. MacLean, 'The Honourable Society of the Inn of Court of Northern Ireland', 23(1) (1972), *Northern Ireland Legal Quarterly*, 90-94.

<sup>57</sup> Ritchie, *ibid*, t. 466.

Gymdeithas ei hysgol cyfraith ar gyfer hyfforddi myfyrwyr a'u paratoi ar gyfer ymuno a'r proffesiwn.

64. Yn ogystal, cafwyd ymateb academiaidd i'r sefyllfa gyfansoddiadol a chyfreithiol newydd a ddaeth i fodolaeth yn 1920. Roedd adran cyfraith i'w gael ym Mhrifysgol Queen's ym Melffast ers sefydlu'r brifysgol honno yn 1848. Cyfadran academiaidd oedd hon, a dywedwyd amdani mai, 'the aim of the teaching in the Faculty is to give students, through the reading of law subjects, what can truly be called a university education.'<sup>58</sup> Er hyn, roedd gan yr adran academiaidd rôl allweddol wrth ddarparu hyfforddiant ac addysg i ddarpar gyfreithwyr a bargyfreithwyr y dalaith, a bu partneriaeth glôs rhwng y Gyfadran ac Ysbyty'r Bargyfreithwyr a Chymdeithas y Cyfreithwyr i'r pwrpas hwn. Yn 1973, yn dilyn Adroddiad Armitage ar addysg a hyfforddiant cyfreithiol yn y dalaith, sefydlwyd Sefydliad Astudiaethau Cyfreithiol Proffesiynol o fewn Prifysgol Queen's, i ddarparu addysg alwedigaethol i fyfyrwyr sydd am ymarfer fel cyfreithwyr neu fargyfreithwyr. Byddai myfyrwyr yn mynychu'r Sefydliad ar ôl cwblhau eu gradd (LLB gan amlaf), a chwblhau rhan academiaidd eu haddysg.<sup>59</sup>
65. Cynigwyd cwrs unedig i'r darpar gyfreithwyr â'r darpar fargyfreithwyr, ond gyda pheth amrywiaeth i adlewyrchu anghenion hyfforddi gwahanol y ddwy gangen o'r proffesiwn. Mae hyn yn arwyddocaol ac yn dynodi gwahaniaeth rhwng y sefyllfa yng Ngogledd Iwerddon a'r hyn a geir yng Nghymru a Lloegr, sef addysg alwedigaethol ar wahân i ddwy gangen y proffesiwn. Roedd maint cymharol fychan y proffesiwn cyfreithiol yng Ngogledd Iwerddon, a chyfyngiadau ar adnoddau yn golygu mai'r hwn oedd y ffordd fwyaf synhwyrol o ddarparu addysg gyfreithiol alwedigaethol, sef cwrs galwedigaethol unedig.
66. Yng Nghymru a Lloegr, ceir o hyd darpariaeth wahanol i'r myfyrwyr sydd am fod yn gyfreithwyr a'r rhai sydd am ymarfer wrth y Bar. Gyda chytundebau hyfforddi a disgyblaethau yn brin, efallai fod model Gogledd Iwerddon yn cynnig gwell hyblygrwydd ac yn sicrhau nad yw drysau wedi eu cau yn rhy gynnar i fyfyrwyr, fel bod ganddynt yr opsiwn i fynd yn gyfreithwyr neu fargyfreithwyr ar ôl cwblhau eu haddysg alwedigaethol.
67. Yn 1936, sefydlwyd cylchgrawn cyfreithiol academiaidd gan ysgolheigion ym Mhrifysgol Queen's, Belfast, sef y *Northern Ireland Legal Quarterly*. Yn y rhifyn cyntaf, eglurwyd pam yr angen am gyhoeddiad o'r fath: 'Since the constitutional changes in 1920 there has been a marked divergence in the law and practice in Northern Ireland from that of England and the Irish Free State...the profession in

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<sup>58</sup> J. L. Montrose, 'Legal Education in Northern Ireland', *Journal of Legal Education*, 5 (1952), 18-25, ar t. 22.

<sup>59</sup> Gweler J. H. S. Elliott, 'The Queen's University of Belfast: The New institute of Professional Legal Studies', *International Bar Journal*, 9 (1978), 63-67.

Northern Ireland is faced with the fact that there is a considerable and growing volume of law and practice in regard to which resort to existing textbooks and other legal literature is no longer helpful...this journal will in an appreciable degree helps its readers to keep in touch with legal developments peculiar to Northern Ireland.’<sup>60</sup>

68. Roedd yr angen i ddarparu ffynhonnell gwybodaeth a sylwebaeth ar gyfreithiau Gogledd Iwerddon yn bwysig. Ond, roedd angen agwedd mwy eang hefyd, a gwelwyd cydnabyddiaeth o bwysigrwydd cadw cysylltiadau'r gorffennol ac o osgoi arwahanrwydd llwyr: '...the profession in Northern Ireland is bound by many ties and traditions to that wider community with which it formerly had closer association, and that although a progressive divergence must be anticipated in the respective legal systems, yet there is in these systems an underlying unity so great that it is appropriate and important that constant touch should be kept with the developments in law and practice in the wider community, and with the ideas inspiring such developments.’<sup>61</sup>
69. Diddymwyd Deddf Llywodraeth Iwerddon 1920, a oedd wedi diffinio'r sefyllfa gyfansoddiadol yng Ngogledd Iwerddon am dros saithdeg o flynyddoedd, pan ddaeth Deddf Gogledd Iwerddon 1998 (sef y ddeddf sydd yn gweithredu telerau Cytundeb Gwener y Groglith) i fodolaeth. Deddf i hyrwyddo heddwch oedd Deddf 1998. Ei brif ddarpariaeth oedd creu Cynulliad Gogledd Iwerddon, sef adfer y ddeddfwrf a ddiddymwyd yn 1972 pan ohiriwyd senedd Gogledd Iwerddon ac y cafwyd rheolaeth uniongyrchol o Lundain. Cafwyd Deddfau ychwanegol ers hynny, megis Deddf Gogledd Iwerddon 2006, i ddatblygu'r cyfansoddiad presennol, a chafwyd deddfau hefyd yn ymwneud â gweinyddiaeth y llysoedd. Cafwyd rhai diwygiadau i'r awdurdodaeth gyda Deddf Cyfiawnder (Gogledd Iwerddon) 2002. Serch hynny, y model a sefydlwyd yn 1920 sydd, i bod pwrpas, yn sail i awdurdodaeth Gogledd Iwerddon o ran gweinyddiaeth o hyd.
70. Gweinyddir llysoedd Gogledd Iwerddon gan Wasanaeth Llys Gogledd Iwerddon a sefydlwyd yn 1979 o dan Ddeddf Cyfiawnder (Gogledd Iwerddon) 1978. Mae'r Gwasanaeth Llys yn gweithredu fel gwasanaeth sifil penodol ar gyfer Gogledd Iwerddon, ac yn darparu cymorth gweinyddol ar gyfer y llysoedd, tribiwnlysoedd a'r farnwriaeth yn y dalaith. Mae hefyd yn gyfrifol am oruchwylio gweithredu dyfarniadau llys trwy wasanaeth gweithredu canolog a ddarparir gan Swyddfa ar gyfer Gweithredu Dyfarniadau. Mae yn cynnig cefnogaeth i'r Ysgrifennydd Gwladol ar gyfer Gogledd Iwerddon a gweinidogion eraill y Goron, wrth iddynt gydymffurfio a'u dyletswyddau statudol yn gysylltiedig â gweinyddu cyfiawnder yng Ngogledd Iwerddon.

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<sup>60</sup> Gweler golygyddol, *Northern Ireland Legal Quarterly*, 1 (1936), t. 4

<sup>61</sup> Ibid.

71. Gyda Deddf Diwygio'r Cyfansoddiad (y Deyrnas Unedig) yn 2005, crëwyd Goruchaf Lys y Deyrnas Unedig fel y Llys Apêl uchaf ar gyfer llysoedd Gogledd Iwerddon. Roedd y Goruchaf Lys yn cymryd hen swyddogaeth Pwyllgor Apeliadau Tŷ'r Arglwyddi, a oedd, ers Deddf 1920, yn bennaf llys apêl ar gyfer y dalaith. Gorf'u'r newidiadau hyn yn Llundain achosi peth newid i deitl awdurdodaeth Gogledd Iwerddon, a adwaenid fel Goruchaf Lys Cyfiawnder hyd at 1 Hydref 2009. Bellach, yr enw arno yw Llys Cyfiawnder Gogledd Iwerddon.
72. Mae gan Ogledd Iwerddon ei chynrychiolaeth ar Oruchaf Lys y Deyrnas Unedig yn rhinwedd ei statws fel awdurdodaeth. Yr Arglwydd Kerr, cyn-Arglwydd Brif Ustus Gogledd Iwerddon, yw'r aelod presennol.
73. Setlwyd cyfansoddiad presennol yr awdurdodaeth yng Ngogledd Iwerddon gan Ddeddf Cyfiawnder (Gogledd Iwerddon) 1978. Mae Llys Cyfiawnder Gogledd Iwerddon yn cynnwys y Llys Apêl, sydd yn ymgynnull yn y Llysoedd Cyfiawnder Brenhinol ym Melffast. Barnwyr y Llys Apêl yw'r Arglwydd Brif Ustus, sef Llywydd y Llys Apêl, a thri Arglwydd Ustus Apêl. Mae gan Farnwyr Uchel Lys hefyd yr hawl i wrando ar apeliadau yn ymwneud a materion troseddol. Mae'r Llys Apêl yn clywed apeliadau troseddol o Lys y Goron a materion sifil o'r Uchel Lys (gan gynnwys Arolygiadau Barnwrol). Gall y Llys Apêl hefyd glywed apeliadau ar bwyntiau cyfreithiol o'r llysoedd sirol, llysoedd ynadon a rhai tribiwnlysoedd.
74. Mae'r Uchel Lys hefyd yn ymgynnull yn y Llysoedd Cyfiawnder Brenhinol ym Melffast. Ei farnwyr yw'r Arglwydd Brif Ustus (sef Llywydd yr Uchel Lys) tri Arglwydd Ustus Apêl, ynghyd a deg o Farnwyr Uchel Lys a dau Farnwr Uchel Lys rhan-amser. Mae i'r Uchel Lys dair adran, yr Adran Siawnsri, Adran Mainc y Frenhines a'r Adran Deulu, i ddelio â'r gwahanol fathau o faterion a ddaw ger ei bron.
75. Ymhlith y llysoedd eraill, mae gan Lys y Goron awdurdod llwyr dros droseddau ditiadwy. Troseddau difrifol yw'r troseddau hyn. Yr Arglwydd Brif Ustus yw Llywydd Llys y Goron ac y mae Arglwyddi Ustus Apêl, Barnwyr Uchel Lys a Barnwyr y Llys Sirol yr hawl i eistedd yn Llys y Goron. Mae Llys y Goron yn ymgynnull trwy Ogledd Iwerddon. Mae'r llysoedd sirol yn clywed achosion sifil sydd yn hawlio iawndal â gwerth llai na £15,000. Ceir 17 o farnwr llys sirol a phedwar barnwr rhanbarth yn gwrando ar achosion yn y llysoedd hyn. Mae ganddynt bwerau eang i glywed achosion yn ymwneud ag eiddo priodasol neu iawndal am niwed troseddol. Mae'r llysoedd ynadon, sydd yn cynnwys barnwyr cyflogedig ac aelodau lleyg, yn clywed achosion troseddol llai difrifol, achosion sy'n ymwneud â throseddwyr ifanc a rhai achosion yn ymwneud a materion teuluol. Arweinir Llys y Crwner gan Farnwr Uchel Lys, ynghyd ag un uwch-Grwner a dau Grwner arall. Ymysg y swyddogion lled-farnwrol eraill, ceir Comisiynwyr Budd-dal Cymdeithasol a Chomisiynwyr Cynnal Plant.

76. Fel rhan o gyfrifoldebau awdurdodaeth Gogledd Iwerddon, mae heddlu a charchardai'r dalaith yn dod o dan awdurdod y Cynulliad yno. Diddymwyd, i bob pwrpas, yr hen Gwnsableriaeth Frenhinol Ulster yn Nhachwedd 2001, a sefydlwyd Gwasanaeth Heddlu Gogledd Iwerddon yn ei le, a hynny yn unol â chytundeb Gwener y Groglith. Mae Bwrdd Heddlu Gogledd Iwerddon yn sicrhau goruchwyliaeth annibynol o'r heddlu.<sup>62</sup> Mae Gwasanaeth Carchardai Gogledd Iwerddon yn asiant ar ran Adran Gyfiawnder y Deyrnas Unedig, a chafodd ei sefydlu yn 1995. Gwasanaeth Carchardai Gogledd Iwerddon sydd yn gyfrifol am garchardai'r dalaith, ac mae'n ffurfio rhwydwaith o asiantau sydd yn gyfrifol am gyfiawnder troseddol yn y dalaith. Mae Ysgrifennydd Gwladol Gogledd Iwerddon yn atebol dros y gwasanaeth, ac y mae gweinyddiaeth y gwasanaeth yn nwylo Cyfarwyddwr Cyffredinol y gwasanaeth.
77. Dyma, felly, gefndir hanesyddol a sefyllfa bresennol awdurdodaeth Gogledd Iwerddon. Ym mha ffordd y mae hanes a phrofiad Gogledd Iwerddon o fudd i Gymru? Rhaid derbyn fod pob sefyllfa yn wahanol, ac ofer yw chwilio am gynsail cadarn i'w efelychu yn union. Ond, mae esiampI Gogledd Iwerddon yn awgrymu bod awdurdodaeth yn gynaliadwy mewn amgylchiadau lle mae'r boblogaeth yn gymharol fechan. Nid oes angen edrych tua Gogledd Iwerddon, hyd yn oed, i gadarnhau cywirdeb y gosodiad hwn - mae Ynys Manaw, er enghraifft, lle mae'r boblogaeth yn llawer llai, yn profi'r pwynt i'r dim (er mae sefyllfa gyfansoddiadol Ynys Manaw yn wahanol, gan nad yw yn rhan o'r Deyrnas Unedig).
78. Mae Gogledd Iwerddon yn gymhariaeth fuddiol gan mai traddodiad y gyfraith gyffredin a geir yno. Nid oes ganddi'r arwahanrwydd hwnnw o ran egwyddorion a thraddodiad cyfraith a geir yn yr Alban. Petai Cymru yn awdurdodaeth, byddai hithau yn parhau gyda thraddodiad y gyfraith gyffredin yn yr un modd.
79. Dangosodd Syr Roderick Evans a'r Athro Iwan Davies, yn eu hymateb i Gomisiwn Richard yn 2003, bod Cymru yn cynhyrchu digon o waith cyfreithiol o'i gymharu â Gogledd Iwerddon i gyfiawnhau'r angen am strwythurau llysoedd cynhenid, ac yn enwedig uchel lys a llys apêl.<sup>63</sup> Felly, nid oes yna ddadl ddilys o safbwynt demograffi yn erbyn yr awdurdodaeth Gymreig. Mae esiampI Gogledd Iwerddon hefyd yn dangos mai camddefnyddio hanes a wneir yn aml er mwyn amddifadu Cymru o strwythurau cyfreithiol cynhenid.
80. Nid oedd gan na Belffast na Gogledd Iwerddon ganolfannau cyfreithiol o bwys cyn cyfansoddiad 1920. Crëwyd awdurdodaeth newydd yno dros nos. Yn y bôn, ewyllys gwleidyddol oedd wrth wraidd

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<sup>62</sup> Gweler: <http://www.psni.police.uk/>

<sup>63</sup> Syr Roderick Evans a Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Cyflwyniad i Gomisiwn Richard, 2003).

sefydlu awdurdodaeth Gogledd Iwerddon yn 1920. Mae profiad Gogledd Iwerddon hefyd yn dangos fel y gall awdurdodaeth fod yn symbol cryf o hunaniaeth, a bod angen hunaniaeth gyfreithiol i hunaniaeth ddemocrataidd lwyddo.

81. Yn ogystal, mae'r profiad yno yn brawf o'r ffaith nad yw creu awdurdodaeth newydd yn golygu ysgariad llwyr oddi wrth yr hen awdurdodaeth, ac nid yw, o anghenraid, yn arwain at greu sefyllfa ynysig o ran gweinyddu cyfiawnder. Fel y nododd Carwyn Jones mewn darlith rai blynyddoedd yn ôl: 'O safbwynt y proffesiwn cyfreithiol, yr wyf o'r farn ei bod hi'n bwysig y gellir symud yn rhwydd rhwng Cymru a Lloegr. Mae'n ddigon posibl y bydd modd i ni ddysgu gwersi o'r dull o weithredu sydd wedi ei fabwysiadu yng Ngogledd Iwerddon. Yno, caiff unrhyw aelod o'r proffesiwn wneud cais i ymarfer yng Nghymru a Lloegr'.<sup>64</sup> Ni fyddai creu awdurdodaeth i Gymru yn amddifadu'r proffesiwn cyfreithiol yng Nghymru rhag gweithredu yn Lloegr.
82. Hyd yn oed ar ôl sefydlu'r awdurdodaeth Gymreig, byddai perthynas agos rhyngddi ac awdurdodaeth Lloegr ac awdurdodaethau eraill y Deyrnas Unedig. Byddai egwyddorion cyfreithiol priodol yn cael eu mabwysiadu ar draws yr awdurdodaethau, gan ymateb i'r angen i gydweithio ar lefel wladwriaethol ar rai materion cyfreithiol, angen a fyddai'n sicrhau nad gweithred o ynysu neu ymwahanu llwyr fyddai sefydlu'r awdurdodaeth Gymreig.

## Manteision

### *Y Ddadl Gyfansoddiadol*

83. Oherwydd datblygiad swyddogaeth y Cynulliad Cenedlaethol fel deddfwrfa, bydd y gwahaniaeth rhwng cyfraith Cymru a chyfraith Lloegr yn siŵr o gynyddu.<sup>65</sup> Golyga hyn fod angen barnwriaeth a phroffesiwn cyfreithiol sy'n arbenigo yng nghyfraith Cymru ac yn medru darparu atebion cyfreithiol cywir a deallus.<sup>66</sup> Fel y dywedodd yr Arglwydd Brif Ustus, yr Arglwydd Judge, y cwestiwn sylfaenol mewn awdurdodaeth neu system gyfreithiol, yw: 'does the citizen have the ability to hold the executive of the day, or any of the large and weightier authorities to account before and independent judge who will give the relief or redress which the law permits, or to require them to act lawfully?'<sup>67</sup>

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<sup>64</sup> Gweler Carwyn Jones, *Y Gyfraith yng Nghymru: Y Ddeng Mlynedd Nesa'* (Darlith Cymdeithas y Cyfreithwyr, Eisteddfod Genedlaethol Cymru, Caerdydd a'r Cylch 2008), t. 15.

<sup>65</sup> Gweler Timothy H. Jones, John H. Turnbull a Jane M. Williams, 'The Law of Wales or The Law of England and Wales', *Statute Law Review*, 26(3) (2005), 135-145.

<sup>66</sup> Timothy H. Jones a Jane M. Williams, 'Wales as a Jurisdiction', t. 101.

<sup>67</sup> Anerchiad Yr Arglwydd Judge, Cynhadledd Cymru'r Gyfraith, Caerdydd, 9 Hydref 2009.

84. Wrth ystyried y ddadl dros awdurdodaeth Gymreig, gofynnodd Winston Roddick, 'What are the arguments for devolving the administration of justice?' Ei ateb oedd:

'In my opinion, the principal argument is that including responsibility for the administration of justice as part of a devolution settlement which devolves full law making powers makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction? Secondly, it would be internally logical, consistent and coherent. Thirdly, it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales and fourthly it would bring justice closer to the people for whom the laws were made.'<sup>68</sup>

85. Mae yma ddadl aeddfed dros greu awdurdodaeth ar wahân oherwydd bod hynny'n angenrheidiol os yw Cymru i weithredu mewn modd sydd yn gyfansoddiadol ddilys, ac yn gyson â'r patrwm o fewn y wladwriaeth Brydeinig yn gyffredinol. Yn wir, mae'r patrwm hwn o gael awdurdodaeth gyfreithiol i gydfynd â'r ddeddfwrfa ranbarthol i'w ganfod mewn gwledydd datganoledig neu ffederal ar draws y byd, gwledydd megis Awstralia a Chanada. Galwn y ddadl hon y ddadl gyfansoddiadol.

86. Efallai mai hon yw'r ddadl bwysicaf. Craidd y ddadl yw, os yw democratiaeth yng Nghymru i aeddfedu ac i weithredu yn unol â'r safonau democrataidd a chyfansoddiadol a welir ymysg rhanbarthau neu genhedloedd datganoledig ar draws y byd, mae'r angen i strwythurau cynhenid cyfreithiol Cymru fod yn gyson â'r safonau hynny. Prif swyddogaethau'r awdurdodaeth a'i barnwyr fyddai gweithredu fel modd i'r unigolyn i ddwyn y weithrediaeth a'r ddeddfwrfa i gyfrif ac i ddarparu remediau lle mae sefyllfa o anghyfreithlondeb. Rôl gyfansoddiadol bwysig y farnwriaeth yw darparu arolygaeth o weithrediadau'r ddeddfwrfa a'r llywodraeth, er mwyn sicrhau ymddygiad sydd yn gyson a chyfraith ryngwladol a safonau hawliau dynol. Dyma yw un o swyddogaethau cyfansoddiadol pwysicaf y farnwriaeth bellach o fewn y cyfansoddiad Prydeinig.<sup>69</sup>

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<sup>68</sup> Winston Roddick, *The Development of Devolution and Legal Wales* (Darlith Flynyddol Canolfan Materion Cyfreithiol Cymreig, Prifysgol Aberystwyth, 28 Tachwedd 2008), t. 16.

<sup>69</sup> Mae Bogdanor yn dyfynnu Dicey fel hyn: 'In his *Introduction to the Study of the Law of the Constitution*, Dicey detected "three leading characteristics of completely developed federalism- the supremacy of the constitution- the distribution among bodies with limited and co-ordinate authority of the different powers of government- the authority of the courts to act as interpreters of the constitution".' Vernon Bogdanor, *Devolution in the United Kingdom* (Rhydychen: Gwasg Prifysgol Rhydychen, 1999). t. 294. Mae swyddogaeth y llysoedd fel dehonglwyr y cyfansoddiad yn un allweddol mewn democratiaeth.



87. Wrth gwrs, efallai bod modd cynnig remedi gyfreithiol mewn sefyllfa o anghyfreithlondeb o fewn y drefniadaeth bresennol, ac efallai y byddai rhai yn mynnu bod yr awdurdodaeth unedig bresennol yn ddigon abl i ddelio gydag arolygiadau barnwrol o benderfyniadau'r Cynulliad a'r Llywodraeth yng Nghymru. Ond nid yw hyn yn gyson â phwrpas ac ysbryd datganoli, sydd yn amcanu i ddod a llywodraeth a chyfiawnder yn agosach at y bobl.
88. Wrth ddod a llywodraeth a deddfu o Lundain i Gaerdydd, mae datganoli wedi sefydlu patrwm gwahanol o lywodraethu ar gyfer Cymru. Os yw cyfiawnder yng Nghymru yn cael ei reoli gan brosesau a systemau a ganolir yn Llundain yn bennaf, sef cadw'r un drefn a fodolai cyn datganoli, mae hyn yn mynd yn groes i amcanion datganoli ac yn ymddangos fel petai yn anwybyddu neges datganoli. Byddai rhai yn ei weld fel ymyrraeth Lloegr ar ddemocratiaeth ac ar awtonomi deddfu yng Nghymru, ymyrraeth sy'n tanseilio hyder yn y gyfundrefn gyfreithiol yn y pendraw.
89. Ar y llaw arall, wrth sefydlu awdurdodaeth Gymreig, byddai'r cyfansoddiad yn fwy cyflawn o safbwynt Cymreig a Phrydeinig. Effaith cydnabod awdurdodaeth Cymru fyddai creu sefyllfa gyfansoddiadol lle y byddai barnwriaeth Gymreig yn dal y Cynulliad Cenedlaethol a Llywodraeth Cymru i gyfrif. Wedi'r cwbl, dyma'r sefyllfa yng Ngogledd Iwerddon a'r Alban.

### ***Dadl Effeithiolrwydd***

90. Bydd y gwahaniaeth yn neddfwriaeth Cymru a Lloegr yn siŵr o gynyddu yn ystod y blynyddoedd nesaf ac y mae hyn yn dwysau'r angen am system gyfiawnder ar wahân. Wedi'r cwbl, lle ceir corf o gyfreithiau cynhenid sydd yn wahanol ar gyfer Cymru, rhaid wrth system gyfreithiol sydd yn medru ymdopi gyda'r cyd-destun penodol Cymreig.<sup>70</sup> Fel y dywedodd Carwyn Jones:

'Wrth ystyried yr angen i ragor o sefydliadau cyfiawnder gael eu lleoli yng Nghymru, mae Llywodraeth Cynulliad Cymru o'r farn bod yn rhaid gwneud hynny yng nghyd-destun y ffaith bod y gyfraith mewn perthynas â Lloegr a'r gyfraith mewn perthynas â Chymru yn gwahaniaethu mwy a mwy, a chan ystyried hefyd natur ddwyieithog y ddeddfwriaeth sy'n cael ei gwneud gan Lywodraeth Cynulliad Cymru a Chynulliad Cenedlaethol Cymru'.<sup>71</sup>

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<sup>70</sup> Fel y dywedodd Syr Roderick Evans, 'There can be no doubt that if the Assembly were to acquire the increased powers available under Part 4 of the act there would be an increase in Welsh legislation and an increase in the potential for the law in Wales in relation to devolved matters to differ from the law in England.'; gweler Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>71</sup> Carwyn Jones, *Y Gyfraith yng Nghymru: Y Ddeng Mlynedd Nesa'* (Darlith Cymdeithas y Cyfreithwyr, Eisteddfod Genedlaethol Cymru, Caerdydd a'r Cylch 2008), t. 12.

91. Wrth gwrs, byddai awdurdodaeth gynhenid yng Nghymru yn medru cynllunio ar gyfer anghenion cyfreithiol Cymru mewn modd cyflawn a chynhwysfawr. Mae'r tir wedi ei fraenaru yn barod, gyda sefydlu gweinyddiaeth unedig ar gyfer y llysoedd yng Nghymru. Mae'r newid diwylliant o fewn y gymuned gyfreithiol yn golygu fod llunio polisi cyfiawnder ar gyfer Cymru yn unig bellach yn rhywbeth i'w ddisgwyl.<sup>72</sup> Roedd y galw am garchar yng Ngogledd Cymru yn esiampl o'r newid diwylliant hwn, ac yn gydnabyddiaeth o anghenion neilltuol carcharorion Cymraeg eu hiaith sydd yn wynebu rhagfarn yng ngharcharorion Lloegr.<sup>73</sup>
92. Cymru yw'r unig wlad o fewn y Deyrnas Unedig nad oes ganddi reolaeth dros gyfiawnder troseddol (eto, yn wahanol i Ogledd Iwerddon a'r Alban, ac, yn wir, Ynys Manaw ac Ynysoedd y Sianel, sydd o dan warchodaeth y wladwriaeth). Roedd polisi'r Llywodraeth rhwng 2007-11, *Cymru'n Un*, yn mynegi awydd Llywodraeth Cymru i weld datganoli'r system gyfiawnder troseddol. Yn y tymor byr, bydd elfennau o weinyddiaeth cyfiawnder troseddol yn siŵr o gael eu datganoli. Mae Gweinidogion Cymru yn gweithredu'n barod mewn rhai agweddau o'r gyfundrefn gyfiawnder troseddol. Mae hyn yn cynnwys yr heddlu, troseddwy'r ifanc, troseddau yn ymwneud a chyffuriau, a gwasanaethau iechyd ac addysg i garcharorion. Mae'r posibilrwydd y bydd Gweinidogion Cymru yn cymryd cyfrifoldeb dros yr heddlu a'r Gwasanaeth Rheoli Troseddwy'r, gan gynnwys carchardai, yn un tebygol iawn. Yn wir, efallai y bydd y Llywodraeth yng Nghaerdydd yn cymryd cyfrifoldeb dros ariannu Gwasanaeth Llysoedd ei Mawrhydi yng Nghymru yn y dyfodol agos. Byddai hynny yn gam allweddol tuag at hyrwyddo anghenion Cymru wrth ddarparu polisiâu cynhenid ar gyfer llysoedd Cymru.
93. Ond dim ond trwy gyfrwng awdurdodaeth gyflawn y byddai'r materion hyn yn cael eu gweinyddu o fewn strwythur cyflawn Cymreig. Trwy greu Uchel Lys, Llys Apêl ac Uchel Lys i Gymru, o dan arweiniad Arglwydd Prif Ustus Cymru, byddai ffocws ac arweiniad i'r gyfundrefn gyfreithiol. Byddai hynny hefyd yn hwyluso cyfathrebu rhwng y proffesiwn cyfreithiol, y farnwriaeth a'r Cynulliad Cenedlaethol fel deddfwrfa, proses a fyddai'n atgyfnerthu awdurdod cyfreithiol y proffesiwn yng Nghymru yn ei gyfanrwydd.

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<sup>72</sup> 'we need a justice system which serves the whole of Wales – a system which provides a service which is reasonably accessible wherever you live in Wales and which is available to you in either Welsh or English. The system should be tailored to meet the needs of Wales and should be capable of providing work and good career structures in Wales for those who work in it.' Gweler Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>73</sup> Syr Roderick Evans, 'Legal Wales- Possibilities for the Future', Darlith ym Mhrifysgol Bangor, 22 Chwefror 2008, t. 18-21.

## ***Y Ddadl Economaidd***

94. Mae'r papur cwmpasu yn gwahodd sylwadau ar y gost o sefydlu awdurdodaeth i Gymru. Er nad wyf mewn sefyllfa i gynnig tystiolaeth ar hyn, hoffwn gynnig rhai sylwadau ar y potensial economaidd o greu awdurdodaeth ar wahân.
95. Byddai sefydlu awdurdodaeth i Gymru yn galluogi'r proffesiwn cyfreithiol yng Nghymru i ddatblygu ei hunaniaeth broffesiynol, proses a allai gynnig hwb economaidd iddi. Mae gan ddatblygiad yr arwahanrwydd cyfreithiol hwn ei bosibiliadau o ran datblygu arbenigedd a sgiliau cyfreithiol cynhenid i gwrdd ag anghenion y cyfansoddiad.<sup>74</sup>
96. Dangosodd ymchwil a wnaed ym Mhrifysgol Abertawe fod yna ddiffyg o ran sgiliau cyfreithiol y proffesiwn cyfreithiol yng Nghymru. Ceir gorddibyniaeth ar waith cyfreithiol traddodiadol ym meysydd trosedd a gwaith teulu, meysydd sydd yn ddibynnol iawn ar gymorth cyfreithiol y wladwriaeth, tra nid oes digon o waith yn deillio o'r sector breifat. Mae diffyg sgiliau ac ystod arbenigedd cyfreithiol yn arbennig o ddwys i'r gogledd o goridor yr M4.<sup>75</sup>
97. Un o sgil-ffeithiau andwyol yr argyfwng sgiliau yw bod cryn dipyn o waith cyfreithiol Cymru yn cael ei allforio i gwmnïau cyfreithiol yn Lloegr. Yn ddi-os, mae datrys y diffyg hwn, trwy feithrin gallu cyfreithwyr Cymru i ddarparu gwasanaethau cyfreithiol o safon, yn hanfodol os yw'r proffesiwn i gyfrannu i adfywiad economaidd Cymru ac i weithredu'n effeithiol o fewn y cyd-destun deddfwriaethol datganoledig. Mae mawr angen strategaeth Gymreig ar gyfer y proffesiwn cyfreithiol sydd yn mynd i'r afael a'r argyfwng sgiliau, ond gan werthfawrogi'r cyd-destun cyfansoddiadol, demograffig, ieithyddol a chymdeithasol yng Nghymru. Mae angen atebion Gymreig i'r materion hyn, a gall datblygiad yr awdurdodaeth Gymreig fod yn fodd o ganfod llwybr tua dyfodol llewyrchus i'r proffesiwn. Gellir, felly, gweld datblygiad yr awdurdodaeth Gymreig fel cyfle economaidd i'r proffesiwn cyfreithiol. Byddai'n cynnig her i'r proffesiwn i ddatblygu arbenigedd mewn meysydd newydd yn seiliedig ar ddeddfwriaeth Cymru.<sup>76</sup> Mae'r cyfle economaidd yn allweddol i'r ddadl, ac, fel y dywedwyd, 'the contribution to the economy of Wales which a fully developed legal system would make would be substantial'.<sup>77</sup>

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<sup>74</sup> Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

<sup>75</sup> Gweler Iwan Davies and Lynn Mainwaring, 'The Provision of Private-practice Legal Skills in Wales', *Wales Journal of Law and Policy*, 4(3) (2006), 290-98.

<sup>76</sup> 'If Welsh lawyers sympathetic to the continuing process of devolution have learnt anything thus far, it is the need for them to make a greater contribution to the constitutional development of Wales': gweler Timothy H. Jones a Jane M. Williams, 'Wales as a Jurisdiction', tt.78-101, ac ar d. 100.

<sup>77</sup> Syr Roderick Evans, 'Legal Wales- Possibilities for the Future', Darlith ym Mhrifysgol Bangor, 22 Chwefror 2008, t. 1.

98. Mae cefnogaeth Llywodraeth Cymru tuag at y proffesiwn cyfreithiol yng Nghymru yn bwysig i'r drafodaeth. Wrth greu panelau o Gwnsleriaid y Frenhines a Chwnsleriaid iau i wneud gwaith eirioli a chynghori ar ran Llywodraeth y Cynulliad, roedd y Cwnsler Cyffredinol ar y pryd yn ymwybodol o bwysigrwydd cefnogi'r proffesiwn yn lleol. Roedd ei neges yn un a groesawyd yn fawr: 'mae Llywodraeth Cynulliad Cymru am i'r proffesiynau cyfreithiol yng Nghymru gael gwybod y byddai'n well ganddi, pan fo amgylchiadau'n caniatáu hynny, gyfarwyddo Cwnsleriaid lleol'.<sup>78</sup>
99. Mae cyfle hefyd i ddarparwyr addysg a hyfforddiant ac i ysgolheictod cyfraith yng Nghymru i fod yn gyfrannwr yn y dasg o ddatblygu awdurdodaeth Cymru, gan sicrhau bod yr arbenigrwydd yng Nghymru i gwrdd ag anghenion yr awdurdodaeth newydd.
100. Efallai y bydd y Bar yng Nghymru yn mynd at i sefydlu presenoldeb proffesiynol yn y brifddinas yn gyson a'r hyn a geir trwy weddill y Deyrnas Unedig? Efallai, cyn bo hir, y gwelwn y dydd pryd y bydd gan y Bar ei chanolfan yng Nghymru?

### ***Y Ddadl ddiwylliannol-ieithyddol***

101. Nid oes angen ymhelaethu gormod ar y berthynas bwysig sydd rhwng yr iaith Gymraeg a gweinyddu cyfiawnder yng Nghymru.<sup>79</sup> Gan fod yr hawl i ddefnyddio'r iaith Gymraeg mewn gweithrediadau cyfreithiol wedi ei gyfyngu i Gymru,<sup>80</sup> mae'r dimensiwn ieithyddol hwn yn ychwanegu elfen arall at y ddadl dros awdurdodaeth Gymreig.<sup>81</sup> Meddai Syr Roderick Evans:

'Rwyf fi'n digwydd credu...ei bod yn briodol fod hawliau siaradwyr Cymraeg yn cael eu cyfyngu i Gymru. Ond mae gan y penderfyniad gwleidyddol i gyfyngu arnynt fel hyn ganlyniad pwysig. Os yw'r hawl i ddefnyddio'r iaith i fod yn ystyrlon, ac os yw'r Gymraeg a'r Saesneg i gael eu trin yn gyfartal, o fewn yr ardal ddaearyddol lle gweithredir yr hawl statudol, rhaid cael yr holl sefydliadau cyfreithiol ar gyfer gweithredu'r ddeddf ac ar gyfer caniatáu i

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<sup>78</sup> Carwyn Jones, *Y Gyfraith yng Nghymru: Y Ddeng Mlynedd Nesa*, t.13.

<sup>79</sup> Er mwyn cael argraff o agwedd gadarnhaol y gyfundrefn gyfreithiol tuag at yr iaith Gymraeg, gweler, Yr Arglwydd Judge, 'The Welsh Language: Some Reflections on its History', Darlith Agoriadol Sefydliad Hywel Dda, Prifysgol Abertawe, 21 Mehefin 2011.

<sup>80</sup> Gweler *Williams v Cowell* [2000]1 W.L.R. 187

<sup>81</sup> 'Our linguistic make up is fundamentally different from that of England. We have two official languages and court proceedings in Wales are conducted in Welsh and English on a daily basis – often with both languages being used in the same case. Traditionally, it is in the more rural areas of Wales that the Welsh language has been at its strongest and unfortunately it is often in these areas that the local courts have been closed either because they are regarded as too small or the cost of maintaining them regarded as too high.': gweler Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

siaradwyr Cymraeg a allai fod am arfer ei hawl statudol i ddefnyddio'r iaith Gymraeg.<sup>82</sup>

102. Mae'r sylwadau hyn hefyd yn adlewyrchiad o bwysigrwydd cenedligrwydd Cymru i'r drafodaeth, ac yn enwedig ei nodwedd genedlaethol fwyaf allweddol, sef ei hiaith. Yr hyn sydd yn drawiadol yw cyfansoddiad y farnwriaeth yng Nghymru bellach, gyda nifer ohonynt yn medru'r Gymraeg a chanddynt ddealltwriaeth ddofn o anghenion cymdeithasol a chyfreithiol Cymru. Mae'r ffaith fod deuddeg o farnwyr cylchdaith, deg barnwr rhanbarth, pymtheg o ddirprwy farnwyr rhanbarth a thair ar ddeg o gofiaduron yn medru cynnal achosion yn Gymraeg yn arwydd o barch at y Gymraeg a'i siaradwyr o fewn y system gyfreithiol.<sup>83</sup>

## CASGLIADAU AC OPSIYNAU

103. Ar y 3ydd o Fawrth 2011, cafwyd mandad democrataidd dros y cyfansoddiad newydd a sefydlwyd gan Ddeddf Llywodraeth Cymru 2006, ac y mae'r Cynulliad Cenedlaethol nawr yn gweithredu fel deddfwrfa a chanddi'r gallu i greu deddfwriaeth sylfaenol o fewn y pynciau datganoledig. Roedd hwn yn gam pwysig tuag ati gysoni'r sefyllfa gyfansoddiadol o fewn gwledydd datganoledig y Deyrnas Unedig. Dyma gyd-destun y drafodaeth hon.

104. Nid ar sail beirniadaeth o'r system gyfiawnder presennol y cyfyd y dadleuon hyn o blaid datblygu awdurdodaeth i Gymru, ond oherwydd bod angen ymateb strwythurol priodol o fewn y system gyfreithiol yng Nghymru i'r penderfyniad a wnaeth pobl Cymru ym Mawrth 2011.

105. Ar y llaw arall, rhaid hefyd derbyn mai nid ar chwarae bach y mae datod clymau cyfreithiol sydd wedi bodoli am ganrifoedd. Fel y dywedodd Rawlings, 'a centuries-long process of legal, political and administrative assimilation with a powerful neighbour cannot be wished away'.<sup>84</sup>

106. Ond mae'r ddadl dros awdurdodaeth gyfreithiol yn seiliedig yn bennaf ar yr angen i normaleiddio'r cyfansoddiad yng Nghymru drwy sicrhau fod yna sefydliadau a strwythurau cyfreithiol cynhenid sydd yn medru gweithredu o fewn y cyd-destun cyfansoddiadol. Yn ogystal, mae'r fath ddatblygiad yn cynnig cyfle democrataidd, cyfreithiol, cymdeithasol ag economaidd. Er nad oedd creu awdurdodaeth ar wahan yn un o amodau i'r bleidlais yn refferendwm Mawrth 2001, mae

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<sup>82</sup> Syr Roderick Evans, 'Cymru'r Gyfraith- Camu 'Mlaen', t. 7.

<sup>83</sup> Gweler Syr David Lloyd Jones, *Peirianwaith Cyfiawnder mewn Cymru sy'n newid*, t. 21.

<sup>84</sup> Gweler Richard Rawlings, 'Say not the Struggle naught Availeth': *The Richard Commission and After*, Darlith Flynnyddol Canolfan Materion Cyfreithiol Cymreig, Prifysgol Aberystwyth, 2004, t. 23.

sefydlu awdurdodaeth yn ddatblygiad sydd yn synhwyrol ac yn gydnaws a datblygiad datganoli yng Nghymru heddiw.

107. Mewn darlith gyhoeddus yn 2006, cydnabu Carwyn Jones y byddai'r ddadl o blaid awdurdodaeth ar wahân yn cryfhau petai yna bleidlais gadarnhaol o blaid deddfwrfa mewn refferendwm. Roedd datblygiad awdurdodaeth ar wahân i Gymru yn cael ei gydnabod yn agored a chyhoeddus fel un o oblygiadau'r fath benderfyniad. Meddai:

'Yr wyf yn cydnabod nad oes unrhyw beth yn Neddf Llywodraeth Cymru 2006 ynnddi ei hun nac ohoni ei hun yn creu awdurdodaeth ar wahan i Gymru o fewn y Deyrnas Unedig, ac nid wyf o'r farn bod achos ar hyn o bryd o blaid awdurdodaeth ar wahân. Serch hynny, os gwelir sefyllfa lle bydd y Cynulliad yn gallu arfer pwerau deddfu sylfaenol, mae'n anochel, yn fy marn i, y bydd yn rhaid cynnal trafodaeth ynghylch a ddylid cadw un awdurdodaeth sengl ar gyfer Cymru a Lloegr ai peidio. Ni wn am unrhyw le arall yn y byd lle mae gan ddeddfwrfa bwerau deddfu, ond lle nad oes ganddi awdurdodaeth diriogaethol gysylltiedig.'<sup>85</sup>

108. Wrth gwrs, efallai y bydd datblygiad yr awdurdodaeth Gymreig, ac union ffurf yr awdurdodaeth honno, yn dibynnu ar y modd y bydd yr awdurdodaeth unedig bresennol yn cwrdd yn llwyddiannus a gofynion y cyfansoddiad newydd.<sup>86</sup> Fel y dywedodd Syr Roderick Evans, 'the ultimate decision may be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.'<sup>87</sup>

109. Bydd yr angen am ddeddfwriaeth yn Llundain hefyd yn ddibynol ar yr ateb i'r cwestiwn, pa mor radicalaidd fydd y cam nesaf tuag at greu system gyfiawnder ar wahan i Gymru? Petai yna benderfyniad i greu awdurdodaeth tebyg i'r hyn a geir yng Ngogledd Iwerddon, a hynny ar unwaith, yna byddai'r angen am ddeddfwriaeth yn fwy amlwg. Wrth gwrs, mae'n hynny'n ddibynol ar ba mor sylweddol yw'r newidiadau a gyflwynir. Ni fyddai angen deddfwriaeth er mwyn creu mân newidiadau strwythurol i weinyddiaeth y llysoedd. Hyd yma, ni fu angen deddfwriaeth sylfaenol er mwyn datganoli neu ail-drefnu system gyfiawnder Cymru, megis yng nghyd-destun y Llys Gweinyddol neu ffiniau'r Gylchdaith.

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<sup>85</sup> Carwyn Jones, *Y Gyfraith yng Nghymru: Y Ddeng Mlynedd Nesa*, tt. 14-15.

<sup>86</sup> 'One factor which might prove influential in deciding whether Wales develops a separate structure from that in England will be the degree to which the present institutions of England and Wales are prepared to accommodate within an England and Wales jurisdictional structure the development in Wales of institutions, bodies and organizations which meet the developing needs of Legal Wales. A lack of flexibility in this respect on the part of England and Wales institutions and a failure or refusal to respond positively to the legitimate expectations of Wales are likely to result in hastening the creation of a freestanding legal system in Wales along the lines of those which exist in Northern Ireland and Scotland rather than prevent it.' gweler Syr Roderick Evans, 'Legal Wales- Possibilities for the Future', t. 8.

<sup>87</sup> Syr Roderick Evans, 'Devolution and the Administration of Justice', uchod.

110. A fyddai angen refferendwm arall? Barn Jack Straw oedd, y 'byddai prosiect mor fawr ac uchelgeisiol yn sicr yn gofyn am ddeddfwriaeth sylfaenol, ac mae'n anochel y byddid disgwyl iddo gael ei gymeradwyo gan refferendwm.'<sup>88</sup>
111. Ond nid wyf fi yn credu y byddai angen refferendwm o gwbl. Roedd angen refferendwm i gymeradwyo swyddogaeth y Cynulliad Cenedlaethol fel deddfwrfa gan fod hynny yn effeithio ar y gyfraith ei hun, sef cynnwys y gyfraith, a'r modd ac ym mhle y caiff deddfwriaeth sylfaenol ei greu. Ond mater gweinyddol a strwythurol yw'r modd y rheolir y system gyfreithiol. Ni fyddai creu awdurdodaeth ar wahan i Gymru yn gam digon sylweddol i warantu refferendwm. Dadl dros greu strwythurau newydd yw hanfod y ddadl hon dros awdurdodaeth ar wahân.
112. Dylid felly ystyried datblygiad awdurdodaeth ar wahân fel sgil-effaith i'r penderfyniad i greu deddfwrfa, fel cam angenrheidiol er mwyn cynnal swyddogaeth y ddeddfwrfa o fewn y cyfansoddiad, ac yng ngyd-destun yr angen i gysoni'r cyfansoddiad y Deyrnas Unedig. Nid fydd angen refferendwm arall er mwyn cyflawni hyn, a gellid disgwyl i'r aelodau etholedig yn Llundain a Chaerdydd i gymryd y camau priodol i sefydlu'r strwythurau cyfreithiol angenrheidiol. Wedi'r cwbl, a fu refferendwm cyn sefydlu Llys Cyfiawnder Ewrop neu'r Llys Troseddol Rhyngwladol, datblygiadau oedd yn creu awdurdodaethau cyfreithiol rhyngwladol bwysig? Nid wyf yn ymwybodol o unrhyw gysail lle cynhaliwyd refferendwm yn un swydd er mwyn sefydlu awdurdodaeth gyfreithiol.
113. Cyn y gellid cyflwyno unrhyw ddeddfwriaeth i sefydlu awdurdodaeth i Gymru yn unol â model Gogledd Iwerddon, byddai'n rhaid bod yn glir iawn ynglŷn â'r oblygiadau cyfreithiol, cyfansoddiadol ac economaidd. Credaf y byddai cynnal ymchwiliad cynhwysfawr ar y pwnc ar ffurf comisiwn (megis Comisiwn Richard a osododd y sylfaeni ar gyfer datganoli deddfwriaethol i Gymru) yn fanteisiol. Byddai comisiwn o'r fath yn cynnwys arbenigwyr cyfansoddiadol a chyfreithiol, a'r dasg fyddai casglu tystiolaeth fanwl a chynnig opsiynau a, lle byddo hynny'n briodol, argymhellion ar gyfer deddfwriaeth. Ar y llaw arall, gan gofio fod Comisiwn Silk yn ystyried trefniadau cyfansoddiadol yn sgil datganoli ar hyn o bryd, y mae'r comisiwn hwn, o bosibl, yn gymwys i ystyried y ddadl dros awdurdodaeth ar wahân fel rhan o'i chylch gorchwyl.
114. Fel opsiwn amgen i ddatblygiad awdurdodaeth llwyr ar wahân, gellid ystyried cyflwyno gwelliannau a newidiadau graddol i weinyddiaeth y drefn bresennol wrth gadw'r awdurdodaeth unedig, newidiadau na fyddai yn gofyn am ddeddfwriaeth. Er enghraifft, yn

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<sup>88</sup> Yr Arglwydd Ganghellor a'r Ysgrifennydd Gwladol dros Gyfiawnder, Y Gwir Anrhydeddus Jack Straw AS, 'Gweinyddu Cyfiawnder yng Nghymru', uchod.

hytrach na sefydlu barnwriaeth gwbl ar wahan i Gymru, a hynny o dan Arglwydd Brif Ustus, gellid codi statws barnwr llywyddol Cymru a'i ddynodi fel y Dirprwy Arglwydd Brif Ustus (Cymru). Gellid estyn tymor y swydd a dirprwyo rhagor o gyfrifoldebau iddo dros y llysoedd a'r farnwriaeth yng Nghymru. Dyma oedd awgrym yr Arglwydd Dafydd Elis-Thomas yn ei ddarlith yn yr Eisteddfod Genedlaethol rai blynyddoedd yn ôl. Awgrymodd y dylai Barnwr Llywyddol Cymru wasanaethu am dymor o chwe blynedd yn hytrach na phedair, fel y gwna ar hyn o bryd, ac y dylid cyfeirio ato fel, *Arglwydd Lywydd y Llysoedd yng Nghymru*.<sup>89</sup>

115. Ond rhaid cofio i'r sylwadau hyn gael eu cyflwyno cyn y datblygiadau cyfansoddiadol a ddaeth yn sgil refferendwm Mawrth 2011. Erbyn hyn, efallai nad yw'r fath syniad yn ddigon uchelgeisiol i gwrdd a'r sefyllfa yng Nghymru bellach, ac mai barnwriaeth annibynol o fewn awdurdodaeth ar wahân sydd yn cynnig y ffordd ymlaen.
116. Os mai addasu'r awdurdodaeth unedig fyddai'r opsiwn a gymerir, gellid o leiaf sicrhau fod gan yr Uchel Lys a'r Llys Apêl swyddfeydd parhaol yng Nghymru i ddelio gydag apeliadau o Gymru a sicrhau eu bod yn cael eu clywed yng Nghymru.
117. Mae'r proffesiwn cyfreithiol Cymreig yn graddol addasu i'r newidiadau cyfansoddiadol, ac y mae gan Gymdeithas y Cyfreithwyr ei swyddfa yng Nghaerdydd. Mae Pwyllgor Sefydlog Cymru'r Gyfraith yn engrhaifft arall o ymateb y proffesiwn cyfreithiol i'r cyd-destun cyfansoddiadol newydd. Dylid annog a chefnogi datganoli professiynol er mwyn sicrhau presenoldeb yng Nghymru. Yn ogystal, byddai sefydlu Cyngor Addysg Gyfreithiol i Gymru yn fodd o hyrwyddo ysgolheictod cyfraith yn y prifysgolion fyddai'n rhoi lle dyledus a phriodol i gyfraith Cymru ac oblygiadau cyfreithiol datganoli o fewn y cwricwlwm. Gall y Gweinidog Addysg yng Nghaerdydd sicrhau'r datblygiad hwn yn ddi-drafferth.
118. Yn y pendraw, mater i'r aelodau etholedig yng Nghaerdydd a Llundain fydd penderfynu i ba raddau, ym mha fodd ar ba gyflymder y dylid addasu'r system gyfreithiol yng Nghymru i gwrdd ag anghenion y cyfansoddiad yng Nghymru. Er y byddai cymeradwyaeth y proffesiwn cyfreithiol i unrhyw newidiadau a gyflwynir yn rywbeth i'w ddeisyfu, dyletswydd y gymuned gyfreithiol fydd cwrdd a dymuniad pobl Cymru fel y caiff ei fynegi trwy brosesau democrataidd a chan gynrychiolwyr etholedig.

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<sup>89</sup> Dafydd Elis Thomas, yn ei ddarlith, 'Cyfansoddiad Newydd Cymru', Eisteddfod Genedlaethol Cymru, Y Bala, 2009.



Inquiry into the establishment of a separate Welsh jurisdiction  
Response from the Welsh Committee of Judges'  
Council, Judiciary of England and Wales



JUDICIARY OF  
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

David Melding AM  
Chair of the Constitutional and Legislative Affairs Committee  
Constitutional and Legislative Affairs Committee  
Tŷ Hywel  
National Assembly for Wales  
Cardiff CF99 1NA

14 February 2012

Dear *David Melding,*

As Chair of the Welsh Committee of the Judges' Council, I have pleasure in enclosing our response to the Constitutional and Legislative Affairs Committee's inquiry into the establishment of a separate Welsh jurisdiction.

*Yours sincerely,*

*John Judge*



JUDICIARY OF  
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

**Response of the Welsh Committee of the Judges' Council to the  
Constitutional and Legislative Affairs Committee of the National  
Assembly's Call for Evidence**

1. This response to the inquiry into the establishment of a separate Welsh jurisdiction conducted by the Constitutional and Legislative Affairs Committee of the Welsh Assembly (hereafter, 'the Committee') is submitted by the Welsh Committee of the Judges' Council (hereafter, 'the Welsh Committee').
2. The Judges' Council was first established under the Judicature Act 1873. In its modern form it is one of the bodies through which the Lord Chief Justice exercises his responsibilities under the Constitutional Reform Act 2005<sup>1</sup>. The Welsh Committee of the Judges' Council provides advice and consideration of specific matters affecting the administration of justice in Wales.
3. The purpose of this response is to focus, as the Committee requests, on the technical aspects and practical implications of creating a separate jurisdiction for Wales. Obligations under Article 6 of the European Convention on Human Rights and the Commonwealth (Latimer House) Principles on the Three Branches of Government must be kept in mind.
4. It would be inappropriate for the Welsh Committee to comment on the desirability or otherwise of the creation a separate jurisdiction for Wales or on any consequential 'political' issues which may arise. The Welsh Committee will confine its response to addressing each of the four specific questions posed in the Committee's request.
5. Our response highlights matters which, from the perspective of the judiciary, require detailed analysis and careful consideration before any changes are decided upon. The Welsh Committee acknowledges that appropriate judicial structures in Wales are necessary to support existing constitutional changes and to accommodate possible further changes.

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<sup>1</sup> Further information about the Judges' Council is available here: [www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/how-the-judiciary-is-governed/judges-council](http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/how-the-judiciary-is-governed/judges-council)



6. We note that the Welsh Assembly Government may produce a Green Paper on the same subject, and that the work of the Committee will be taken into consideration in the formation of the Green Paper.

### Question 1

#### The meaning of the term “separate Welsh jurisdiction”

7. The All Wales Convention Report stated that ‘jurisdiction can be indicated by a defined territory, a distinct body of law, or a separate structure of courts and legal institutions’<sup>2</sup>. ‘Jurisdiction’ is not a term of art. The All Wales Convention statement is adequate for the purpose of this response.
8. Wales and England are commonly spoken of as forming a unitary jurisdiction. In historical terms, this arises from their shared laws (since 1536) and their shared courts (since 1830<sup>3</sup>). In recent years there has been some divergence between the body of law which applies in Wales and in England, and Welsh justice has increasingly come to be administered in Wales. Some commentators observe that through this differentiation there already exists a distinct Welsh jurisdiction, which is worthy of examination on its own terms.<sup>4</sup> The primary unifying features of the Welsh and English jurisdiction, while other features exist, are now the shared common law (and system of precedent), a large body of shared statute law, and the shared judiciary and court administration.
9. Ultimately, the divergence of the Welsh jurisdiction could entail a division of the Welsh and English judiciary and the uncoupling of the common and statute law which applies in each nation. Either step would constitute a major change in our constitutional arrangements. Both have been the subject of Government consultation in the past.
10. There is scope for further differentiation between the legal systems in Wales and England without severance of our judiciary and our common and statute law. The approach would focus on the development of Welsh-based courts and strengthening Welsh legal institutions (paragraphs 16 and 42 below).

### Question 2

#### The potential benefits, barriers and costs of introducing a separate Welsh jurisdiction.

11. The Committee’s question assumes that no element of a separate jurisdiction exists in Wales. However, some difference in laws and some separation in court administration are now discernable. In this section, the present arrangements are summarised.

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<sup>2</sup> All Wales Convention Report, 2009, at paragraph 3.9.16

<sup>3</sup> The *court system* had become entwined before the Law Terms Act of 1830, through the claimed concurrent jurisdiction of the Court of Kings Bench with the Courts of Great Session, see e.g. *R v Athos* (1723), and through use of *latitat*.

<sup>4</sup> See Jones, T. H. & Williams, M.J. “Wales as a jurisdiction” [2004] P.L. 78

12. The question posed will be addressed in relation to: first, separation of Welsh courts and court administration; second, separating the Welsh judiciary, and; third, developing a separate system of laws.

#### *Separate Courts and Court Administration*

13. Subsequent to the abolition of the Courts of Great Session, local courts continued to exist in Wales. Quarter sessions and petty sessions survived the changes of 1830, and were 'essentially local institutions'<sup>5</sup>, while county courts have sat in Wales since 1847. It has been said that 'Wales ha[s] only been without courts with competence in smaller claims for sixteen years from 1830 to 1846'<sup>6</sup>.
14. Courts with competence in larger claims have increasingly come to have a base in Wales. As the Committee notes, a Mercantile Court, a Chancery Court and an Administrative Court<sup>7</sup> have been established in Wales. The only specialist court within the High Court not currently represented in Wales is the Admiralty Court<sup>8</sup>. The Court of Appeal sits in Wales. Cardiff is at present the only place outside London at which the Civil Division of the Court of Appeal sits. It does so regularly. Criminal Division sittings have been less frequent and without a regular pattern. However, these must be understood to be manifestations of the fact that all these courts, and the judges sitting in them, are judges of England and Wales. Sittings of the Upper Tribunal take place in Wales.
15. Since 2007 and the creation of HMCS (now HMCTS) Wales, the administration of the courts in Wales has been co-extensive with the geographic borders of Wales. The cross-border tribunals are now also administered on this basis. The devolved tribunals have, of course, similarly been administered entirely inside Wales' borders. Responsibility for the administration of tribunals which operate within devolved areas rests with the Welsh Assembly Government<sup>9</sup>. Responsibility for the administration of the courts and cross-border tribunals in Wales rests with HMCTS, an agency jointly responsible to the Lord Chief Justice and to the Lord Chancellor.<sup>10</sup>
16. Without a complete separation from England, further separation of Welsh courts and court administration might consist in:

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<sup>5</sup> Devolution Conference report at appendix V, paragraph 19 (1920)

<sup>6</sup> Watkin, T.G. "The Legal History of Wales" (2007), at p 171

<sup>7</sup> There are 'excepted classes' of Administrative Court claims, which may only be issued at the Royal Courts of Justice in London. These are set out at paragraph 3.1 of Practice Direction 54D to the Civil Procedure Rules. They include proceedings relating to control orders. Some Chancery disputes must similarly be heard in London. These include revenue and High Court patent disputes.

<sup>8</sup> Lloyd Jones, D. "The Machinery of Justice in a Changing Wales", in *Trafodion Anrhydeddus Gymdeithas y Cymmrodorion 2009 (Transactions of the Honourable Society of Cymmrodorion 2009)*, New Series, Volume 16 (2010)

<sup>9</sup> The Administrative Justice and Tribunals Council Welsh Committee has investigated the current system of responsibility for Welsh tribunals. Its reports are available here: [www.justice.gov.uk/ajtc/welsh/publications.htm](http://www.justice.gov.uk/ajtc/welsh/publications.htm)

<sup>10</sup> The National Assembly has certain responsibilities for example in respect of youth justice and CAFCASS Cymru (see section 35 of the Children Act 2004).

- a. Developing a High Court office in Cardiff to coordinate further sittings of the High Court in Wales;
  - b. Establishing a Court of Appeal office in Cardiff to coordinate further sittings of the Court of Appeal (civil and criminal divisions) in Wales;
  - c. Giving to the Welsh Presiding Judges a wider discretion to sit in Wales, when reasonably required for purposes of administration, or to hear cases in Wales and over judicial deployment in Wales;
  - d. Changing the system for Welsh judicial appointments (paragraph 26 below);
  - e. Strengthening responsibility for the administration of justice in Wales, either with or without further devolution of executive or legislative functions (paragraph 41 and following below).
17. A working group of the Judicial Executive Board made recommendations for the hearing of High Court and Court of Appeal civil and administrative cases outside London in a report prepared in 2006, to which the Committee is referred<sup>11</sup>. The group stated: “in large measure and with some variation, we accept and adopt the argument that there should be a strong expectation that Welsh cases are heard in Wales”<sup>12</sup>.
18. In terms of the practicalities of hearing cases outside London, the working group commented on the implications for (tight) judicial resources,<sup>13</sup> the difficulty if “there is no back up work for the judge if the list collapses”<sup>14</sup>, and the necessity for administrative centres with capacity to administer and list locally, staffed by people who know sufficiently and in advance when appropriate judges will be securely available<sup>15</sup>.
19. Each of these factors, which were considered by the working group particularly in respect of Administrative Court cases, bear on the question of the practicality of increasing the volume of other High Court cases, and of Court of Appeal cases, in Wales. These factors, including the cost implications, need to be considered, when the principle that Welsh cases should be heard in Wales, and broader questions in relation to a separate jurisdiction, are debated.
20. The Committee considers the judiciary and the system of law under separate headings.

### *Separate judiciary*

21. To a large extent cases heard in Wales are presided over by a judiciary which is based in Wales. Lay Justices who live in Wales serve in their local justice areas. In respect of full time, professional judges, Wales is served by six District

<sup>11</sup> The report is available at [www.judiciary.gov.uk/publications-and-reports/reports/general/justice-outside-london/index](http://www.judiciary.gov.uk/publications-and-reports/reports/general/justice-outside-london/index)

<sup>12</sup> Working Group report, paragraph 65. In respect of the Administrative Court, this aim is reflected in Practice Direction 54D of the Civil Procedure Rules, which sets out the ‘general expectation’ that proceedings will be administered and determined in the region with which the claimant has the closest connection, while where the claim raises devolution issues consideration will be given to whether it should more appropriately be determined in London or Cardiff (para 5.2(g)).

<sup>13</sup> Working group report para 82 & 87

<sup>14</sup> *Ibid* para 84

<sup>15</sup> *Ibid* para 81, 84 & 88

Judges (Magistrates Courts), judges who sit alone to hear summary trials, 26 full time District Judges who sit in the civil courts, and 27 full time Circuit Judges. In addition to this, two High Court Judges are appointed as Presiding Judges for Wales. They sit for half the year in London and half the year in Wales. There is also a Family Liaison High Court Judge who sits in Wales for about 18 weeks a year, and High Court Administrative and Chancery supervising judges. Other members of the High Court and the Court of Appeal sit in Wales at intervals throughout the year. The senior Welsh tribunal judiciary meet on a regular basis.

22. There are some distinctively Welsh judicial institutions. There exists, in addition to the Judges' Council Committee for Wales, the Association of Judges for Wales and the Welsh Bench Chairmen's Forum. The Circuit and District Judges Associations also have a Welsh dimension. A Welsh Committee of the Judicial College is to be formed, the Chairman also being a member of the main College Board.
23. In terms of appointment and training, the ability to speak Welsh can (and frequently is) specified as being essential for appointment to particular judicial posts, and it is possible to advertise specifically for Welsh speaking lay justices. Across both nations, the salaried judiciary is appointed following competitions administered by the Judicial Appointments Commission. Lay justices are formally appointed by the Lord Chancellor following the recommendation of local Advisory Committees. Specialist training, administered by the Judicial College, is provided for judges in the use of the Welsh language in court.
24. There are no formal barriers between the Welsh and English judiciary. Local area provisions apply in respect of lay justices, but in respect of the salaried judiciary, once appointed, a judge is capable of being deployed to work in courts in either nation, or may move between the two, as, increasingly, judges of the High Court move. The Lord Chief Justice has responsibility for judicial welfare, training, deployment and the allocation of work, representing the views of the judiciary to parliament and to ministers, and has shared responsibility for judicial discipline and the effective operation of the Court system. He is the head of the judiciary in Wales and in England. The Senior President of Tribunals has statutory responsibility for tribunal judiciary, excluding those of devolved tribunals.
25. Separation of the Welsh and English Judiciary might entail adopting a separate system of appointments to the Welsh bench, creating a separate High Court and Court of Appeal for Wales, and, ultimately, providing separate leadership of the Welsh judiciary. In theory, these measures could take place without any (further) separation of Welsh and English law, and the practical consequences which follow can be examined in isolation (as, for convenience, they are here). However, the issues of a separate judiciary and separate laws are inextricably entwined. The evidence of Lord Justice Eldon Bankes, an eminent judge with strong Welsh connections, to the Government's 1920 Conference on Devolution was that "unless the jurisdiction [of Welsh judges]

was to be exclusive, as is the case in Scotland and in Ireland, it seems hardly worth while to set up a separate judiciary for Wales<sup>16</sup>.

26. Without separating the Welsh and English judiciary, consideration could be given to establishing a Welsh Committee of the Judicial Appointments Commission, for appointments below High Court level<sup>17</sup>, or a judicial Appointments Commission for Wales. Judicial involvement in appointments is essential. Concern has been expressed about the present position in relation both to court and to tribunal appointments in Wales.
27. It is imperative that, if any form of separation of the Welsh judiciary is adopted, the independence of the Welsh judiciary from the other branches of state be maintained. Similarly, if, as mooted at paragraph 16(e) above, the committee were to consider changes not only to the remit of HMCTS Wales (or any successor agency), but to its system of governance, the judiciary's primary concern would be that the courts in Wales remain independent from the Welsh executive. The independence of the courts and tribunals is a vital element of the independence of the judiciary, which must be safeguarded (paragraph 42 below).
28. The practical implications of creating a separate Welsh judiciary have been addressed in past consultations and inquiries<sup>18</sup>. While present circumstances are different from those in the early part of the twentieth century, the basic issues arising are the same. The Committee's attention is drawn to questions arising from those inquiries, which include:
  - a. The volume of High Court and Court of Appeal cases which arise in Wales, and whether this would generate sufficient work for divisions of those courts sitting full time in Wales without requiring its judges to undertake work of a lower level, which may in consequence lessen the desirability of Welsh High Court and Court of Appeal positions to potential applicants<sup>19</sup>;
  - b. Whether the present compliment of judges sitting in Wales, and of legal practitioners based in Wales, is sufficient to establish a resident High Court and Court of Appeal bench;
  - c. Whether the collegiate quality of the higher judiciary could be maintained across the separate judiciaries, and, if not, whether the risk arises of conflicting authorities across the separate divisions of the

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<sup>16</sup> The record of Lord Justice Bankes' evidence is available at the Public Records Office with reference LCo2/507

<sup>17</sup> The current functioning of the Judicial Appointments Committee is discussed in relation to Wales at the Legal Wales Conference in Cardiff on 9<sup>th</sup> October 2009 in a lecture available in Welsh here [www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-pill-legal-conf-wales-welsh-version.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-pill-legal-conf-wales-welsh-version.pdf), and in English here: [www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-pill-legal-wales-conf.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-pill-legal-wales-conf.pdf)

<sup>18</sup> In 1919 – 1920 the devolution of justice to Wales was considered as part of a Conference on Devolution chaired by the Speaker, James W Lowther. Lord Stuart of Wortley chaired a Committee on the Judiciary, the report from which formed Appendix V to the Conference Report. In 1943- 1944 the War Cabinet considered again the question of devolution of justice in the context of a request made by the Welsh Members of Parliament for a Secretary of State for Wales [Public Records Office document LCo2/3214].

<sup>19</sup> See evidence of Sir John Sankey to the 1920 Conference, LCo2/507, page 4

courts and chambers of the Upper Tribunal in Wales and in England (with, in consequence, an increase in the number of appeals, and decrease in legal certainty<sup>20</sup>);

- d. The extent to which the current cross-over of Welsh and English judges enriches judicial experience and the law, by, for example, broadening the experiences of the judges;
- e. Whether the creation of separate judiciaries would cause any loss, to Wales, of its association with a court system that has international standing, which may help attract international business to Wales;
- f. What are the distinctive needs of Wales which necessitates or makes desirable a separate system of judicial appointments, and could these distinctive needs be met within the current appointments system more cost effectively than by establishing a new system;
- g. How should any separate system of appointments operate, how would judicial independence be enshrined within the system, would a separate office of the Judicial Appointments and Conduct Ombudsman be necessary, and what would be the costs inherent in establishing the separate system;
- h. What are the distinctive needs of judges sitting in Wales which necessitates or makes desirable a separate training organisation, and could these distinctive needs be catered for by the existing Judicial College more cost effective than by establishing a new institution;

29. These are questions, which, in the Welsh Committee's view, the Assembly and Welsh Government should address.

#### *Separate system of law*

30. There is a small, but growing body of statute law which is unique to Wales. It comprises the Acts (and formerly the measures) of the Welsh Assembly and the Acts of the United Kingdom parliament which apply uniquely to Wales

31. The common law is shared.

32. Welsh and English systems of law are likely to become increasingly separate if further areas of legislative competence are devolved to the Welsh Assembly. Responsibility for implementing EU law within newly devolved areas would fall to the Welsh Government.

33. The increased separation of the Welsh and English system of law would also arise from the uncoupling of our (shared) common law. Judges in Wales might no longer be required to follow the decisions of higher courts, or the Upper

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<sup>20</sup> See the comments of Sir Claud Schuster in his evidence to the 1920 Conference that, 'no two minds operating on the same subject matter in Cardiff and London respectively can be expected always to come to the same conclusion' and 'if the Court of Wales has a jurisdiction which is co-ordinate and equal within its own limits with the English Court, the result will be that the two courts will come to different conclusions upon similar matters....The only agency to produce co-ordination between the judicial system between the two countries will be the House of Lords, and it is not reasonable to suppose that the litigant should be forced to have recourse to the House except in cases of great importance either in principle or amount' (record of evidence at page 23). This divergence would not be problematic if the systems of law were uncoupled in any event.



Tribunal, in England reached on the same point of law, but would instead be free to reach their own decisions. If the Northern Irish model were followed, the judgments of the United Kingdom Supreme Court would be binding on Welsh judges where such judgments concerned Great British or United Kingdom legislation, Welsh common law, or questions arising out of areas in which Welsh and English common law was the same. Judgments of other English courts and of the Upper Tribunal on similar areas might be persuasive, but would not be binding.

34. As noted above, the questions of a separation of law and of a separation of judges are intertwined. The purpose of creating a separate judiciary if there is only a limited separation of law should be closely examined. On the other hand, a separate judiciary is not a necessary consequence of an increased differentiation of Welsh and English law. It is an essential judicial function to identify the body of law which is relevant to a particular dispute, and to apply it. Judges develop specialism and familiarity with dealing with particular bodies of law, but, particularly in our higher courts, adjudicate on disputes in a range of areas to which distinct laws apply.
35. The practical consequences of increasing separation in Welsh and English substantive law therefore include the need to assess the extent to which a separate judiciary should follow, and the questions raised at paragraph 28 above pertain. In addition, however, consideration will need to be given to the following:
  - a. What are the distinctive needs of Wales which the common law must meet, and, given the flexibility of the common law to adapt to particular circumstances, whether it could do so without any formal uncoupling of the development of Welsh and English common law;
  - b. Whether pre-existing common law would continue to be treated as the law in Wales, and how likely Welsh judges would be to depart from pre-existing common law in any event;
  - c. Whether the uncoupling of Welsh and English common law would introduce legal uncertainty, and, if so, the volume of litigation, including appeals, which would arise from giving to Welsh judges the power to depart from English common law, on questions including the circumstances in which they should so depart;
  - d. Developing scrutiny systems to ensure compliance with EU law, to avoid conflicts with the United Kingdom's international obligations, and to limit litigation under s 94(6)(c) of the Government of Wales Act 2006 (or any succeeding provision);
  - e. The implementation of a system for determining the choice of jurisdiction between England and Wales, for summoning litigants and witnesses, and for transferring cases between the two jurisdictions. The volume of litigation which may arise in connection with choice of forum;
  - f. The implementation of systems for recognising and enforcing cross-border judgments;
  - g. The establishment in Wales of Welsh versions of judicial rule making committees (such as the Civil Procedure and Criminal Procedure Rule Committees);

- h. The establishment in Wales of distinct forms of the legal institutions which currently exist to promote the development of Welsh and English law (e.g. the Law Commission) support the judiciary (e.g. the Judicial College), and maintain standards (e.g. the Judicial Appointments and Conduct Ombudsman);
- i. In respect of any separation of the criminal law and devolution of criminal justice, the establishment of a criminal justice system infrastructure, such as a Sentencing Council, a Crown Prosecution Service and a Prison Service;
- j. The extent to which separation of the legal professions between England and Wales would or should result. Regulation of the legal profession is not currently devolved, but questions of the regulation of Welsh legal professionals are relevant, as is their ability to practise in England.

### Question 3

#### The practical implications of a separate jurisdiction for the legal profession and the public.

36. The major implication for the legal profession would come if there were separate systems of entry to the Welsh and English legal professions and barriers to movement between the two. The point at which it would be necessary to introduce separate systems and barriers has not yet been reached (see also paragraph 35(j)).
37. In 1920, Lord Stuart of Wortley's Committee on the Judiciary, part of the Speaker's Conference on Devolution, left unanswered "the question whether the constitution of a separate Bench for Wales, with the consequential segregation of the Welsh Bar, and the possible setting up in Wales of separate establishments for legal education, would tend to the improvement of standards in the administration of justice, or improve the chances and opportunities of young Welsh aspirants to fame and the other prizes of a successful legal career"<sup>21</sup> This is a multi-faceted question but remains relevant.
38. A large proportion of the Welsh judiciary have spent their entire legal careers in Wales. Amongst the rest, particularly the higher judiciary, opinions differ. Some judges consider that their judicial experience in England has made them better able to serve the public and the interests of justice in Wales. Others would have preferred to devote their service entirely to Wales, especially if appropriate judicial structures were in place.
39. The implications for the public are fundamental to the debate and to decisions to be made. Elected by the people of Wales, Committee members will no doubt put them in the forefront of their deliberations. Beyond providing information and raising questions, it would be inappropriate for the Welsh Committee to express an opinion in this response.

### Question 4

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<sup>21</sup> Appendix V to the Conference Report of James W Lowther, paragraph 15.

The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system

40. The Northern Ireland analogy is apposite and the Committee is right to consider it. With a smaller population than Wales, Northern Ireland has been a separate jurisdiction for almost a century. The Welsh Committee does not at present have the knowledge necessary to make comparisons.

Ministry of Justice

41. Underlying this entire paper is the Welsh Committee's concern for the independence of the judiciary and recognition by the Welsh Assembly and Government of the separation of powers. This is not the place for a full discussion of issues arising from the powers presently exercised in Wales but concerns have been expressed, particularly in relation to devolved tribunals, and are subject to ongoing discussion between the judiciary and the Welsh Government.

42. As well as appointments to tribunals, concerns relate to the need for independence from sponsoring departments, funding for recruitment and training, disciplinary matters and perceived inconsistencies in judicial administration. Vulnerability follows from the absence of an appropriate judicial or ministerial umbrella.

43. The administration of justice is not a devolved function so that the Lord Chancellor and Minister of Justice is the minister of justice for Wales. There would be such a minister, or equivalent, if the administration of justice were to be devolved. Though at present it is not devolved, the present exercise of powers in Wales has significant impact on the administration of justice and the need for appropriate ministerial responsibility in Wales should, in the Welsh Committee's view, be considered.

## Inquiry into the establishment of a separate Welsh jurisdiction Personal response (Professor Thomas Glyn Watkin)

### INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION

#### Evidence submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales

Thomas Glyn Watkin\*

#### *Summary*

1. This paper addresses the first of the issues raised in the Committee's call for evidence, namely what is meant by the term "separate Welsh jurisdiction".
2. It argues that by applying a strict interpretation of the concept of jurisdiction, based on the way the term is used in some of the civil law countries of mainland Europe, the current position and needs of Wales as a distinct law district become clearer.
3. The argument reflects and develops views expressed by the author in his contribution to the discussion organized by the Law Society (Wales) on the issue of a Welsh jurisdiction at the National Eisteddfod at Wrexham in August, 2011. The other contributors to that discussion were Professor Richard Wyn Jones and Mr. Emyr Lewis.

#### *The term 'Jurisdiction'*

4. The Committee's scoping paper refers to a definition of jurisdiction as "the territory or sphere of activity over which the legal authority of a court or other institution extends". It also states that England and Wales currently form a single jurisdiction.
5. The word *jurisdiction* in English is used less strictly than equivalent terms in other European languages – at least in doctrinal legal writings in those languages, even though it is derived from the same linguistic root as those other terms.
6. Whereas the focus of the term in English, as defined in ¶4 above, is the extent of the authority of courts, in other parts of Europe the focus is on what that authority is actually for, from which one then determines its appropriate extent. The looser English usage has, in the past, enabled the concept to be used as a reason, or as an excuse, to block or attempt to block legal developments, such as distinct legal provision for Wales (1880–1) or creating an office of Secretary of State for Wales (late 1930s/40s).

#### *Jurisdiction as 'legal authority'*

7. The English word *jurisdiction*, like its counterparts in other languages, is derived from the Latin *juris dictio*, meaning 'a stating (*dicere*) of the law (*ius*)', that is *law* in the sense of 'what is lawful or just' (*ius*) rather than law as 'what is enacted' (*lex*). This distinction in the meaning of *law* is to be found in most modern European languages, but not in English. Jurisdiction in this sense is the authority to state what the law is – the *Oxford English Dictionary's* 'power of declaring or administering law or justice'.

#### *Jurisdiction as 'the legal authority of a court'*

8. In doctrinal writing on the law in several European countries, the word *jurisdiction* is used to describe the authority of a court in doing what courts are established to do,

namely administer a body of law regarding a particular legal subject. Wherever a body of law (*corpus iuris*) exists, there must be a court or courts with the authority to administer it, in the sense of stating it, applying it and, when necessary, interpreting it, in individual cases. Rules of law are expressed at a general level; it is for the courts to apply those general rules to particular cases, in so doing state how the general rule applies to the particular case and, where necessary for its application, interpret the rule in order to apply it.

***Jurisdiction as ‘the legal authority of ... other institution(s)’***

9. It is not only courts that state the law (*ius dicere*). Tribunals also rightly fall within the definition. It may however be thought that legislatures also fit the definition in that they also state the law. Herein, however, lies a possible source of confusion. In most European languages and legal systems, legislatures would not be described as having jurisdiction, for they do not make law in the sense of *ius*, but rather law in the sense of *lex* – ‘what is enacted’ not ‘what is just or right’. Courts declare law in the latter sense, albeit in accordance with legislation as a source of that law. Even in English, this distinction is recognized as courts are said to administer *justice*, not merely law, for they state the law as it applies to a particular case, so as to achieve a *just* result in accordance with the law.
10. The territorial and subject-matter competence of a legislature – in the case of Wales the Assembly’s competence to legislate in relation to Wales (territorial competence) in relation to the subjects listed in Part 1 of Schedule 7 (subject-matter competence) – is also a different matter from the territorial and subject-matter competence of the courts which declare and administer the laws it makes (discussed below – ¶13–¶18), although concurrence between the territorial and subject-matter competence of a legislature on the one hand and the jurisdiction of the courts which declare and administer its enactments on the other arguably makes for a more understandable legal arrangement than that currently afforded by the extent/applicability distinction (discussed below – ¶21–¶24).

***Jurisdiction as the legal authority of a court over a ‘sphere of activity’***

11. *Jurisdiction* as used in civil law countries, as opposed to those of the common law tradition, refers to the authority of a court or courts to declare and apply a particular body of law. Thus, where there is a distinct body of criminal law, it follows that there must be courts charged with applying that law to particular cases. These courts are those with criminal jurisdiction. Where there is a distinct body of commercial law dealing with mercantile matters, there will have to be courts with the authority to declare and apply that body of law – courts with commercial jurisdiction. Wherever a distinct body of law exists, there has to be a court or courts with authority to declare and administer it – that is, with jurisdiction over it. The existence of a distinct body of law necessitates the existence of jurisdiction over it – over that ‘sphere of activity’. One cannot have one without the other. *Jurisdiction* in this sense is a necessary concomitant of the existence of a distinct body of law. This remains true even when a court has jurisdiction over more than one body of law.
12. Viewed thus – *jurisdiction* as a sphere of activity, as authority over a particular body of law – the question relating to the legal status of Wales is not whether there *ought to be* or *can be* a Welsh jurisdiction but whether there *is* a Welsh jurisdiction. If there is a separate body of law relating to Wales, it follows that there must be courts with jurisdiction to administer it by applying it to particular cases and, in so doing, declaring it and, when

necessary, interpreting it in order to apply it. The existence of such a jurisdiction is a matter of fact not of choice. The choice relates to what is done in recognition of that fact.

### ***Jurisdiction and Competence***

13. A strict distinction is also made in civil law countries between the jurisdiction of a court and its competence. In English, the term *jurisdiction* is sometimes used where a civil lawyer would use the term competence. While the definition in ¶4 correctly reflects one use of the term in English, it also illustrates the confusion in English between these two concepts – *jurisdiction* and *competence*, for competence also relates to the extent of a court’s legal authority, regarding both territory and spheres of activity – but differently.
14. For the civil lawyer, the jurisdiction of a court relates solely to the question of what body or bodies of law it administers. Courts can have, for instance, criminal, commercial, constitutional, civil or administrative law jurisdiction.
15. Courts must also have competence. Their competence relates to three things: the territory within which they may exercise their jurisdiction, the subject-matter regarding which they may exercise their jurisdiction, and the level of adjudication which they are entitled to perform.
16. The territorial competence of a court relates to the geographical area in which it has authority to exercise its jurisdiction. Thus, for instance, a magistrates court may have criminal jurisdiction but only be competent to hear and determine cases arising within its own locality.
17. The same is true of subject-matter competence. A magistrates court with criminal jurisdiction can hear criminal cases but its competence is limited to minor offences. The Crown Court, likewise with criminal jurisdiction, has competence to try serious crimes. In the civil jurisdiction, the subject-matter competence of the county court is limited, but that of the High Court is not. Here again, the definition in ¶4 may confuse two concepts, for the words ‘sphere of activity’ could mean either a body of law the court administers (its jurisdiction) or the subject-matter over which it has competence – or indeed both.
18. Finally, some courts – exercising a particular jurisdiction – will only be entitled to hear cases which are being tried for the first time – first instance competence, while others will be allowed to hear appeals from the decisions of lower courts. The functional competence of courts within their jurisdiction is therefore also distinguished, with some having first instance competence, some competence to hear appeals and at least one with competence to conduct a final review of decisions on points of law only. In the United Kingdom, this last is the Supreme Court of the United Kingdom with functional competence as the final review court and territorial competence throughout the UK across several jurisdictions in the sense used here – criminal, civil, etc. Even in civil law countries, the court of final review frequently has jurisdiction over several bodies of law, although there are sometimes separate chambers corresponding to the several jurisdictions exercised. The words ‘sphere of activity’ could also be taken to cover functional competence.

### ***Competence and Administrative Practice***

19. Until the 1970s, the legal system of England and Wales was highly centralised, with, in civil matters, the High Court and the Court of Appeal based in London. Today, both the High Court and the Court of Appeal can and do sit in other centres, including locations in

Wales. In addition, some specialist courts – such as the Administrative Court – also now sit in Wales to hear cases involving Wales.

20. Whether a case is listed to be heard in Wales or elsewhere depends upon the administrative practices of the courts rather than, in other countries, rules of law delimiting the competence of the courts with regard to the territory from which litigation may come before them as well as the subject matter of the litigation.

### ***Applicability and Extent***

21. Currently, there is a body of law in existence which applies only to Wales. This body of law emanates from a number of sources, including enactments of the UK parliament, enactments of the National Assembly and legislation made by the Welsh Ministers.
22. This body of law is a distinct part of the law of England and Wales, which law now consists – in terms of its applicability – of three distinct parts: the law of England and Wales that applies to both England and Wales; the law of England and Wales that applies only to England, and the law of England and Wales that applies only to Wales. The last two bodies of law are set to increase in size, while it is likely that the first-mentioned will decrease.
23. All three bodies of law *extend* to England and Wales, even though some laws apply only to England and some apply only to Wales. This means that jurisdiction over all three bodies is shared by the same courts. A court in Newcastle or Penzance has jurisdiction over the law applicable only to Wales and a court sitting in Haverfordwest has jurisdiction over the law applicable only in England.
24. The likelihood of problems arising in consequence of this is probably slight. Cases dealing with the law applicable only to Wales are likely to be commenced or listed to be heard in Wales. Nevertheless, it needs to be asked whether it is time for the jurisdiction or the competence of the courts of England and Wales to be legally defined as opposed to administratively regulated so as to ensure that Welsh cases are heard in Wales. Reasons for doing so exist.

### ***An existing distinction***

25. Returning to the geographical scenarios above, there is an existing difference between the trial of a case in Haverfordwest and the trial of a case in Newcastle. The former trial could be conducted in Welsh, while in the latter there would be no right for the parties to use that language during the course of the trial.
26. The right to use Welsh before the courts is limited to the territory of Wales. In effect, therefore, a territorial distinction already exists between courts which otherwise have the same jurisdiction. If this territorial distinction regarding the linguistic rights of litigants were formally recognized as a rule determining the courts' own territorial competence – so that cases arising in Wales or relating to Wales could only be tried by courts in Wales – it would prevent persons losing that linguistic right for reasons of administrative convenience.
27. It needs to be emphasized that this is not something which flows from the existence of a body of law applicable only to Wales; it applies to the adjudication of all bodies of law

which apply in Wales. In the strict sense, therefore, this point goes to competence not jurisdiction.

28. The existence of a body of law applicable only to Wales does however introduce a further dimension regarding the need for such a rule of territorial competence and arguably, because a distinct body of law is involved, a formal jurisdictional separation with regard to the administration of the bodies of law that apply in England and in Wales respectively.

### *A distinct body of law*

29. That portion of the law of England and Wales which applies only to Wales is distinct from the other two portions in another important respect. Much of the legislation within that portion is distinct from the remainder of the statute law of England and Wales in that it is made bilingually. Further, the Welsh and English versions of such bilingual legislation are by statute to be treated as of equal standing for all purposes. They are therefore to be of equal standing when it comes to applying their provisions, including any interpretation of those provisions which their application may require. Courts with jurisdiction over that distinct body of law must therefore treat the two versions as of equal standing when interpreting the law, which will certainly mean that in some cases, the meaning of the versions taken together will fall for consideration, and arguably, for safety's sake, requires such consideration whenever a point of interpretation arises.
30. If courts throughout England and Wales have jurisdiction over this body of law, then courts in Newcastle or Penzance, as much as Cardiff or Caernarfon, must be expected to deal with this bilingual legislation with equal ability. If that cannot be done, then the notion that they can have legal authority over this sphere of their activity is compromised. Given that courts sitting in England as opposed to those sitting in Wales are not expected to try cases or hear litigants in the Welsh language, they can hardly be expected to declare and interpret laws which have been made in that language as well as in English if both versions are, as statute requires, to be treated as of equal standing. At the very least, therefore, a rule of competence is needed by which, as with Welsh language or bilingual hearings, hearings which could involve laws made bilingually must be heard in Wales. Given that such laws can only exist in relation to the subjects listed under the twenty headings of the National Assembly's current legislative competence, in effect hearings with regard to the devolved subjects should fall to be heard in Wales. Only courts in Wales would be competent to hear such cases so that, in effect, with the exception of the Supreme Court, only courts in Wales would have jurisdiction over that body of law.

### *Courts with a distinct competence*

31. When one combines this with the existing rule that it is only in Wales that the Welsh language may be used in trials, the end result is the need for a rule of territorial competence ensuring that litigation relating to Wales is as a general rule, and not as a matter of administrative practice, heard only by courts in Wales. This would ensure that if any party to proceedings wishes to use the Welsh language, they will be able to do so, and also ensure that if bilingual legislation falls for consideration, both versions will be treated, as statute demands, as being of equal standing for that purpose.
32. Given that, apart from the Supreme Court, only decisions of the Court of Appeal are binding on lower courts and that contentious issues of statutory interpretation are more likely to be determined at that level, it is at that level most of all that it will be essential



for the judges to be able to deal effectively with issues arising from the interpretation of bilingual legislation. Likewise, where a case has been heard at first instance in the Welsh language, the appeal court should be able to hear the appeal also in Welsh. It follows that a distinct chamber of the Court of Appeal is needed with the capacity to hear and determine cases in Welsh and to hear and determine cases which involve the application, and therefore the possible interpretation, of bilingual legislation. Given that not all judges sitting in lower courts will have the ability to interpret bilingual legislation, it may also be appropriate to allow questions of such interpretation to be remitted to the appeal court for determination prior to judgement being given at first instance. It would be appropriate for that court to sit permanently in Wales. In other words, with regard to jurisdiction over the body of law applicable only in Wales, a Court of Appeal sitting in Cardiff would be the court of second instance, and it would also be the only court with territorial competence over appeals regarding first instance decisions in trials conducted in Welsh under the body of law which applies in both England and Wales. Arguably, it might also be the only court with territorial competence over all first instance decisions taken in Wales, and conversely it should probably not have territorial competence over first instance decisions taken in England, nor jurisdiction with regard to that body of law which applied only in England.

33. Competence regarding final review on points of law could still lie to the Supreme Court of the United Kingdom, where the issue of the interpretation of bilingual legislation and familiarity with other aspects of the law applicable only in Wales would need to be resolved and could be resolved by ensuring that the Court had amongst its members judges with the necessary knowledge and experience of the law in Wales, as currently required by statute with regard to Scotland and Northern Ireland.

### **Conclusions**

34. The concept of Wales being ‘a separate jurisdiction’ therefore resolves itself into two basic questions:

should courts in Wales have exclusive jurisdiction (in the strict sense) over laws which apply only in Wales; and,

should courts in Wales have exclusive territorial competence (in the strict sense) over cases which relate primarily to Wales under the law which applies to England and Wales.

35. It is submitted that there are sound reasons, as outlined above, for responding affirmatively in both instances.
36. In terms therefore of the looser meaning of *jurisdiction* in English, there are good reasons for holding that only courts in Wales should have legal authority over the territory of Wales regarding those spheres of activity which are regulated by laws applying only in Wales and with regard to those regulated by laws applying in both England and Wales.

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\* Professor Thomas Glyn Watkin, now retired, is an honorary professor at both Bangor and Cardiff Law Schools. Prior to his retirement he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998).

**Inquiry into the establishment of a separate Welsh jurisdiction  
Personal response (His Honour Judge Wyn Rees<sup>1</sup>)**

**This was received in the medium of Welsh and has been translated  
by the National Assembly for Wales**

1 This submission is made in response to the invitation issued by the Constitutional and Legislative Affairs Committee of the National Assembly for Wales to submit written evidence for the Committee's Inquiry into the establishment of a separate Welsh jurisdiction.

2 I make this submission as an individual.

**The meaning of the term "separate Welsh jurisdiction"**

3 The main elements of a separate jurisdiction appear to be a defined territory, a distinct body of law and a separate structure of courts and legal institutions.

4 Wales is clearly a defined territory.

5 As to a distinct body of law, the establishment of the National Assembly for Wales and the increase in its legislative powers is leading to the development of a distinct body of law in Wales. However, that body of law is limited to those fields which have been devolved to the National Assembly. As the justice system has not been devolved, the body of law being developed by the National Assembly has little impact, comparatively speaking, on the work of the criminal, civil and family courts in Wales whose work is based, largely, on statutes and rules that are common to England and Wales.

6 Although the Association of Judges of Wales was established in 2008, a separate structure of courts and legal institutions does not exist in Wales to any significant extent. However, in certain

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<sup>1</sup> A Circuit Judge and a Deputy High Court Judge, he is the Deputy Designated Family Judge for South Wales. Through his involvement with the Judicial Studies Board, he instigated training seminars for the Welsh speaking judiciary in Wales and, with the creation of the Judicial College, to replace the Judicial Studies Board, advocated the creation of a Wales Committee of the College to address judicial training issues arising from legislation passed by the National Assembly. He is a member of the Law and Administration of Justice Terminology Subject Working Group of the Welsh Language Board. Since 1993, he has been involved in judicial appointments, both in the preparation of material and as a panel member, for the Lord Chancellor's Department and the Judicial Appointments Commission.

respects, the structure that applies to England and Wales does recognise Wales as an entity in itself, most notably in:

- the establishment of HMCTS Wales, which is responsible for the administration of courts and tribunals in Wales;
- the creation of a Mercantile Court for Wales;
- the establishment of the Administrative Court in Wales with a supporting Office in Cardiff;
- the appointment of a Designated Civil Judge for Wales and that of a Chancery Judge for Wales;
- sittings of the Court of Appeal in Cardiff;
- the creation by the Judicial College of a Wales Committee;
- the establishment by the Law Society of an Office in Wales.

7 Currently, in the absence of a distinct body of law in Wales that has a significant impact upon the work of the courts in Wales, it is difficult, in my view, to argue for the establishment of a separate Welsh jurisdiction. Whether any part of the criminal, family and civil justice systems should be devolved to the National Assembly is a political issue upon which it would not be appropriate for me to comment. However, if a significant part of the justice system were to be devolved, the creation of a separate Welsh jurisdiction would then become necessary.

8 In the meantime, I believe consideration should be given to developments that could improve the administration of justice in Wales and further develop legal institutions in Wales, such as:

- making it a requirement that an application to the Administrative Court involving the National Assembly or a public body in Wales must be commenced and heard in Wales;
- establishing an office in Wales to administer all appeals from Wales to the Court of Appeal;
- creating a Law Commission for Wales;
- creating a Judicial Appointments Commission for Wales. The National Assembly's powers in this respect

may be limited, currently, to the appointment of judges to tribunals that are within its devolved powers. However, those powers may increase, in the future, and consideration could be given, also, to the provision of a Welsh input into the work of the Judicial Appointments Commission in London in relation to judicial appointments in Wales. In any such development, however, the principle of judicial independence from government should be maintained;

- establishing channels of communication between the National Assembly and the Wales Committee of the Judicial College so that training issues for the judiciary arising from legislation passed by the National Assembly may be identified and addressed by the College;
- creating Rules Committees, if appropriate, to be responsible for the drafting of rules arising from legislation passed by the National Assembly.

### **The potential benefits, barriers and costs of introducing a separate Welsh jurisdiction**

- 9 No doubt costs, which would need to be the subject of a detailed assessment, would be incurred in establishing a separate Welsh jurisdiction. The main benefit of doing so would be to bring the justice system closer to the people of Wales and to make it more accountable to them. A further benefit would be the creation of employment in Wales to perform functions that are currently undertaken outside Wales.

### **The practical implications of a separate jurisdiction for the legal profession and the public and the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system**

- 10 The assessment of any such implications and the operation of other small jurisdictions should be based on a study of other separate jurisdictions both within and, where appropriate, outside the United Kingdom.

## Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru Argymhelliad Ei Anrhydedd y Barnwr Wyn Rees<sup>1</sup>

### Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru

#### Argymhelliad Ei Anrhydedd y Barnwr Wyn Rees<sup>2</sup>

- 1 Gwneir yr argymhelliad hwn mewn ymateb i wahoddiad Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Cynulliad Cenedlaethol Cymru i gyflwyno tystiolaeth ysgrifenedig i ymchwiliad y Pwyllgor i sefydlu awdurdodaeth ar wahân i Gymru.
- 2 Gwnaf yr argymhelliad hwn fel unigolyn.

#### Ystyr y term “awdurdodaeth ar wahân i Gymru”

- 3 Mae'n ymddangos mai prif elfennau awdurdodaeth ar wahân yw tiriogaeth ddiffiniedig, corff o gyfreithiau cynhenid a chyfundrefn llysoedd a sefydliadau cyfreithiol ar wahân.
- 4 Mae'n amlwg fod gan Gymru diriogaeth ddiffiniedig.
- 5 O safbwynt corff o gyfreithiau cynhenid, mae creu Cynulliad Cenedlaethol Cymru a'r cynnydd ym mhwerau deddfu'r Cynulliad wedi arwain at ddatblygiad corff o gyfreithiau cynhenid yng Nghymru. Serch hynny, mae'r corff hwnnw o gyfreithiau wedi'i gyfyngu i'r meysydd hynny a ddatganolwyd i'r Cynulliad Cenedlaethol. Gan nad yw'r gyfundrefn cyfiawnder wedi'i ddatganoli, fodd bynnag, nid yw'r corff o gyfreithiau a ddatblygwyd gan y Cynulliad Cenedlaethol yn dylanwadu, rhyw

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<sup>1</sup> Barnwr Cylchdaith a Dirprwy Farnwr Uchel Lys, ef yw Dirprwy Farnwr Teulu Dynodedig De Cymru. Trwy ei gysylltiad a'r Bwrdd Astudiaethau Barnwrol, cychwynodd seminarau hyfforddi ar gyfer Barnwyr Cymraeg eu hiaith yng Nghymru a chyda sefydlu'r Coleg Barnwrol, i gymryd lle'r Bwrdd Astudiaethau Barnwrol, bu'n argymhell sefydlu Pwyllgor Cymru o'r Coleg er galluogi'r Coleg i ymateb i unrhyw elfennau hyfforddi ar gyfer y farnwriaeth sydd yn deillio o ddeddfwriaeth a grewyd gan y Cynulliad Cenedlaethol. Mae'n aelod o Weithgor Terminoleg y Gyfraith a Gweinyddu Cyfiawnder Bwrdd yr Iaith. Er 1993, bu'n ymwneud â phenodiadau barnwrol, wrth baratoi deunyddiau ac fel aelod paneli, ar ran Adran yr Arglwydd Ganghellor a'r Comisiwn Penodiadau Barnwrol.

<sup>2</sup> Barnwr Cylchdaith a Dirprwy Farnwr Uchel Lys, ef yw Dirprwy Farnwr Teulu Dynodedig De Cymru. Trwy ei gysylltiad a'r Bwrdd Astudiaethau Barnwrol, cychwynodd seminarau hyfforddi ar gyfer Barnwyr Cymraeg eu hiaith yng Nghymru a chyda sefydlu'r Coleg Barnwrol, i gymryd lle'r Bwrdd Astudiaethau Barnwrol, bu'n argymhell sefydlu Pwyllgor Cymru o'r Coleg er galluogi'r Coleg i ymateb i unrhyw elfennau hyfforddi ar gyfer y farnwriaeth sydd yn deillio o ddeddfwriaeth a grewyd gan y Cynulliad Cenedlaethol. Mae'n aelod o Weithgor Terminoleg y Gyfraith a Gweinyddu Cyfiawnder Bwrdd yr Iaith. Er 1993, bu'n ymwneud â phenodiadau barnwrol, wrth baratoi deunyddiau ac fel aelod paneli, ar ran Adran yr Arglwydd Ganghellor a'r Comisiwn Penodiadau Barnwrol.

lawer, ar waith y llysoedd troseddol, sifil a theulu yng Nghymru gan fod gwaith y llysoedd hynny yn seiliedig, yn bennaf, ar statudau a rheolau sy'n gyffredin i Loegr a Chymru.

6 Sefydlwyd Cymdeithas Barnwyr Cymru yn 2008 ond ni cheir yng Nghymru unrhyw gyfundrefn sylweddol o lysoedd a sefydliadau cyfreithiol ar wahân. Serch hynny, mae'r gyfundrefn sy'n gyffredin i Loegr a Chymru yn cydnabod, i raddau, bod Cymru yn uned ynddo'i hun, er enghraifft:

- sefydlwyd GLITEM Cymru, sydd yn gyfrifol am weinyddiad y llysoedd a'r tribiwnlysoedd yng Nghymru;
- crewyd Llys Mercantilaidd Cymru;
- sefydlwyd Llys Gweinyddol yng Nghymru gyda swyddfa wrth gefn yng Nghaerdydd;
- penodwyd Barnwr Sifil Dynodedig i Gymru a Barnwr Siawnsri i Gymru;
- mae'r Llys Apêl yn eistedd yng Nghaerdydd;
- crewyd Pwyllgor Cymru gan y Coleg Barnwrol;
- sefydlwyd Swyddfa yng Nghymru gan Gymdeithas y Gyfraith.

7 Ar hyn o bryd, yn absenoldeb corff o gyfreithiau cynhenid yng Nghymru sydd yn dylanwadu'n sylweddol ar waith y llysoedd yng Nghymru, anodd yw dadlau, yn fy marn i, o blaid sefydlu awdurdodaeth ar wahân i Gymru. Mae'r penderfyniad a ddylid datganoli unrhyw ran o'r cyfundrefnau troseddol, sifil a theulu i'r Cynulliad Cenedlaethol yn un gwleidyddol ac ni fyddai'n briodol i mi fynegi barn ar hynny. Serch hynny, petai canran sylweddol o'r gyfundrefn cyfiawnder yn cael ei ddatganoli, byddai creu awdurdodaeth ar wahân i Gymru yn angenrheidiol.

8 Yn y cyfamser, credaf y dylid ystyried datblygiadau a all wella gweinyddu cyfiawnder yng Nghymru a datblygu ymhellach sefydliadau cyfreithiol yng Nghymru, megis:

- ei wneud yn ofynnol bod unrhyw gais i'r Llys Gweinyddol sydd yn ymwneud â'r Cynulliad Cenedlaethol neu gorff cyhoeddus yng Nghymru yn cael ei gychwyn a'i wrando yng Nghymru;
- sefydlu swyddfeydd yng Nghymru i weinyddu'r holl apeliadau o Gymru i'r Llys Apêl;

- creu Comisiwn y Gyfraith ar gyfer Cymru;
- creu Comisiwn Penodiadau Barnwrol ar gyfer Cymru. Ar hyn o bryd, mae pwerau'r Cynulliad Cenedlaethol, yn hyn o beth, wedi'u cyfyngu i benodiadau barnwrol ar gyfer y tribiwnlysoedd sydd o fewn ei bwerau datganoledig. Serch hynny, fe all y pwerau hynny gynyddu yn y dyfodol a gellid ystyried, hefyd, mewnbwn Cymreig i waith y Comisiwn Penodiadau Barnwrol yn Llundain ynghylch penodiadau barnwrol yng Nghymru. Mewn unrhyw ddatblygiad o'r fath, fodd bynnag, dylid gwarchod yr egwyddor bod y farnwriaeth yn annibynnol o'r llywodraeth;
- sefydlu cysylltiadau rhwng y Cynulliad Cenedlaethol a Phwyllgor Cymru y Coleg Barnwrol er galluogi'r Coleg i ymateb i unrhyw elfennau hyfforddi ar gyfer y farnwriaeth sydd yn deillio o ddeddfwriaeth a grewyd gan y Cynulliad Cenedlaethol;
- creu Pwyllgorau Rheolau, os yn gymwys, i ymgymryd â'r cyfrifoldeb o lunio rheolau sydd yn deillio o ddeddfwriaeth a grewyd gan y Cynulliad Cenedlaethol.

### **Manteision, rhwystrau a chostau posibl cyflwyno awdurdodaeth ar wahân ar gyfer Cymru**

- 9 Heb os, byddai costau ynghlwm wrth sefydlu awdurdodaeth ar wahân ar gyfer Cymru a byddai angen gwneud asesiad manwl o'r costau hynny. Y prif fantais o sefydlu awdurdodaeth ar wahân fyddai dwyn y gyfundrefn cyfiawnder yn agosach at bobl Cymru a'i gwneud yn fwy atebol iddynt. Mantais bellach fyddai creu swyddi yng Nghymru ar gyfer y swyddogaethau hynny a gyflawnir, ar hyn o bryd, y tu allan i Gymru.

### **Goblygiadau ymarferol awdurdodaeth ar wahân ar gyfer y proffesiwn cyfreithiol a'r cyhoedd a sut mae awdurdodaethau bach eraill yn y Deyrnas Unedig yn gweithio, yn enwedig y rhai, megis Gogledd Iwerddon, sy'n defnyddio system cyfraith gyffredin**

- 10 Dylid seilio asesiad o'r goblygiadau hyn a'r modd y mae awdurdodaethau bach eraill yn gweithredu ar astudiaeth o awdurdodaethau eraill sydd ar wahân ac sydd o fewn a, lle bo'n briodol, y tu allan i'r Deyrnas Unedig.

## CLA WJ 18

### **Inquiry into the establishment of a separate Welsh jurisdiction**

#### **Personal response (Rhys ab Owen Thomas)**

1. This memorandum is written by Rhys ab Owen Thomas from Iscoed Chambers in Swansea. The views stated are my own and do not necessarily reflect the view of Chambers.

2. The topics on which I wish to concentrate are the meaning of a Welsh Jurisdiction and whether a separate Welsh Jurisdiction is necessary. It is my opinion that we must first approach the principle of a separate Welsh Jurisdiction before answering any practical questions with regard to costs and any other possible implications. Instead of discussing the merits of a separate Welsh Jurisdiction I wish to reflect on the present situation. Does the existence of a body of Welsh law create a separate Welsh jurisdiction?

3. It is difficult to define what is "Jurisdiction" as it is used in different (often lax) ways across the world. The origin of the word "Jurisdiction" comes from the Latin *ius* meaning "law" and "*dicere*" meaning "to speak". Therefore, on a literal interpretation the meaning is "to state the Law". What is the law in the Jurisdiction of England and Wales?

4. The Law in England and Wales falls into three categories. The law in England and Wales which is applicable in both countries, the law in England and Wales which applies only to England; and the law of England and Wales that applies only to Wales. The *Laws in Wales Acts 1535 and 1542* (the Acts of Union) created the England and Wales Jurisdiction but since the second half of the nineteenth century there have been laws passed which solely applied to Wales, the first being the *Sunday Closing (Wales) Act 1881*. However, not since the Acts of Union has there been such a large body of laws which apply only to Wales. Following, the Referendum result in March 2011, the National Assembly for Wales has primary law making powers to make laws for Wales in the devolved areas without the permission of the



United Kingdom Government. The UK Parliament is also likely to pass and amend laws, in areas which are devolved in Wales, that will only apply to England. Therefore, the differences between the law that applies only to England and the law that applies only to Wales will expand further. It is important that the legal profession in both England and Wales are conscious of these differences. The differences cannot be ignored and are relevant to all Legal Professionals in both England and Wales. It is not inconceivable that failure to take account of these differences could lead to successful professional negligence claims. Professor Thomas Watkin gave the following example in his Keynote Address at the *Association of Law Teachers* annual conference in April 2011:

*Imagine an English entrepreneur contemplating opening a branch of his business in Wales and seeking legal advice about the planning consents needed to build a new factory or supermarket only to find that the advice he has received is based on the law applicable in England and not that applicable in Wales. Imagine if he has not been told that the law relating to waste disposal is not the same and therefore extra costs will be incurred. Imagine if he is a house builder who has not been told that new homes built in Wales must now have fire sprinklers fitted as a norm....”*

5. A further difference is that law passed by the National Assembly (except in emergencies such as during the foot and mouth disease) is made in both the English and Welsh languages; they have equal rights. This differentiates Wales from Scotland and Northern Ireland which each have their own Jurisdiction but which only pass laws passed in the English language. It is arguable that to define the law passed by the National Assembly one would have to study both the English and Welsh versions to ensure that one has a correct understanding. Ambiguities between the two versions are less likely as they are both considered and drafted together rather than one translated from the other language at a later date. Nevertheless, it is not inconceivable that ambiguities between the two languages will still occur from time to

time. The implication of the importance of taking into account both the English and the Welsh versions before giving advice or passing judgment is far reaching and perhaps not yet been fully realised. Sir David Hughes Parry in his report "*Legal status of the Welsh language*" (1965) advocated a fully bilingual civil service in Wales. It will be interesting to see what effect bilingual legislation will have on the legal profession in England and Wales.

6. A further aspect with regard to the Welsh language is that everyone in Wales has a right to use the Welsh Language in court. The Welsh Courts Act 1942, Welsh Language Act 1967 and Welsh Language Act 1993 have assisted in forming a separate Welsh legal identity. The language's official status in Wales was recently confirmed in the Welsh Language Measure in 2011.

7. There has been a huge change within the legal profession in Wales since devolution. The foundation of the HMCS Wales; creation of Mercantile Court for Wales; Judicial Reviews regarding Welsh Public Authorities being heard in Wales; Court of Appeal sitting in Cardiff; establishment of an Administrative Court in Wales; establishment of a Chancery Court in Wales; a fluent Welsh speaker appointed as a High Court Judge and the Employment Appeals Tribunal sitting regularly in Wales. In practice, the Courts and Tribunals have already taken steps towards recognising Wales as separate Jurisdiction in a similar way to Northern Ireland. Hopefully, the above examples will be followed eventually by the Supreme Court deciding to sit in Wales.

8. A traditional view of a "Jurisdiction" requires it to have the three branches of an Executive, Legislature and a Judiciary. Wales has had all three but not at the same time (the Court of Great Sessions in Wales was abolished in 1830). However, with a body of Welsh law already in existence and set to grow, with such prominence given to the Welsh language and with the Courts and Tribunals already recognising a legal Wales it is arguable that a separate Welsh Jurisdiction is already in existence. The only difference between Northern Ireland and the current situation in Wales is that of the status of the Welsh language. To formalise the developments in Wales since 1999 would ensure clarity within the legal profession and beyond. If a

Separate Welsh Jurisdiction exists in all but name then its creation will not cause the seismic shift that is feared by some but be a part of an on-going development that recognises the growing body of law that applies only to Wales. A growing body of Welsh law has far reaching consequences for the legal profession in both England and Wales but the possibilities should be embraced rather than feared.

RHYS AB OWEN THOMAS

**Inquiry into the establishment of a separate Welsh jurisdiction  
Personal Response (The Hon Mr Justice Roderick Evans)**

Response to the Inquiry into the  
Establishment of a Separate Welsh Jurisdiction  
by  
The Hon Mr Justice Roderick Evans

Roderick Evans practised as a barrister in Swansea from 1970 to 1992 and was appointed Queen's Counsel in 1989. In 1992 he was appointed a Circuit Judge and, thereafter, was Resident Judge at Merthyr Tydfil Crown Court (1994-98), Swansea Crown Court (1998-99) and Senior Circuit Judge and Honorary Recorder of Cardiff (1999-2001).

Since 2001 he has been a High Court Judge. From 2004 to the end of 2007 he was a Presiding Judge initially of what was the Wales and Chester Circuit and after April 2007 of Wales.

February  
2012

Summary

- Whether a Welsh jurisdiction should be created is a political decision.
- The matters which will influence that decision extend beyond the anticipated divergence between the law in England and that in Wales.
- The position of Wales within the unified jurisdiction is unsatisfactory.
- Legal institutions in Wales could be strengthened and developed and Wales's emerging legal personality accommodated in part at least within the unified jurisdiction but it is doubtful whether adequate resources would be made available to do so.
- The creation of a Welsh jurisdiction would enable the development of a justice system tailor made to meet the needs of Wales, bring the administration of justice closer to the people of Wales and create jobs and career structures not presently available in Wales.

## 1. Comments on the Consultation Documents

- 1.1 The letter inviting the submission of written evidence and the Scoping Paper attached to it set out a list of “significant developments in the administration of justice in Wales since the establishment of the Assembly”. The content of the list is broadly correct and the developments listed are significant but care should be taken in assessing their importance in the context of considering a Welsh jurisdiction.
- 1.2 Each of the five circuits in England has a Mercantile Court, a Chancery Court and (with the present exception of the Western Circuit) an Administrative Court. The Court of Appeal has also undertaken to sit in major English cities although it may be that that undertaking is no longer being honoured for the reason mentioned later (see para. ?).
- 1.3 What can be said about these developments in Wales is that some of them might not have occurred had it not been for devolution as the quantity of relevant work available in Wales, when looked at from London and compared to that available in the large cities of England, might not have otherwise justified the establishing of these courts. It can also be said that the existence of the Mercantile, Chancery and Administrative Courts in Wales would go some way to provide the framework of a jurisdiction if one were to be created.
- 1.4 I wish to comment upon two particular matters.
- 1.5 Sittings of the Court of Appeal in Wales  
Although indications were given in the late 1990s that both divisions of the Court of Appeal would sit regularly in Wales no formal arrangements or protocols for timetabling such sittings were ever put in place. In the early years the Criminal Division sat more often in Wales than the Civil Division but these sittings were not satisfactory in terms of efficiently disposing of cases as the absence of a Court of Appeal office in Wales and the lack of proper arrangements in London for identifying cases from Wales for hearing in Wales resulted in inadequate available work to fill the lists when the court sat in Wales. On occasions appeals from English Crown Courts were listed in Cardiff to try to provide adequate work for the court.
- 1.6 In recent years the Civil Division has sat in Cardiff for two or three weeks a year with the result that in 2009, 2010 and

2011 the majority of civil appeals from Wales (but not interlocutory hearings or renewed applications for permission to appeal) have been heard in Wales.

1.7 The position of the Criminal Division is very different. It did not sit in Wales at all during 2009 and 2011 and sat for five days in 2010 during which it heard only a handful of appeals from Wales

1.8 The appointment of a Welsh speaking High Court Judge

There are two High Court Judges who are able to sit on cases in which Welsh is used. The ability to speak Welsh was not a criterion of appointment of either. One of those judges will shortly retire. The person appointed to fill the vacancy created by his retirement is unlikely to be Welsh let alone Welsh speaking. Furthermore, the documents misrepresent by over simplification the circumstances in which Welsh can be used in court hearings.

## 2 Separate Jurisdiction

2.1 One might expect that a “separate jurisdiction” requires a defined territory, a law making body within that territory empowered to make laws for that territory and a judicial system within that territory to administer those laws. However, the United Kingdom encompasses a number of “separate jurisdictions” none of which falls neatly within that pattern. These jurisdictions have developed for historical or political reasons and have been tailor made to meet the requirements of a particular situation. None is exclusive or watertight in the sense that there is no input from outside the territory into the workings of the jurisdiction.

2.2 Scotland retained its separate jurisdiction after the union with England. It had a defined territory and a judicial system largely separate from that of England but all its laws were made by the Westminster Parliament. Even now, following the creation of the Scottish Parliament, when much Scottish law is made in Edinburgh, there remain significant crossovers between the Scottish and England and Wales jurisdictions. For example, laws applicable to Scotland in fields reserved to the UK government continue to be made in Westminster and there are elements of the tribunal judicial system which applies to Scotland which are organised on a United Kingdom or Great Britain basis.

2.3 The jurisdiction of Northern Ireland was created for political reasons in the 1920s. It has a defined territory, a separate

judicial system and a devolved legislature which creates laws applicable only to that territory. However, there are cross-overs between the Northern Ireland jurisdiction and other jurisdictions and the jurisdiction of Northern Ireland continued even during periods of direct rule from Westminster. Part of the Northern Irish tribunal judicial structure, like that of Scotland, is organised on a UK or Great Britain basis and the UK parliament legislates on reserved matters.

- 2.4 Following the Good Friday Agreement, criminal law was a reserved matter and it continued to be so until 2010. In a speech delivered on 16<sup>th</sup> October 2008, the then Prime Minister Gordon Brown sought to encourage the Northern Irish Assembly to seize the opportunities which the devolution arrangements in Northern Ireland offered. He said:

“.....there is something more vital at stake for your entire society that only the completion of devolution can deliver. How can you, as an Assembly, address common criminality, low-level crime and youth disorder when you are responsible for only some of the levers for change; when you have responsibility for education and health and social development but have to rely on Westminster for policing and justice?”

The people of Northern Ireland look to you to deal with these matters because to them they are important. Full devolution is the way to deliver better services, tailored to the needs of all communities, regardless of the politics. It is the best way for you to serve them.”

- 2.5 Wales, on the other hand, although it has a defined territory and a legislature which can create laws on certain devolved matters does not have its own jurisdiction. In broad terms, the administration of justice in Wales is not devolved and the judicial system which operates in Wales is part of the judicial system of England and Wales. I say “in broad terms” as aspects of the tribunal judicial system which operates in Wales, like those of Scotland and Northern Ireland are organised on a UK or Great Britain basis. Of potentially more significance, however, is the fact that some aspects of the administration of justice are devolved. The National Assembly/Welsh Government is responsible for over a dozen tribunals and has the power to create further tribunals. Although appeals from these tribunals feed into the wider England and Wales appellate structures, the Assembly’s responsibility for these tribunals and its ability to pass

primary legislation enable one to say that Wales already has an embryonic jurisdiction which will develop as the Assembly acquires more powers, creates more laws which are different from those which apply in England and establishes more tribunals.

2.6 While each of these jurisdictions has features fundamentally different from the others each has an appeal route to the Supreme Court and each has to have regard to the jurisprudence of Europe.

2.7 Jurisdictions, therefore, come in a variety of forms even within the UK and can be created to fit the particular requirements of a state or devolved administration and can be amended as circumstances change.

### 3 Wales's position in the jurisdiction of England and Wales

3.1 The present jurisdiction is wholly London-centric. All its institutions are based in London and Wales is treated for practical purposes just as another circuit of England. There are a number of adverse professional, social and economic consequences to this amongst which are the following:

- (i) The system has inhibited the development of expertise in certain specialised areas of practice. For example, the fact that until comparatively recently all Judicial Review cases were heard in London meant that few practitioners in Wales developed or had the scope to develop a practice in that field. However, the opening of the Administrative Court in Cardiff and the possibility of doing this work in Wales has caused some practitioners to develop the necessary knowledge and expertise.
- (ii) There is no body in Wales which has responsibility for making decisions on the siting, designing and financing of court building in Wales. The infrastructure of the administration of justice has never been developed on a whole Wales basis. The result is that we have courts along the North Wales coastal strip and courts along the Southern coastal strip but inadequate provision between the two. Between Swansea and Caernarfon there is no Crown Court (save for Carmarthen Crown Court which because of its inadequate facilities can be used only for restricted categories of work) and between Merthyr Tydfil and Mold there is no Crown Court at all.



- (iii) Many jobs and career structures relating to the administration of justice in Wales are based in London.
- (iv) Because of the unified England and Wales jurisdiction individuals who have no knowledge of or connection with Wales can be appointed to the judiciary in Wales or to judicial posts which have responsibility for or influence over Wales.
- (v) Sittings of the High Court and Court of Appeal in places outside London – including Wales – are limited by the demands of London for judicial time.
- (vi) The unified jurisdiction does not adequately recognise the developing constitutional position of Wales and attempts to obtain appropriate recognition for Wales have to be made on an *ad hoc* basis and are met with resistance.
- (vii) Although in recent years attitudes towards the use of the Welsh language in the administration of justice have changed for the better we still have, forty-five years after the passing of the first Welsh Language Act, a system which is fundamentally English and which accommodates the Welsh language when it has to. Welsh and those who wish to use it remain in an inferior legal position.

3.2 These disadvantages and others similar to them could be remedied without the creation of a separate Welsh jurisdiction if the present jurisdiction were to provide Wales with the necessary structures and resources to ensure the development of Wales's emerging legal personality and to enable the judicial structures in Wales to properly support the constitutional changes which have taken place and those which are likely to occur. However, experience so far makes me question whether such provision will be made.

#### 4. The need for a Welsh Jurisdiction

- 4.1 Whether a Welsh jurisdiction should or should not be created is a political decision which will be made for reasons wider than the present or anticipated differences between English and Welsh law. It is inappropriate for a serving judge to express an opinion on such a political matter. The judiciary will make work and will work within whatever jurisdictional structure democratically elected politicians put in place and will expect the independence of the judiciary to be respected and protected within that structure.
- 4.2 The divergence between the law in England and the law in Wales brought about by devolution is significant but not

great. At present that divergence may not at first sight require the setting up of a jurisdiction but the divergence will increase now that the Assembly has acquired the powers contained in Part IV of the 2006 Act and will further increase as the Assembly acquires more responsibilities and legislative competence.

4.3 One of the reasons frequently advanced for the distinction drawn between the nature of the devolution settlements in Scotland and Northern Ireland (a reserved powers model) and that in Wales (a transferred powers model) is that the former model is inappropriate for Wales as Wales does not have its own jurisdiction i.e. it does not have the necessary judicial structures to support such a devolutionary settlement. It follows from that argument that if Wales moves to a reserved powers model or intends to do so or gains a breadth of legislative competence which, for example, includes part of the justice system, a Welsh jurisdiction would be necessary.

4.4 There has to be a strong element of forward planning. The creation of a jurisdiction will take time as there are essential elements of a jurisdiction which do not presently exist in Wales. Therefore, waiting until the degree of divergence has reached a critical stage before deciding to create one would result in a period of uncertainty and dysfunctionality.

## 5. The Elements of a Jurisdiction

5.1 A Welsh jurisdiction would have its own judiciary and court system with a Chief Justice as head of the Welsh judiciary. That structure is already in place up to the level of the Crown Court but it would be necessary to put in place a High Court and Court of Appeal together with offices to support those courts. It would also be necessary to consider what parts of the tribunal system should be brought within the jurisdiction.

5.2 A Service to administer the courts and tribunals would be necessary and again the framework of that is already in place in HMCTS Wales.

5.3 In addition there is a range of bodies and functions which would need to be considered. They include the equivalent of a Judicial Appointments Commission, judicial disciplinary procedures, an Offender Management/Probation Service, a Prison Service, a police service answerable to a Welsh Government Minister, a prosecution service together with procedures for reciprocal enforcement of warrants, judgements, etc.

- 5.4 There would be a cost to the creation of a jurisdiction but I am unable to comment on that save to say that many of the necessary functions are already being carried out in London and transferring them to Wales would be unlikely to incur more than start up costs. Also to be considered are the benefits from new jobs and career structures, the ability to offer our young people the opportunity of employment in fields or at levels in those fields previously unavailable in Wales and the tailoring of a legal system to the specific demographic, geographic and linguistic needs of Wales.
- 5.5 The arguments referred to in the Scoping Paper advanced by Jack Straw MP against creating a Welsh jurisdiction are exaggerated and unpersuasive. The matters to which he refers are readily accommodated in relation to other jurisdictions – for example Northern Ireland – and could be equally well accommodated in relation to a Welsh jurisdiction.

## 6. The implications of a separate jurisdiction for the Legal Profession

- 6.1 If Wales and England were to have separate jurisdictions each would be a Common Law jurisdiction and the fundamental concepts of the law would be similar. There is no reason why Welsh lawyers should not continue to be able to practice in England and to have rights of audience in English courts or why English lawyers should not be in the same position in Wales.

## 7. Other jurisdictions

- 7.1 I am not in a position to comment on how other small jurisdictions operate. However, the jurisdiction of Northern Ireland is obviously one which has potential relevance to Wales. Another is that of the province of New Brunswick, Canada. That, too, is a common law jurisdiction which serves a population of approximately 750,000 one third of which is Francophone and two thirds Anglophone. In 2000 and 2001 a group of Welsh lawyers visited New Brunswick to see how a small, common law, bilingual jurisdiction operated. A report was compiled after each visit. The 2000 report is available from the office of The Counsel General to the National Assembly for Wales and the 2001 report from HMCTS Wales. The main focus of the reports was bilingualism but they might provide interesting background information.

## **Inquiry into the establishment of a separate Welsh jurisdiction Response from The Association of Judges' of Wales**

1. The Association of Judges' of Wales (hereafter "the Association") was formed in 2008 shortly after the administration of the courts in Cheshire was separated from the administration of the courts in Wales and when, for the first time, something approaching a Welsh judiciary became identifiable. In broad terms, the membership of the Association is made up of all serving and retired District Judges and Circuit Judges in Wales, and all serving and retired High Court, Court of Appeal and Supreme Court Judges who are members of the Wales and Chester Circuit. In addition, those Tribunal Judges who sit full-time in Wales are also members of The Association. A full list of the categories of membership can be supplied if required.

2. Whether a separate Welsh jurisdiction should be created and, if created, the form such a jurisdiction should take are political issues and the Association is not able to express views on those or any related political matters. The Association's intention in providing this response is to address, as far as it is able, the four specific matters raised by the Committee and to draw attention to some matters of concern to the Association which should be addressed even if Wales remains part of the unitary jurisdiction.

### Issue 1 – What is meant by the term "Separate Welsh Jurisdiction"

3. The description of a jurisdiction given in paragraph 3.9.15 of the Report of the All Wales Convention as being "indicated by a defined territory, a distinct body of law or a separate structure of courts and legal institutions" is adequate for present purposes. It is, however, important to note that there is no rigid template for a jurisdiction: jurisdictions differ in nature, one from the other and that is so even in the case of the main jurisdictions in the United Kingdom – England and Wales, Northern Ireland and Scotland. If a separate jurisdiction were to be created for Wales it would not have to replicate any other jurisdiction; it could be tailor made to meet the needs of Wales and develop further if those needs change.

### Issue 2 – The potential benefits, barriers and costs of introducing a separate Welsh jurisdiction

4. The establishing of the National Assembly for Wales marked the beginning of a process by which the laws in Wales could differ from the laws in England. Initially, the differences were minor. However, with a gradual increase in the Assembly's legislative powers, the differences have increased and now that the Assembly has primary

legislative powers over the twenty devolved subject matters, those differences will further increase.

5. At present, those differences can be accommodated within the present judicial structures and, of themselves, do not require a Welsh jurisdiction, with one embryonic but growing exception: the Administrative Court in Wales where a significant proportion of the cases already involve the application of Welsh law. The situation in this court is made more difficult by the ability of litigants to commence Welsh proceedings in London where there is a lengthy delay – perhaps 9 months or so – before directions are given to transfer the case to Cardiff. This unsatisfactory state of affairs does need to be remedied: a means to do so might be an amendment to the Civil Procedure Rules requiring that Welsh cases be commenced and heard in Cardiff.

6. Increasing divergence between the law in England and Wales in the presently devolved fields will necessitate an ongoing assessment of the need for a separate jurisdiction and if, as is often said, devolution is a process not an event, an ongoing assessment will be made all the more necessary if the Assembly acquires legislative competence over matters beyond those set out in Part 4 of the Government of Wales Act 2006. One of the primary reasons given for limiting the devolution settlement in Wales to a conferred powers model rather than the reserved powers model which exists in Scotland and Northern Ireland is that Wales does not have its own jurisdiction. If Wales is to move to a reserved power model of devolution or to a degree of legislative competence which approximates to it, a separate Welsh jurisdiction is likely to be necessary. Similarly, if responsibility for significant parts of the justice system is transferred to the Welsh Government the creation of a Welsh jurisdiction would be a natural concomitant to such a development.

7. There will be an inevitable time lag between the date upon which a decision to create a jurisdiction is made and the coming into existence of that jurisdiction. Therefore, the decision to create a jurisdiction should not await the time when a jurisdiction is urgently needed to sustain the devolution settlement as the time lag is likely to produce a period of instability. We regard it as of fundamental importance that judicial structures and administrative structures relating to the administration of justice in Wales develop to support not only the present constitutional changes but also possible future constitutional change.

8. Within the present unified jurisdiction the position of Wales is not adequately recognised. The jurisdiction is London-centric and for practicable purposes, Wales is treated as a Circuit of England. Decisions taken in London frequently ignore Wales and efforts to secure even some recognition of the Welsh dimension are met with

opposition. We set out some examples which might illustrate this point:

- (a) Over 10 years elapsed between the establishing of the Administrative Court in Wales in 1998 and the opening of an office in Cardiff to support it in 2009. During those 10 years the Court was administered from London and it did not work efficiently. Repeated requests for an office in Cardiff were met with arguments that opening such an office would be too expensive, the amount of Administrative Court work available in Wales was too small to justify an office and having a branch office in Wales, distinct from the main office in London, would cause complications.
- (b) The newly established Judicial College (the successor to the Judicial Studies Board) was set up without any budget allocated to Welsh language training and without any provision for representation from Wales in its structures of governance. Requests for such representation, which were ultimately successful, were met with prolonged resistance.
- (c) Regular sittings of the Court of Appeal in Wales were promised in 1998. In recent years the Civil Division of the Court of Appeal has sat regularly in Wales although by no means all Welsh civil appellate work is heard in Cardiff. Sitting of the Criminal Division of the Court of Appeal are rare – 5 days in the last 3 years.
- (d) Sittings out of London of High Court and Court of Appeal judges are limited because of London's needs to ensure adequate High Court and Court of Appeal judges to sit in London.
- (e) Recently a decision has been taken to remove from all County Court in England and Wales the ability to issue a common form of County Court claim and to centralise the issuing of such claims in a County Court in Salford near Manchester. The decision was taken without consultation and without provision for issuing Welsh language claims. A suggestion that, if centralisation is necessary, the issuing of claims in Wales should be centralised in a County Court in Wales, has been rejected.

9. The above examples illustrate the unsatisfactory position of Wales within the present jurisdiction. If Wales is to continue within the unified jurisdiction of England and Wales it is essential that adequate provision be made to develop legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, to develop structures which will complement and underpin the evolving constitutional position of Wales and make adequate provision to recognise and develop Wales' present and emerging legal personality and characteristics. The developments which we regard as important include, but are not limited to:

- (a) An acceptance of the proposition that all cases arising in or having a primary connection with Wales, (below the level of the Supreme Court), should be heard in Wales and that jobs and career structures connected with legal work in Wales are based in Wales.
- (b) Consistently with (a) above, amending and strengthening arrangements for the hearing of High Court and Court of Appeal cases in Wales and the opening of an office of the Court of Appeal in Wales to administer all appeals from Wales.
- (c) The creation of a Judicial Appointments Commission for Wales or a dedicated committee of the present Judicial Appointments Commission to make judicial appointments in Wales.
- (d) The establishing of a body – perhaps jointly by the Assembly and the Ministry of Justice in London – to develop in a coherent and systematic way Wales' position within the present jurisdiction; to improve public access to the legal system in Wales and to ensure that the economic benefits which can be derived from the administration of justice are available to Wales.

10. We are unable to comment on the costs of creating a Welsh jurisdiction or the cost of strengthening legal institutions in Wales were Wales to remain within the present jurisdiction. Either option is likely to have cost implications but there are positive matters which would offset any such costs. Firstly, bringing the administration of justice closer to the people of Wales and the creation of jobs and career structures in Wales would have important socio-economic benefits. Secondly, the development of improved structures for the administration of justice would have wider economic advantages, not only to the legal profession, but to those industries which support the administration of justice. Thirdly, there is an inevitable cost of administering and hearing Welsh cases in London and hearing and

administering those cases in Wales is unlikely to increase the basic costs although there would be start-up costs for the offices, for example, of the High Court and Court of Appeal.

11. We do not regard the arguments against creating a separate Welsh jurisdiction referred to by Jack Straw MP and quoted in paragraph 6 of the Scoping Paper to be “overwhelming”. Indeed, the matters raised by him have all been dealt with in the context of other jurisdictions in the UK.

#### Issue 3 – The practical implications of a separate jurisdiction for the legal profession and the public

11. We do not think it appropriate to comment upon the practical implications for a separate jurisdiction for the legal profession in Wales save to say that we see no reason why, if a separate jurisdiction were created, English lawyers should not be able to practice in Wales or why Welsh lawyers should not be able to practice in England.

#### Issue 4 – The operation of other small jurisdictions in the UK

12. We are not in a position to comment upon the operation of other jurisdictions in the United Kingdom.

13. Finally, we wish to emphasise that whatever decision is made about the strengthening of judicial structures in Wales or the creation of a separate Welsh jurisdiction, it is essential that the independence of the judiciary from government is maintained and safeguarded in any new order.



**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from The Law Society**



Cymdeithas y Cyfreithwyr  
The Law Society

**Wales:  
Separate Jurisdiction**  
February 2012

cefnogi  
cyfreithwyr

supporting  
solicitors

The Law Society is the representative body for 150,128 solicitors in England and Wales<sup>1</sup>. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

In Wales, The Law Society has a permanent office which is resourced to enable solicitors across England and Wales to respond to both law and policy consultations and to respond to current legal issues both stemming from the devolution of law-making and consequent upon a developing and distinct legal community.

## **A. Overview**

This inquiry by the Constitutional and Legislative Affairs Committee ("the Committee") is welcomed. Our interest in the development of law-making and the administration of justice in Wales is broad and is reflected in our work with the National Assembly for Wales, the Welsh Government, stakeholders in public life in Wales and in our annual lecture at the National Eisteddfod, which has provided a platform for the raising of issues related to the development of devolution.

Our members' views on a separate Welsh jurisdiction and, indeed, the separation of the Welsh jurisdiction from the jurisdiction of England and Wales vary and over the coming months we are undertaking our own work to raise the debate within the profession in order to ascertain these views. Our response to this inquiry is not intended to be a position statement on the principle of a separate jurisdiction for Wales but a response which aims to assist the Committee with its consideration of the nature and implications of a separate jurisdiction by outlining some of the key considerations and options that exist.

## **B. Response to the terms of reference**

### **B.1 the meaning of the term "separate Welsh jurisdiction"**

A legal jurisdiction in its simplest form is a justice system, it is the system for delivering justice and can be defined territorially. A "separate Welsh jurisdiction" would be geographically defined but how far would its legal remit extend?

The First Minister has claimed "criminal justice need not be devolved for there to be a Welsh jurisdiction"<sup>2</sup>. In Northern Ireland there was a separate court system with full law reform support falling under their Department for Finance and Personnel before the recent devolution of criminal justice which sits in the Northern Ireland Department

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<sup>1</sup> Total number of solicitors on the roll as of 31 July 2011 - Law Society Annual Statistical Report

<sup>2</sup> Law Society Annual Lecture National Eisteddfod of Wales Cardiff and District 2008  
Carwyn Jones AM, Counsel General Law in Wales: The Next Ten Years

for Justice. The two parts have yet to be joined together. Full devolution of a criminal justice system is likely to take time and, if there are to be significant differences in law and procedure between the two systems, is likely to carry significant implications for training and reform across the entire system in Wales. This is likely to be costly and over-ambitious at this stage. The devolution of criminal justice is not considered further in this response.

Looking at a separate Welsh jurisdiction in today's context, therefore, any separation from the jurisdiction of England and Wales will likely be limited to civil law. But, can there be a separation of the machinery of justice where there is a continuation of legal principle and vast areas of coterminous legislation? Although the areas of primary law-making in Wales extend across 20 subjects<sup>3</sup> which directly impact on the lives of people in Wales there is a wide body of law which continues to apply to England and Wales.

In its report the All Wales Convention noted that "the courts in England and Wales are fully competent to consider cases involving the laws of England and Wales, the laws of Wales only and relevant considerations from European Union or common law more generally"<sup>4</sup>. The Committee will be aware of changes within the courts and tribunals service which were usefully described by the Hon. Mr David Lloyd Jones in The Law Society Wales annual lecture of 2010<sup>5</sup>.

There are a number of elements to be considered, which lead to the following questions:

1. First, the substantive law. It is relatively simple for different law to be applied by the courts in a distinct territory, as has been demonstrated by the success in the devolved areas so far. However, a number of questions need to be resolved, particularly in the field of private law where agreements will have been entered into on the basis of a particular understanding of English law. How far will Welsh legislation overturn or amend this understanding? There is also the question of the extent to which Welsh courts are to have jurisdiction in developing a distinct approach to interpreting common law obligations. In principle, there is no reason why Welsh treatment of disputes should not diverge from the existing English and Welsh approach. However, there may need to be clarity over how individual disputes will be treated. Many agreements will have been entered into without any contemplation that a separate Welsh jurisprudence may develop and some provisions will be needed to establish how the courts will deal with disputes over such agreements brought to the Welsh courts by parties, one of which may not reside in Wales or neither of which may wish to be bound by Welsh jurisprudence. There will need to be clarity over the approach of the Welsh system to parties choosing their jurisdiction. It may well be that, as jurisprudence develops, Welsh law will become an attractive alternative to the law of England and Wales but equally parties may choose not have disputes resolved by Welsh law. In public law, these questions are less likely to arise provided there is clarity over which law will apply to which institutions.

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<sup>3</sup> Government of Wales Act 2006 Schedule 7

<sup>4</sup> All Wales Convention Report para 3.9.22

<sup>5</sup> The machinery of justice in a changing Wales the Hon. Mr Justice David Lloyd Jones Senior Presiding Judge, Wales Circuit

2. This leads to the question of the jurisdiction of individual courts. It is assumed that it is likely that Welsh courts will follow usual international practice in enforcing judgements from other jurisdictions. But, a decision will need to be made as to the extent to which courts in Wales will deal with disputes arising involving what will then be English law. It is not clear to what extent it will be necessary for individuals living in Wales to challenge public institutions governed by English law but, if they do, there will be a question as to whether proceedings should begin in Wales or England. However, it is inevitable that some private disputes involving individuals living in Wales will be governed by English law and there will need to be a view taken as to whether the Welsh courts will adjudicate on those disputes and, if they do, what appeal mechanisms will exist. Should there, for example, be a separate Court of Appeal dealing with Welsh law while cases decided under English law go to the Court of Appeal in London? How far should the Supreme Court continue to have jurisdiction?

3. There then follows the question of the procedures to be adopted by the courts. Even if some disputes are to be decided under what will then be English law, it does not necessarily follow that procedures for resolving such disputes will be the same or, arguably, the rules as to costs.

4. These considerations then lead to questions about the character of the judiciary in Wales (and, indeed, of the legal profession) and the extent to which a separation of qualification and appointments mechanisms are needed or whether existing ones can be adapted.

The changes which have led to the current arrangements accommodate the need to have access to justice according to the law in Wales, but a separation from the England and Wales structure would require the establishment of a number of bodies. The Justice department lists around 30 organisations within the justice system which are necessary to its operation in respect of civil law. The structure supporting the judiciary and the courts and tribunals service is extensive and a separate jurisdiction could require the creation and implementation of such a structure including responsibility for areas such as judicial appointments and conduct, and civil procedure and costs.

Wales would need a new department within the Welsh Government to have responsibility for the jurisdiction and to establish an independent judiciary. Speaking in 2009, the Rt Hon Sir Malcolm Pill noted "the judicial arm of the constitution of Wales must be integral to the settlement and not left merely to follow along and comply with it, whatever form it takes"<sup>6</sup>.

As well as the machinery of justice, a jurisdiction denotes the jurisprudence and there are responsibilities following this aspect of a jurisdiction. The growth of the body of law is central to this and the establishment of an organisation to review legislation and recommend reform in the way that the Law Commission does now for England and Wales is crucial to a fully rounded jurisdiction.

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<sup>6</sup> Rt Hon Sir Malcolm Pill Legal Wales Conference Marriott Hotel, Cardiff 9 October 2009

## **B.2 the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;**

The costs will depend upon the extent to which the Welsh jurisdiction is entirely separate (something that may be easier to achieve in the lower courts than in the county or High Court) or can use the existing mechanism and resources from the current jurisdiction. It may well be a gradual process. In Wales there are already a number of separate Welsh tribunals. These tribunals are demonstrating the pros and cons of a separate system, for example the Welsh policies developed in the areas in which the tribunals operate are readily applied to the hearing and resolution of cases. However, the small number of members of each tribunal does have an effect particularly on the costs e.g. the cost per head of training is likely to be higher. The evidence of the Chairmen of the Welsh tribunals might inform the Committee on the success or otherwise of the operation of these tribunals although the Wales only tribunals do not operate in a way that is directly similar to a Welsh courts and tribunals service<sup>7</sup>.

Another body which gives a useful example of the operation of a separate justice organisation within Wales is CAF/CASS Cymru the family courts service. This is the responsibility of the Welsh Government and knowledge of the experience of running this service may usefully be gleaned by the Committee.

A separate jurisdiction would raise the question of whether there needed to be a separate regulatory system for legal services providers and a different system for qualification. In the context of a smaller legal profession, the costs of this might well be considerable, particularly if a number of its members wished also to practise in England and were to face a double regulatory cost. It might, however, be possible to adapt the existing structures that work for both England and Wales, at least in the first instance, to apply to both jurisdictions. There would be an impact on legal education: would all courses in Wales offer only Welsh legal qualifications? The teaching of a bilingual approach to law-making and the use of Welsh in providing legal services and in representing persons through the courts and tribunals would receive renewed attention.<sup>8</sup>

The Law Society promotes the benefits of the jurisdiction of England and Wales on a global stage. The law in England and Wales is transparent, predictable, flexible and supports the needs of modern commerce; in addition English is the language of international business. These features make England and Wales a highly attractive jurisdiction in which to resolve disputes. By creating a "separate Welsh jurisdiction" the benefits of this might be lost and Wales could be perceived as a difficult place to do business. Conversely, economic and social advantages may flow from developing the legal profession in Wales and in the development of law that is suited to the particular situation in Wales.

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<sup>7</sup> The Hon. Mr Roderick Evans The Lord Callaghan Memorial Lecture 2010 Devolution and the Administration of Justice Swansea University 19th February 2010

<sup>8</sup> See below B3

### **B.3 the practical implications of a separate jurisdiction for the legal profession and the public**

An immediate issue is how solicitors qualified in England and Wales would qualify to practise in the new jurisdiction. Legal services are not within the devolved subjects and any changes would require new legislation on regulation of legal services for the Welsh jurisdiction. This is an area in which the Law Society has particular interest and is under active consideration currently.

Would a separate Welsh jurisdiction create a need for a separate regulatory infrastructure in Wales for the legal profession, e.g. the equivalent of the Solicitors Regulation Authority or could practitioners in Wales remain within the current regulatory system? Regulation of legal services includes record keeping, disciplinary proceedings, supervising legal education providers and dealing with the transfer of lawyers into the jurisdiction. This is of central importance because of concerns regarding the ability of practitioners to move across the border between Wales and England to practise in future.

The relationship between Northern Ireland and England and Wales has been held up as an example of mutual recognition of legal qualification however a practitioner from Northern Ireland cannot automatically practise in England and Wales. The Solicitors Regulation Authority require application through its Qualified Lawyers Transfer Scheme as for lawyers coming from any other jurisdiction. In the case of Northern Ireland academic qualifications are recognised but a period of training is often required. There would be a need to arrange agreements for recognition of rights of audience so that practitioners in England and Wales could be heard in courts and tribunals in the other country.

Would the legislation on the provision of legal services more generally and the opening up of new markets continue to apply to Wales?

For some time we have advocated "a single database for all legislation applicable for Wales to be compiled and maintained as a public service"<sup>9</sup>. The UK Statute Law Database is held up as an example of such a single portal but it is not well maintained. On many of its pages there are warnings that there have been amendments without the relevant provisions being added. This is not an adequate service. It is apparent that maintaining information on legislation for Wales is not commercially viable and so the task must fall to public provision. There is a need for a comprehensive Welsh Statute Book.

In addition, there is a dearth of practitioners' texts with many commercial publications failing to maintain commentary on Welsh legislation and cases. As time moves on and the body of law increases through new legislation and court decisions, this gap will become more significant.

Devolution is progressing and public awareness increasing but a move to a separate Welsh jurisdiction will require careful explanation. Public access to justice will be changed at its roots although a Welsh legal service is likely to follow the traditions of the jurisdiction of England and Wales it will be separate, it will be new.

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<sup>9</sup> The Law Society Wales Response to the All Wales Convention February 2009

#### **B.4 The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system**

We are the Law Society of England and Wales and do not operate within the other devolved legislatures. However, we have links with our colleagues in Scotland and Northern Ireland and it may be of interest for the committee to direct questions to these representative bodies.

For further information please contact:

**E Kay Powell Solicitor / Cyfreithiwr  
Policy Adviser Wales/Ymgynghorydd Polisi Cymru  
UK Operations / Gweithrediadau DU**

The Law Society / Cymdeithas y Cyfreithwyr  
Wales Office / Swyddfa Cymru  
Capital Tower / Twr y Brifddinas  
Greyfriars Road / Heol Y Brodyr Llwydion  
Cardiff / Caerdydd  
CF10 3 AG

t: 029 2064 5254

f: 029 2022 5944

e: [kay.powell@lawsociety.org.uk](mailto:kay.powell@lawsociety.org.uk)

[www.lawsociety.org.uk](http://www.lawsociety.org.uk)

## CLA WJ 22

### **Inquiry into the establishment of a separate Welsh jurisdiction Personal response (Serving District Judge)**

1. As the submission is made by a serving Judge it is made with no wish to give oral evidence. The judicial position held means that there is no indication, and none should be interpreted, of any political view.

2. It is noted that the Committee is inquiring into the technical aspects of the question of the establishment of a separate Welsh jurisdiction. Whether such a jurisdiction is established is a political one and no comment is made in that regard. This submission is made on the basis of legal work undertaken in the County and High Court from a District Bench perspective with jurisdiction in civil and family matters. It is also made on the basis that there appears at present to be no formal definition of what is meant by "separate Welsh jurisdiction". The comments do not address issues which arise from the operation of criminal courts or tribunals. The one exception to this is I would note that I also sit as a Legal Chair of a Tribunal – Adjudication Panel for Wales. I do not know if the Committee have consulted the President of the Panel in regard to their Inquiry. This Tribunal is a Wales only Tribunal and in a recent case (which is ongoing) an application for judicial review was filed by the Respondent in the case in the High Court (Administrative) in London and the application dealt with in London. This was notwithstanding the fact that the jurisdiction of the Tribunal is Wales only and that there is an Administrative Court based in Cardiff.

### 3. Background

The jurisdiction of the county courts is entirely statutory and covers almost the whole field of civil and family law. Areas of work cover, for example, virtually all cases under the Consumer Credit Act, actions by mortgage lenders for possession and actions by landlords under the Rent Acts and the Housing Acts 1985, 1988 and 1996.

Common law cases (basically tort, including personal injuries, debt and other breaches of contract) and claims in equity. The county courts have

unlimited jurisdiction in applications under the Inheritance (Provision for Family and

Dependants) Act 1975, Section 146 and Section 147 of the Law of Property Act 1925 and under Section 13 of the Trusts of Land and Appointment of Trustees Act 1996 and Companies Act Cases.

In family law, the jurisdiction is similarly divided either by statute or practice direction. They include adoption, dissolution of marriage/civil partnership and judicial separation. The county courts share jurisdiction with the High Court and the Family Proceedings Court in



applications under the Children Act 1989, including public law work such as care orders.

4. District Judges are employed by the Ministry of Justice and appointed by HM Queen. Appointment follows a competition organised under the auspices of the Judicial Appointments Commission. This is an independent body who appoint on the basis of merit. It is essential in my view that in any appointments procedure independence from the Executive is retained. Recommendations for appointment have to be approved by the Lord Chancellor. In principle there is no reason why such approval could not be devolved. It is essential if appointment of judges to serve in Wales is retained by the JAC that there is a designated member of the Commission for JAC from Wales. The JAC could devolve powers to Wales if there were to be a wholly separate jurisdiction. District Judges within Wales are appointed for service on the Wales circuit, though subject to approval, could serve on other circuits based in England. There have been examples during past decade of transfers of District Judges between circuits. The County Courts in Wales are managed by the Ministry of Justice. Transfer of management structure from say the MOJ to the Assembly would carry significant costs consequences. It may curtail opportunity for transfers as exist currently between circuits.

The management of the Wales circuit is devolved to HMCTS office in Wales and supervised by the Presiding Judge for Wales (a High Court Judge) appointed I understand by the Lord Chief Justice. Each Circuit I understand have such an arrangement. There is also a Designated Family Division Liaison Judge. It may be worthwhile considering whether the position of a Presiding Judge/ Liaison Judge for Wales should be formally codified to ensure some form of statutory protection. Appointment could remain under the auspices of the Lord Chief Justice for England and Wales. It is essential there are legal protections to ensure the management of Courts in Wales are retained by an office based in Wales. There has been a significant reduction in numbers of staff in the past year. Judicial independence is essential and it is of some concern for example that this important principle has not been fully appreciated by the Assembly in the drafting of the latest Welsh Language Act.

5. As noted above the jurisdiction of the work undertaken by the District Bench is extremely wide. Currently little appreciation exists that a number of the areas of work include areas where powers have been devolved to the Welsh Assembly. It is inevitable that separate legislation will develop in many of those fields.

In terms of daily activity of the District Bench our rules are governed by the Civil Procedure Rules, the Insolvency Rules and the Family Procedure Rules. These are significant statutory instruments and I cannot envisage at present a situation where operation of the County

and High Courts in Wales would be governed by entirely separate sets of rules. The Rules are amended following recommendations of the Rules Committee and the implementation of a statutory instrument. Subject to consent of the Rules Committees there is no reason why if the Assembly wished there to exist a particular distinct rule for Wales this could not occur. At present any statutory instrument would have to be implemented on a Westminster basis. The Assembly may take the view for example

- i) In housing issues that there be a certain requirement undertaken by a Local Authority before possession proceedings against tenants are commenced
- ii) a local authority does not take a particular form of enforcement of a debt below a certain limit

Such requirement could be enshrined in Parts 55 or Parts 70-75 of the Civil Procedure Rules 1998. The various Rule Committees are advisory non-departmental public body to make rules of court for civil and family courts.

6. The Rules are reviewed and amended on a regular basis and an amendment to a Rule may on occasions be a more efficient and cost effective form of “legislating” as opposed to the creation of a new Act. The Assembly’s powers to amend would of course be subject to the use of such powers within a devolved sector and subject to approval of the Rules’ Committees and implementation of a statutory instrument. As far as I am aware there is no dedicated appointment on the rules committees from a judge sitting in Wales. The Committee may wish to consider whether the current format for creating and amending the Rules can allow input from the Assembly.

7. One of the areas of work covered by the County Court is housing. This is a devolved area where Wales specific legislation is implemented. Within the current system the Assembly may pass legislation which may create considerable resource issues for the County Court (which of course is funded via Westminster).

8. Another area relates to children issues. Reference is made in the FPR to differences between CAFCASS and CAFCASS Cymru. CAFCASS Cymru is an organisation operated and funded by the Welsh Assembly Government. There is considerable recent concern as to delays by CAFCASS Cymru in the allocation of cases (referred by the County or Family Proceedings Court) and severe delay in finalising reports for the Court. Such delay waste Court resources but more significantly harm children. These are issues in the creation of a devolved structure which have not been fully thought through. The concerns of the Court can be raised via the Lord Chief Justice or HMCTS at a Westminster level but there appears to be no formal channel of communication with the Welsh Government. There is considerable current judicial concern as to the effectiveness of CAFCASS Cymru in its current format, in particular compared to its counterpart in England. This is of greater concern as

historically the operation of CAFCASS in Wales was viewed as more effective than its English counterpart. As another example of rule change or indeed as a separate legislative Act it could be theoretically possible in Wales to make it a statutory obligation that allocation of cases and provision of reports occur within a statutory time frame.

9. Wider amendments to legislation and or CPR/FPR may be more problematic. Issues could arise over jurisdiction. Clinical Negligence claims could and indeed have been subject to Wales only provision. This in part is possible because local health trusts are identifiable as being based in Wales. It would be difficult for example to legislate as to general road traffic personal injury claims. Would jurisdiction depend upon location of accident, or home address of Claimant or Defendant?

10. The creation of Wales specific Courts (such as Mercantile, Administrative) is a logical development of devolution. It is essential the ongoing existence of those Courts is enshrined in legislation to ensure permanency. The right of use of Welsh in our Courts is protected by legislation and should continue to be so. One area of particular concern is the ensuring of an effective dissemination of Wales only legislation. Judicial training is under the control of the Judicial College. Whilst specific courses on the use of Welsh in the Courts have been arranged, and been effective, there is no formal procedure to ensure training of Judges on Assembly legislation. If the Assembly is of the view that legislation will have an impact on the County or High Court (in a civil or family jurisdiction) it should ensure that training issues are raised with the Judicial College.

12. In terms of proposed changes to issuing of Part 7 proceedings in County Court it is proposed all money claims shall be issued at Bulk Centre based in Salford. Initial management of such proceedings shall also take place at Salford before being allocated to local county courts. If in the future it is proposed there be a single County Court as opposed to approximately 400 at present consideration should be given as to whether it is a single County Court for England and Wales or whether there should be one County Court for England and one for Wales. The advantage may be avoiding the matter becoming a contentious issue in the future and having the flexibility to implement Wales only legislation in devolved areas. It is imperative that the new regime ensures that parties who wish to use the Welsh language in civil proceedings can do so.

11. In summary if what is meant by “separate Welsh jurisdiction” (and the consequence of which would be) a totally independent and self financing County and High Court system, at present juncture no case is made out. If what is meant is that there is adaptation of Wales specific procedures and powers, to reflect the devolution of specific

areas to the Assembly, there may be a case for such adaptation. This may be better referred to as a “distinct Welsh jurisdiction”.

17/02/12

## A JURISDICTION FOR WALES: A FEW NOTES

1. Here are a few notes that I have made, which do not follow any sort of strict or hierarchical order. Wales has been increasingly blazing its own trail for a long time. Much administrative and legal confusion has arisen from the uncertainty around powers and authority and we desperately need to put an end to this ineffective mess. An independent jurisdiction would give Wales an opportunity to sort through a wealth of experience and developments that have grown in an ad hoc fashion over decades. This is an unrivalled opportunity to revise appropriate elements of the body of Law, by giving it a more organised form, clearer and more comprehensible content, and more balanced and effective administration.
2. In terms of people who are qualified to administer a legal jurisdiction in this country, there are certainly plenty available. Law has been a popular career for bright and ambitious Welsh people for centuries and many people in other fields have also become proficient in it. Alongside this, in-depth studies of the Laws of Hywel have been published, generating lively debate on the fundamental principles of justice and its administration. Legal response has been a strong element in many public disputes, from human rights and warfare practices to religion, the environment and the economy. The public's mind and spirit are ready for an organised and energetic initiative.
3. Although there are strong arguments for the reorganisation of the Courts in this country, I do not think that that is the priority at present. Too much time and energy would go into reorganisation, leaving too little left for implementing reforms to the content of the Law. It would be much better to produce guidelines on co-operation for the various courts, tribunals, boards, appeals officers, and so on, that we have at

present. That is, one would follow principles not unlike those of the Beecham Report on local services.

4. The icing on the cake would be to ask for a High Court to group the highest courts that exist at present, to consider appeals and to exercise original jurisdiction in cases of the utmost importance (e.g. where the Government or the Assembly, and other public bodies, are interested parties).
5. It is good that the Welsh Ministers are a recognised entity, but it would be better to assign the Ministers' function as a body to matters that are directly relevant to them as a body. Where an issue is related to the area of responsibility and powers of one particular Minister, there is much to be said for the system in Southern Ireland, where the Minister is a corporation sole. This could be very useful in the context of subordinate legislation, where the Minister would introduce individual statutory instruments that apply to only one department's work, and where the Welsh Ministers as a body would introduce more important and significant subordinate legislation.
6. It is very difficult to see the relevance of the Secretary of State for Wales now. Any legislative functions should be transferred to the Assembly, and executive functions to Welsh Ministers.
7. Substantial Consolidation Acts would serve to remove many of the complexities and inconsistencies that have grown in English Law through the ages. Moreover, it would be a way to make the law clearer and easier to apply and enforce. Many areas of law are open to such treatment.
8. There is nothing new in the idea or the practice of codification in the world of Common Law. A number of current issues in the current laws of England and Wales are already covered by detailed legislation that is

coded in nature. Contract law was codified in the British jurisdictions in India, and New Zealand has codified its criminal law for a long time. Some individual U.S. states have codification and similar projects have been drawn up for the current jurisdiction from time to time.

9. The Consolidation Act would set the aims and principles of the issue in question, and would also determine the implementation guidelines. Welsh Ministers would propose Statutory Regulations, subject to the affirmative resolution procedure, to provide for the method of implementation and enforcement. The Minister's function would then be to issue guidance to explain the aims and the principles and to determine the details of the procedures. I have noted below a few areas where such legislation would be particularly beneficial.
10. In the field of contract, it is necessary to prohibit the use of economic force to impose unfair terms and conditions on individuals and other less powerful parties. In that respect, there is much to be said for the American legislation (passed during the presidency of TR, if I remember rightly) that prohibits wholesalers from also operating as retailers.
11. In terms of injustice, it would be worth considering the no-fault compensation system pioneered in New Zealand. Although it would not necessarily be suitable for every case, it should be remembered that the current legal system in the field of injustice absorbs most of the dedicated funds. Alongside this, we should seek arbitration and dispute resolution methods that do not absorb as much money and funds as the status quo.
12. One particular subject that requires attention in the field of injustice is defamation, where a case costs over a hundred times as much as the expenses in other European legal systems. Moreover, the burden of proof is on the defendant, against all natural justice. It should be insisted that the plaintiff must show that he/she has an

appropriate presence or interest in the jurisdiction of Wales, that he/she has suffered harm because of the defendant's alleged statement, and that the statement in question is untrue. We should legislate further so that our courts would not enforce judgments from jurisdictions that do not operate under the same criteria.

13. In the context of criminal law, we need to give full status to victims. The Law of England and Wales as we know it has started to move in this direction in recent years, but victims are still on the periphery of the criminal process. There is much to be said for the French civil party system and research should be undertaken into ways of adapting this to the circumstances and culture of this country.
14. Another urgent need in the criminal context is sorting out the confusion that has arisen in the context of intention (or lack of). It is time to sort out the increasing confusion around recklessness and indifference.
15. In terms of intention and liability, there is no excuse for not awarding due penalties to corporations that injure and kill. Corporations benefit greatly from their legal presence, and there is no justification for allowing them to escape the undesirable consequences of their liability if they are responsible for serious harm. (Certainly, the argument that is based on the relevance of the death penalty does not hold water at all: it would be easy enough to consent to a death sentence for a corporation!)
16. In essence, these points all support the argument for the codification of criminal law. This has been done for a long time in many jurisdictions in the world of Common Law, with a great deal of success. Among the examples to consider would be California, New York, Jamaica, British India, Queensland and New Zealand.



17. The organisation of administrative law is a perfectly natural development from the trends of recent decades. The issuing of appropriate guidelines under the provisions of a Consolidation Act would be of invaluable use to members of public services, as well as the public itself. This would not override the rightful privileges of the executive: *Juger l'administration, c'est juger*, as Portalis said.
18. Clearly, giving both languages equal status would require sound and clear guidelines for interpretation. A good example of this type of instrument would be the Interpretation and General Clauses Ordinance 1966 in Hong Kong. There are similar arrangements in Canada and Israel. (I understand that the Israeli Assembly's Translation Service has prepared Hebrew versions of some of the British statutes that are still in force there.)
19. In essence, this is a suitable subject to be covered by one of the Consolidation Acts mentioned above. In terms of interpretation of specific words and expressions in legislation and other authoritative texts, the Courts would need to apply clear and manageable guidelines. Such guidelines should, of course, include robust criteria for the use of expert witnesses, dictionaries and glossaries, and so on.

**Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru**  
**Personal response (Member of Public)**

*Awdurdodaeth i Gymru: Ychydig Nodiadau*

AWDURDODAETH I GYMRU: YCHYDIG NODIADAU

1. Ychydig nodiadau sydd gennyf yma, yn dilyn trywydd heb fod mewn rhyw drefn gaeth, hierarchaidd. Mae Cymru'n torri'i chwys ei hun yn fwyfwy ers talwm. Cododd sawl dryswch gweinyddol a chyfreithiol o'r ansicrwydd parthed pwerau ac awdurdod, ac mae dirfawr angen dod â'r llanastr aneffeithlon i ben. Byddai awdurdodaeth annibynnol yn gyfle i Gymru roi trefn ar lond cae o brofiad a datblygiadau a dyfodd *ad hoc* yn nhreigl y degawdau. A dyma gyfle ddihafal i ddiwygio elfennau priodol o gorff y Gyfraith, gan roi iddi ffurf fwy trefnus, cynnwys mwy eglur a dealladwy, a gweinyddiad mwy cytbwys ac effeithlon.
2. O ran pobl gymwys i weinyddu cyfundrefn gyfreithiol yn y wlad hon, yn sicr y mae digonedd ohonynt ar gael. Bu'r Gyfraith yn yrfa boblogaidd i Gymry disglair ac uchelgeisiol ers canrifoedd, ac mae llawer o bobl mewn meysydd eraill wedi dod yn hyddysg ynddi hefyd. Ochr yn ochr â hyn, cyhoeddwyd sdtudiaethau trylwyr o Gyfraith Hywel, gan ennyn trafodaeth fywiog ar egwyddorion sylfaenol cyfiawnder a'i gweinyddiad. Bu ymateb cyfreithiol yn elfen gref mewn sawl anghydfod cyhoeddus, o hawliau dynol ac arferion rhyfela i grefydd, yr amgylchedd, a'r economi. Mae meddwl ac ysbryd y cyhoedd yn barod am fenter drefnus ac egniol.
3. Er bod dadleuon cryf i'w cael ail-drenu'r Llysoedd yn y wlad hon, ni chredaf taw dyna'r flaenoriaeth ar hyn o bryd. Byddai gormod o amser ac egni yn mynd at waith ail-drefnu,

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- gan adael rhy ychydig ar ôl i waith gweithredu diwygiadau yng nghynnwys y Gyfraith. Llawer gwell fyddai llunio canllawiau cydweithredu i'r gwahanol Lysoedd, tribiwnlysoedd, byrddau, swyddogion apelio, ayyb, sydd gyda ni eisoes. Hynny yw, byddai rhywun yn dilyn egwyddorion nid yn annhebyg i rai Adroddiad Beecham ym myd gwasanaethau lleol.
4. Yn goron ar hyn byddai gofyn am Uchel Lys i garfannau'r llysoedd uchaf sydd yma ar hyn o bryd, i drafod apelau, ac i arfer awdurdodaeth wreiddiol mewn achosion o'r pwys mwyaf (e.e. lle mae'r Llywodraeth neu'r Cynulliad, a chyrrff cyhoeddus eraill, yn bartion).
  5. Da yw bod Gweinidogion Cymru yn endid cydnabyddedig, ond gwell fyddai neilltuo swyddogaeth y Gweinidogion fel corff at faterion sy'n union berthnasol iddynt fel corff. Lle mae rhyw fater yn ymwneud â maes cyfrifoldeb ac â phwerau yn Gweinidog yn benodol, mae llawer i'w ddweud dros y drefn yn Ne Iwerddon, lle mae'r Gweinidog yn gorfforaeth undyn. Gallai hyn fod yn ddefnyddiol iawn yng nghyd-destun is-ddeddfwriaeth, lle byddai'r Gweinidog unigol gyflwyno mân Offerynnau Statudol sy'n berthnasol i faes un Adran yn unig, a Gweinidogion Cymru fel corff yn cyflwyno'r is-ddeddfwriaeth fwy pwysig a sylweddol.
  6. Anodd iawn yw gweld beth yw perthnasedd Ysgrifennydd Gwladol Cymru bellach. Dylid trosglwyddo unrhyw swyddogaethau deddfwriaethol i'r Cynulliad, a swyddogaethau

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gweithredol i Weinidogion Cymru.

7. Byddai Deddfau Cydgrynhoi swmpus yn fodd i gael gwared â llawer o gynhlethdodau ac anghysonderau a dyfodd yng Nghyfraith Loegr yn nhreigl yr oesoedd. Yn ogystal â hynny fe fyddai'n fodd i wneud y Gyfraith yn fwy eglur ac yn haws ei chymwysu a'i gorfodi. Mae sawl maes o'r Gyfraith yn agored i driniaeth yn y fath fodd.
8. Nid oes dim yn newydd yn y syniad na'r arfer o godeiddio ym myd y Gyfraith Gyffredin. Mae nifer o faterion yng Nghyfraith bresennol Cymru a Lloegr eisoes yn destun deddfwriaeth fanwl sydd o natur Cod. Cafodd cyfraith gontract ei chodeiddio yn y meddiannau Prydeinig yn yr India, ac mae Seland Newydd wedi codeiddio'r gyfraith droseddol ers talwm. Mae rhai o'r Unol Daleithiau unigol wedi codeiddio, a lluniwyd prosiectau cyffelyb ar gyfer yr awdurdodaeth bresennol o dro i dro.
9. Y Ddeddf Grynhoi fyddai'n gosod nod ac egwyddorion y fater dan sylw, gan bennu hefyd y canllawiau gweithredu. Byddai Gweinidogion Cymru yn cynnig Rheoliadau Statudol, yn ddarosyngedig i gymeradwyaeth gadarnhaol, i ddarparu ar gyfer dull a modd y gweithredu a'r gorfodi. Swyddogaeth y Gweinidog pwrpasol wedyn fyddai cyhoeddi cyfarwyddyd i esbonio'r nod a'r egwyddorion ac i bennu manylion y dulliau gweithredu. Nodaf isod ychydig feysydd lle byddai deddfwriaeth o'r fath yn arbennig o fuddiol.

**Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru**  
**Personal response (Member of Public)**

*Awdurdodaeth i Gymru: Ychydig Nodiadau*

10. Ym maes contract, mae angen gwahardd defnydd o rym economaidd i wthio telerau ac amodau annheg ar unigolion ac ar bartïon llai grymus eraill. Yn hynny o beth, mae llawer i'w ddweud dros y ddeddfwriaeth Americanaidd (a basiwyd yn ystod arlywyddiaeth TR, os gwir y cof) sy'n gwahardd cyfanwerthwyr rhag gweithredu fel manwerthwyr hefyd.
11. O ran camwri, byddai'n werth ystyried y system ddigolledu-heb-fai a arloeswyd yn Seland Newydd. Er na fyddai'n addas o reidrwydd i bob achos, dylid cofio fod y system gyfreitha bresennol ym maes camwri yn llyncu rhan fwy'r arian pwrpasol. Ochr yn ochr â hyn, dylid chwilio am ddulliau cyflafareddu a thorri dadl nad ydynt yn llyncu cymaint o arian a chyllid â'r drefn sydd ohoni.
12. Un pwnc yn arbennig sy'n mynnu sylw ym maes camwri yw difenwi, lle mae achos yn costio dros ganwaith y treuliau yng nghyfundrefnau cyfreithiol eraill Ewrop. Ar benn hynny, rhoir y faich brawf ar y diffynydd, yn groes i bob cyfiawnder naturiol. Dylid mynnu fod pleintydd yn gorfod dangos ei fod/bod â phresenolden neu fuddiant pwrpasol yn awdurdodaeth Cymru, iddo/iddi ddiodeff niwed oherwydd datganiad honedig y diffynydd, a bod y datganiad dan sylw yn anwir. Dylid deddfu ymhellach na fydd ein Llysoedd yn gorfodi dyfarniadau o awdurdodaethau nad ydynt yn gweithredu yn unol â'r un meini prawf.
13. Yng nghyd-destun y gyfraith droseddol, mae angen rhoi statws llawn i ddiodeffwyr.

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Dechreuodd Cyfraith Cymru a Lloegr fel yr ydym yn ei hadnabod weithio yn y cyfeiriad hwn dros y blynyddoedd diwethaf, ond dal ar yr ymyl mae dioddefwyr yn y broses droseddol. Mae llawer i'w ddweud o blaid patrwm Ffrengig y parti sifil, a dylid ymchwiliio i ffyrdd o addasu hyn at amgylchiadau a diwylliant y wlad hon.

14. Angen dybryd arall yn y cyd-destun troseddol yw rhoi trefn ar y dryswch a gododd yng nghyd-destun bwriad (neu'i ddiffyg). Mae'n hen bryd rhoi trefn ar y dryswch cynyddol ynghylch byrbwyllledd a dihidrwydd.
  
15. O ran bwriad ac atebolrwydd, nid oes esgus dros beidio â dyfarnu cosb ddyledus i gorfforaethau sy'n anafu a lladd. Bydd corfforaethau yn manteisio'n fawr o'u personoliaeth gyfreithiol, ac nid oes cyfiawnhad dros adael ddianc o ganlyniadau annymunol eu hatebolrwydd os byddant yn gyfrifol am niwed ddifrifol. (Yn sicr ddigon, nid yw'r ddadl wedi'i seilio ar berthnasedd y gosb eithaf yn dal dŵr o gwbl: peth digon rhwydd fyddai cysynio am ddedfryd o farwolaeth i gorfforaeth!)
  
16. Yn y bôn, mae'r pwyntiau hyn i gyd yn ategu'r ddadl o blaid codeiddio'r gyfraith droseddol. Fe wnaed hyn ers talwm mewn nifer o awdurdodaethau byd y Gyfraith Gyffredin, gyda chryn lwyddiant. Ymlith yr enghreifftiau i'w hystyried byddai Califfornia, Efrog Newydd, Jamaica, yr India Brydeinig, Queensland, a Seland Newydd.

**Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru**  
**Personal response (Member of Public)**

*Awdurdodaeth i Gymru: Ychydig Nodiadau*

17. Byddai rhoi trefn ar y gyfraith weinyddol yn ddatblygiad hollol naturiol o dueddiadau'r degawdau diwethaf. Byddai cyhoeddi canllawiau pwrpasol o dan ddarpariaethau Deddf Grynhoi o ddefnydd amhrisadwy i aelodau'r gwasanaethau cyhoeddus, ac i'r cyhoedd eu hunain, fel ei gilydd. Ni fyddai hyn yn damsang ar briod freintiau'r weithrediaeth: *Juger l'administration, c'est juger, ys dywedodd Portalis.*
18. Wrth reswm, o roi statws hollol gydradd i'r ddwy iaith fe fyddai gofyn am osod canllawiau cadarn ac amlwg ar gyfer dehongli. Enghraifft dda o'r math hyn o offeryn fyddai Ordinhad Dehongli a Chymalau Cyffredinol 1966 yn Hong Kong. Ceir trefniadau i'r un math o berwyl yng Nghanada ac Israel. (Deallaf fod Gwasanaeth Cyfieithu'r Cynulliad yn Israel wedi paratoi fersiynau Hebraeg o rai o'r statudau Prydeinig sy'n dal mewn grym yno.)
19. Yn y bôn, dyma bwnc addas iawn i'w gwmpasu gan un o'r Deddfau Crynhoi a grybwyllwyd uchod. O ran dehongli geiriau ac ymadroddion penodol mewn deddfwriaeth a thestunau awdurdodol eraill, byddai gofyn am ganllawiau clir a hylaw i'r Llysoedd eu cymhwyso. Dylai'r fath ganllawiau, wrth reswm, gynnwys meini prawf cadarn ar gyfer y defnydd o dystion arbenigol, geiriaduron a geirfeydd, ayyb.

Inquiry into the establishment of a separate Welsh jurisdiction  
Response from the Bangor Law School, Bangor University and an Annex to the Response

**INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION**

**Submission to the Constitutional and Legal Affairs Committee  
of the National Assembly for Wales**

**Bangor Law School  
Bangor University**

***Introduction***

1. This submission takes the view that a separate Welsh legal jurisdiction already exists. Wales is a defined territory<sup>1</sup> with a body of law that is growing increasingly apart from that pertaining to England and Wales or to England alone.<sup>2</sup> A distinct body of law applying to a defined territory implies the existence of a separate jurisdiction.

The submission therefore takes a different interpretation of the meaning of the word “jurisdiction” to that proposed by the Committee in its scoping paper. The Committee defines jurisdiction as “the territory or sphere of activity over which the legal authority of a court or other institution extends”. Therefore it relies significantly on the view that “jurisdiction” is largely related to the question of which court an action should be commenced in.

2. The Committee’s definition may confuse the concept of “jurisdiction”, which can be taken to refer to the presence of a distinct body of law applying to a defined territory, with that of “competence”, which refers to the authority of particular courts or other institutions to interpret and apply that law. At present there is a separate Welsh jurisdiction, however there are no courts or other legal institutions with exclusive competence over laws that apply only to Wales and over laws that apply both to England and Wales in respect of cases that relate predominantly to Wales.<sup>3</sup> The lack of such competency does not deny the existence of a

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<sup>1</sup> Wales is a statutorily defined territory and such has also been strengthened in practice by the establishment of the Welsh Circuit. Local Government Act 1972 (Part 2 and Schedule 4) as amended by the Local Government (Wales) Act 1994 and confirmed by the Interpretation Act 1978 (Schedule 1). Government of Wales Act 2006 (section 158) as amended by section 43 of the Marine and Coastal Access Act 2009.

<sup>2</sup> See for example, O. Rees, “Devolution and the development of family law in Wales” [2008] *Child and Family Law Quarterly* 45. In the field of health and social care there are substantive differences between provisions on either side of Offa’s Dyke. For instance, in England there is no statutorily defined procedure for assessing charges for domestic social care whereas in Wales there is. The differences that exist come about either by the use of separate and distinct legal processes such as the requisite Measure, or by minute differences found in separate and differing Directions from the Department of Health on the one hand and Welsh Government on the other. See L. Clements and P. Thompson, *Community Care and the Law*, (LAG, 2011) 12-13.

<sup>3</sup> Courts in either England or Wales have authority to administer Welsh law even if it applies to Wales alone. The “apply and extend” principle means that legislation applying to Wales alone has an effect which extends over England and Wales which allows English courts to hear cases related exclusively or predominantly to Wales. Regarding Acts of the Assembly this is defined by section 108 of the Government of Wales Act 2006.



separate Welsh jurisdiction. However, its absence will increasingly hinder the efficient, effective and fair administration of justice in Wales.<sup>4</sup>

3. This submission argues that what needs to be “introduced” is not a separate Welsh jurisdiction, for such already exists. We focus instead on the potential benefits, barriers, costs and practical implications for the legal profession and the public of “introducing” separate courts and other legal institutions with exclusive competence to administer Welsh law and claims under the law of England and Wales that pertain primarily to Wales. In particular, we draw upon research examining the early impacts of establishing a new legal institution in Cardiff, namely the Administrative Court in order to put forward evidence-based recommendations with respect to the development and support of such bodies.<sup>5</sup>
4. The submission also considers the need for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. In doing so we refer comparatively to Northern Ireland, highlighting some of the considerations to be taken into account when establishing and maintaining appropriate legal institutions in small legal jurisdictions.

### *The Administrative Court in Wales*

5. The Administrative Court acts as a constitutional court adjudicating upon the powers of public bodies, establishing standards of legal propriety, applying public law principles consistently and equally, and acting as guardian of our fundamental rights. A Judicial Working Group recommended that an Administrative Court should be established in Cardiff both to improve access to justice and for constitutional reasons.<sup>6</sup>
6. At present the “competence” of the Cardiff Administrative Court (by which we mean the reach of its authority both in terms of the subject matter and territorial origin of claims that can be issued in that Court) is governed by Civil Procedure Rules, Practice Direction 54 Administrative Court (Venue). The Practice Direction does not state that claims wholly or mainly pertaining to Wales must be issued in Cardiff and heard in Wales. There is, however, a general presumption that where claims are issued in Cardiff they will be heard in Wales.

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<sup>4</sup> In this paper, we do not make out the case for a formal legal definition of the competency of the courts in Wales. The arguments in favour of this development have been persuasively articulated elsewhere and, in our view, make such a development an incontestable requirement, see T. G. Watkin, Law Society Wales Annual Lecture, National Eisteddfod 2011.

<sup>5</sup> This research was funded by the Nuffield Foundation and British Academy and supported by the Administrative Court. For further information see, S. Nason, ‘Regionalisation of the administrative court and the tribunalisation of judicial review’ [2009] Public Law 440 and S. Nason and M. Sunkin ‘The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law’ *forthcoming* Public Law.

<sup>6</sup> First, that the Welsh Assembly Government derives its powers from a variety of sources. Second, that public law pertaining to Wales already differs from that pertaining to England and Wales, and to England alone and that such divergences will continue to increase. Third, that judicial review and other public law claims examining decisions made in Wales by Welsh public bodies ought obviously to be issued and heard in Wales, this third point should be seen particularly in the context of bilingual court proceedings. Prior to the opening of an Administrative Court in April 2009, some public law claims could be issued in Cardiff, but this facility came to be known as little more than a “post box” and many claims issued in Cardiff continued to be heard in London.

Nevertheless, in all cases (whether proceedings are initially issued in Cardiff or one of the English courts) a number of factors will be taken into account in determining the final location of administration and hearing.<sup>7</sup> The upshot is that claims under Welsh law and claims under the law of England and Wales either wholly or mainly pertaining to Wales can still be issued and heard in England.

### ***Impacts of the Cardiff Administrative Court (given its current competence)***<sup>8</sup>

#### *Benefits*

7. The case for maintaining a centralised system of public decision-making, including systems for accessing the courts has now been outweighed by the benefits of devolution (in Wales) and localism (in the English regions). A specific claim is that local courts ought to better understand local issues and may serve as a symbol of community, justice and equality within the territory.<sup>9</sup> Comparative research examining the legitimacy of national high courts, for instance, has concluded that with increased awareness comes increased confidence, "...to know something about courts is to be favourably oriented toward them".<sup>10</sup>
8. The current research noted a "cluster" effect in which specialist legal service providers will "cluster" around courts with the relevant "competence" to determine particular claims. This can lead to greater awareness and increased use of the courts among the local population.
9. Prior to the opening of the Administrative Court in Cardiff, Wales generated an estimated 2% of all judicial review<sup>11</sup> claims issued across the Administrative Court as a whole, despite being home to 5.6% of the population of England and Wales.<sup>12</sup> There is early evidence that the number of judicial review applications pertaining to Wales has increased following the opening of the Cardiff Court, to an estimated 2.5%-3% of all Administrative Court claims. The number of claims issued against Welsh public bodies (as opposed to those bodies with responsibility for both England and Wales) has increased (by at least 30%).<sup>13</sup> Increased litigation is not prima facie a "benefit", however given that the number of claims per head of population is so small across Wales compared to the English regions questions must be asked,

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<sup>7</sup> There is a "general expectation...that proceedings will be administered and determined in the region with which the claimant has the closest connection". However, other factors are taken into account such as the location of the claimant's legal representatives, the location of the defendant and their legal representatives, media interest, urgency, the backlog of cases in any of the four regional Administrative Court Centres or in London and so on.

<sup>8</sup> Further data is available at Annex A.

<sup>9</sup> M. Elliott and S. Bailey, "Taking Local Government Seriously: Democracy, Autonomy and the Constitution" (2009) Cambridge Law Journal 436.

<sup>10</sup> J.Gibson, G.Caldeira and V.Baird, "On the legitimacy of national high courts" (1998) 92(2) *American Political Science Review* 343, 344-345.

<sup>11</sup> The most prominent species of public law claim constituting approximately 80% of the Administrative Court's overall caseload.

<sup>12</sup> Office for National Statistics data.

<sup>13</sup> This bucks a trend in the English regions where the number of claims against local authorities is reducing.

and any assumption that this is because public services are better administered in Wales should be treated with caution.

*Barriers, costs and practical implications for the legal profession and the public*

10. Critics were concerned that Wales would not generate enough cases to justify the resources needed to maintain its own Court. It was suggested that communications technology, i.e. video-links would be sufficient to enable claimants and advisers located in Wales to participate in proceedings administered and determined in London. With respect this proposal would fail to achieve most of the “benefits” noted above and it was duly dismissed.
11. Another barrier that remains is the limited specialist public law legal service provision in Wales. There is still an evident lack of experienced practitioners in this field, and the activities of those lawyers with specialist expertise have been hindered by the past London-centricity of public law litigation. General public awareness of judicial review and other public law claims is also extremely limited.
12. There is evidence that the presence of an Administrative Court in Cardiff has improved professional and public awareness of public law redress. In ordinary civil judicial review (i.e. all claims except asylum and immigration) the number of claims per 1,000 residents in Wales has increased from 0.021 to 0.028 between the first and second years of operation of the Cardiff Court. In London and the South of England the number of claims per 1,000 residents has stayed static but is much higher at 0.057 claims per 1,000 residents.
13. A key practical concern is that almost 50% of judicial review claims issued in Cardiff do not pertain either wholly or substantially to Wales. At least 42% of such claims relate to the South West of England, with a smaller proportion concerning the Midlands. Occasionally Welsh solicitors are instructed to represent claimants and defendants from the South West of England (which is of economic benefit to the Welsh legal services industry), but generally speaking public law legal services in Wales are under-developed and those services which exist are under-utilised as a consequence of historic London-centricity. .
14. A high proportion of Welsh claimants and solicitors choose to issue their claims in London.<sup>14</sup> There may be a number of reasons for this, i.e. the gravitas attached to litigating at the Royal Courts of Justice in London and concern for the quality and consistency of justice dispensed by judges outside London. Lack of awareness may be another factor. Approximately half of all claims involving a Welsh public authority or the Welsh Assembly Government are issued in London and the factor seemingly most influential in the choice of issue location is the instruction by Welsh defendants of London-based specialist barristers.
15. Even some unrepresented Welsh claimants, litigants in person, are choosing to issue in London (approximately 40%). However, overall there has been an increase in the number of claims issued by unrepresented Welsh claimants. This phenomenon has been experienced in

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<sup>14</sup> Approximately 40 per cent in the first year post the Cardiff Court’s opening, down to 34 per cent in the second year.

the English regions gaining new Administrative Court Centres,<sup>15</sup> but not in London and the South of England. The growth in Welsh and regional litigants in person may raise particular concerns about the availability of legal aid funding. Regionalisation of the Administrative Court was meant to broaden access to public law redress in part by encouraging regional solicitors to specialise in this area, whereas reforms of public funding have worked to reduce the numbers of solicitors able to undertake publicly funded cases.<sup>16</sup>

***An Administrative Court with exclusive competence over Welsh public law and cases under the public law of England and Wales pertaining primarily to Wales***

*Benefits*

16. At present the Cardiff Court does not have exclusive competence over claims under Welsh law or over claims under English and Welsh law wholly or substantially pertaining to Wales. Such claims are regularly issued and heard in London where there is no protected right to use the Welsh language in court proceedings.<sup>17</sup> Giving the Cardiff Administrative Court exclusive competence would better protect this right. It would also ensure that cases are listed before appropriately experienced judges with the capacity to extend equal weight to both the English and Welsh versions of legislative texts. Giving the Cardiff Court exclusive competence might also lead to an increase in the number of claims issued and heard in Cardiff. This would be beneficial in terms of justifying court and judicial resources. It might also catalyse more widespread and better quality public law legal service provision in Wales.

*Barriers, costs and practical implications for the legal profession and the public*

17. Approximately half the Cardiff Court's current caseload stems from outside Wales. To an extent this work, originating in England, is subsidising access to justice in Wales by ensuring a large enough caseload for the Cardiff Court to remain a going concern. If the Cardiff were to lose its competence with respect to cases under the law of England or the law of England and Wales pertaining mainly to England, Cardiff would lose this work. Similarly public law practitioners in Wales would be less inclined to advise English clients losing out on business.

18. At present approximately five claims per-annum originate in North Wales and most of these are issued in Manchester due to geographical convenience, though hearings take place in North Wales. Were Cardiff to have exclusive competence over Welsh claims this might reduce access to justice for claimants and legal advisers based in North Wales.

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<sup>15</sup> North East, North West and Midlands.

<sup>16</sup> The implication is that specialist firms of advice providers dealing with a higher volume of cases will be able to attract public funding for judicial review claims, whereas the vast majority of solicitors who issue only a small number of claims per-annum will not.

<sup>17</sup> Under section 22 of the Welsh Language Act 1993, there is a right to use the Welsh language in any court proceedings in Wales, but this does not extend to cases heard in England.

### ***Northern Ireland: the experience of a small jurisdiction***

19. A study of the experience of Northern Ireland is instructive in understanding the legal and practical issues involved in successfully operating a small jurisdiction within the UK.

To this end, Bangor Law School, in partnership with the School of Law at Queen's University Belfast, is currently working on a research project entitled '*Small legal jurisdictions in the UK: the legal and practical considerations*'.

The aim of this project is three-fold:

(i) *To consider the legal issues that may arise for small jurisdictions in the UK*

Including cross-jurisdictional issues, binding/persuasive effect of judgements from outside the jurisdiction.

(ii) *To examine the institutional framework required to support such jurisdictions*

Including the role of highly specialised courts that are of fundamental importance to the Welsh public and private spheres (such as the Administrative Court and Mercantile Court), but which generate small caseloads making the effective allocation of resources a challenging consideration. Other concerns are appropriate levels of public funding for institutions and for the cases they administer, and raising awareness of new institutions to ensure access to justice.

(iii) *To identify the implications for the legal profession*

Including the teaching of law at third level; availability of learning materials; professional training issues (including the mutual recognition of qualifying law degrees within the UK); professional qualification and regulation issues (including the mutual recognition of professional qualifications within the UK); continued professional development for legal practitioners; access to statutes and case law; and judicial structures, including training and appointments.

20. As noted, the research project aims to provide a detailed understanding of the institutional framework required to support a separate jurisdiction. This demands consideration not only of courts and tribunals but also the requirement for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. Preliminary research in Northern Ireland suggests that, at a minimum, organisations with the following functions should be established.

(i) A body to ensure that professional training bodies are informed of the evolving needs of the Welsh legal professions.

- (ii) A body to support a general understanding of the law and legal system throughout Wales (through the publication of Welsh law bulletins, the publication of books on various aspects of Welsh law; the organisation of conferences and courses for legal practitioners, civil servants and other interested parties).

### ***Summary and recommendations***

21. If existing courts or new institutions are given exclusive competence over Welsh legal matters, measures must be taken to promote practitioner and general public awareness in order to ensure access to justice and caseloads sufficient to justify the allocation of resources to these institutions and the to the particular fields of law involved.
22. The Administrative Court research concluded that market forces and the availability of public funding have substantial effects on access to justice and these should be taken into consideration when introducing any new institutions or altering the competence of existing institutions.
23. The opportunity to alter the competence of existing institutions and to create new institutions to service the separate Welsh jurisdiction provides an opportunity to create new structures and competencies that both increase efficiency and improve access to justice.<sup>18</sup>
24. Northern Ireland provides an appropriate point of reference in understanding the substance and process required in supporting a successful small jurisdiction. A detailed examination of the Northern Ireland experience would be highly beneficial in contributing to the continued evolution of a separate Welsh jurisdiction.

**Ms Sarah Nason, Lecturer in Administrative Law**

**Dr Alison Mawhinney, Lecturer in Public Law and Human Rights Law (formerly Lecturer in Law, Queen's University Belfast)**

**Mr Huw Pritchard, Doctoral candidate, Bangor Law School**

**Dr Osian Rees, Lecturer in Family Law and Land Law**

**February 2012**

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<sup>18</sup> In public law, for example, it is questionable whether the majority of public law claims (particularly those concerning human rights) must necessarily be issued at High Court level. It can be argued that such claims ought to be capable of issue at any civil court in Wales. Wales does not need to maintain the High Court-centricity of the current arrangements.

## ANNEX A

### 1. *The General Administrative Court caseload*

**Figure 1: Location of issue – Civil judicial review claims**

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	137	6.5	178	8
Cardiff	61	3	80	4
Leeds	221	10.5	238	11
Manchester	215	10	212	10
Sub-total outside London	634	30	708	33

Figure 1 shows that 4% of all civil judicial review claims are now issued in Cardiff, however it should be noted that approximately half of these claims originate from outside Wales, with 42% pertaining to the South West of England. On the other hand approximately 35% of claims originating in Wales were listed outside Cardiff in the second year post regionalisation (1 May 2010 to 30 April 2011), most of these claims were issued in London with 3-5 North Wales claims issued in Manchester.

**Figure 2: Civil judicial review claims per 1000 residents**

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.015	0.019
Wales (Cardiff claims)	0.021	0.028
North East (Leeds claims)	0.029	0.032
North West (Manchester claims)	0.032	0.031
London and South of England (London claims)	0.058	0.056

Figure 2 shows that whilst claim rate per 1000 residents in Wales is half the claim rate in London and the South of England, claim rates in Wales have increased more than in any other region in the second year after the new Administrative Court Centres were opened. The figure for Wales is similar to the North East and North West, with the Midlands having the lowest rate of claim per 1000 residents.

**Figure 3: The main subject areas of judicial review claims by Centre 1 May 2009 to 30 April 2011 (excluding asylum and immigration)**

Subject	Location of issue											
	B'ham		Cardiff		Leeds		Manchester		London		Total	
	No	%	No	%	No	%	No	%	No	%	No	%
Community care	51	16	3	2	15	3	12	3	104	4	182	4

Homelessness	18	6	15	11	7	1.5	36	8	89	3	165	4
Housing	13	4	2	1	6	1	10	2	236	8	267	6
Prisons	47	15	7	5	262	57	192	45	489	17	997	24
Town and country planning	25	8	28	20	17	4	22	5	235	8	327	8

Figure 3 shows the main topics of civil judicial review (excluding asylum and immigration). What this shows is that the most prominent public law claims issued in Cardiff relate to homelessness and town and country planning. However, these figures must be treated with caution as they also include cases stemming from the South West of England that have been issued in Cardiff. On further analysis it appears, however, that homeless in particular, but also town and country planning do have a higher incidence among claims specifically relating to Wales when compared to London and some other English regions.

**Figure 4: Asylum and immigration judicial review claims**

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	334	4	517	6
Cardiff	59	0.8	69	0.9
Leeds	154	2	244	3
Manchester	186	2	284	3.5
Sub-total outside London	733	8.8	1114	13.4
London	6,894	91.2	6,983	86.6

Figure 4 refers specifically to the location of issue of asylum and immigration claims and the proportion issued in Cardiff is clearly very small. In part this is due to the low proportion of foreign born residents living in Wales, nevertheless rates of claim are still lower than is to be expected given immigrant and asylum seeker populations. Unlike with ordinary civil judicial review the vast majority of these claims do originate in Wales, not in the South West of England.

**Figure 5: Asylum and immigration claims per 1000 residents**

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.035	0.055
Wales (Cardiff claims)	0.020	0.024
North East (Leeds claims)	0.020	0.032
North West (Manchester claims)	0.027	0.042
London and South of England (London claims)	0.268	0.272

Figure 5 shows that Wales has the lowest rates of claim per 1000 residents with respect to asylum and immigration judicial review, this is partly a function of the small asylum seeker and immigrant population, however, the current research also found a lack of specialist legal service



providers in this field. 95% of asylum and immigration claims issued in Cardiff involved just one firm of solicitors.

## 2. Ordinary civil judicial review claims, location and type of claimant

The remainder of this Annex focuses on ordinary civil judicial review claims which make up the main caseload in Wales, further data with regard to asylum and immigration claims is available if required.

**Figure 6: Ordinary civil judicial review claims by claimant location where claimant address available<sup>1</sup>**

Claimant location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	35	6	70	8	65	9	69	8
North East	48	8	62	7	100	14	83	10
Midlands	51	8	82	10	123	17	124	14
Wales	25	4	28	3	31	4	42	5
Sub Total Four locations with new Admin Court Centres	<b>26%</b>		<b>28%</b>		<b>44%</b>		<b>37%</b>	
South West	55	8	82	10	62	8	67	8
South East	112	18	167	20	117	15	137	15
London	296	48	361	42	244	33	351	40

Figure 6 clearly shows that in cases where the claimant's address is available (which constitute 36% of all ordinary civil judicial review claims over the period of research) the number and proportion of claims issued by litigants outside London and the South of England has increased substantially in the two years after the new Administrative Court Centres were opened.

**Figure 7: Litigants in person ordinary civil judicial review applications**

Location	1 May 2007 – 30 April 2008	1 May 2008 – 30 April 2009	1 May 2009 – 30 April 2010	1 May 2010 – 30 April 2011
North West	20	24	37	31
North East	28	28	47	52
Midlands	30	30	47	49

<sup>1</sup> The claimant's address is generally only recorded where the claimant personally issues the application, claimant's address was available in 36% of cases during the period of this research, in 58% of cases the claimant remained as an unrepresented litigant, in 42% of claims they went on to instruct legal advisers.

Wales	19	14	18	23
South East	67	64	68	91
South West	39	39	36	47
London	197	199	160	181
<b>Total</b>	<b>400</b>	<b>398</b>	<b>413</b>	<b>474</b>

Figure 7 looks specifically at those claimants who remain unrepresented throughout the progression of their claims. There has been a notable rise in the number of litigants in person from every location except London. This may be a reflection of the availability of legal aid funding outside the Greater London area. It may also be a sign of increased awareness among potential claimants.

### 3. *Legal advisers*

**Figure 8: Ordinary civil judicial review claims by solicitor's location**

Location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	208	14	149	11	167	11	128	9
North East	166	11	182	13	208	14	192	14
Midlands	198	14	132	9	189	13	152	11
Wales	30	2	28	2	37	2	31	2
Sub Total Four new regional Admin Court Centres	41%		35%		40%		36%	
South West	137	9	104	7	87	6	78	5
South East	122	9	118	9	127	9	106	8
London	601	41	696	49	678	45	717	51

Figure 8 examines the origin of claims by considering solicitor's addresses. What we find is that the number and proportion of claims involving solicitors based outside London and the South of England has either stayed the same, decreased or certainly has not increased as dramatically as claims from unrepresented litigants outside London and the South of England. Essentially it appears that whilst judicial review claims from outside London and the South of England are increasing, most of the increase is made up of litigants in person and not represented claimants. Even among represented claimants, a considerable number are still choosing to instruct solicitors from outside their own region, for example approximately 30% of Welsh claimants instruct solicitors based outside of Wales (predominantly solicitors based in London).

This Annex does not discuss the position of barristers in detail though further statistics are available if required. Essentially the research found that barristers outside London are taking on an increasing proportion of Administrative Court work. However, it still appears that London-based barristers are instructed to act for claimants in 40% of judicial review claims originating in Wales and London-based barristers are instructed to act for public body defendants in 50% of claims originating in Wales.

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from Hugh James (Law Firm)**

FEBRUARY 2012

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**Response on behalf of Hugh James to the  
National Assembly for Wales' Constitutional and Legislative Affairs Committee's  
invitation to submit evidence in relation to the  
establishment of a separate Welsh legal jurisdiction**

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**HUGH JAMES**

## 1. INTRODUCTION

- 1.1 This is Hugh James' response to the National Assembly for Wales' Constitutional and Legislative Affairs Committee's (the Committee) invitation to submit evidence in relation to the establishment of a separate Welsh legal jurisdiction.
- 1.2 Hugh James is a top 100 UK law firm. It has 40 partners and 450 employees based in its Cardiff head office; the firm also has a London office.
- 1.3 With a turnover approaching £30 million per year, Hugh James has, for over 50 years, been providing legal advice and support to the public and private sectors in Wales. Its client base includes central government, local government, financial institutions and corporations, utilities, small and medium sized enterprises, and private individuals. These are based in Wales and the wider UK.
- 1.4 Of the major legal firms in Wales, Hugh James is unique in that its decision making and profit centre resides firmly in Wales. It is therefore particularly interested in the constitutional and legal developments taking place and being discussed in Wales, including the current discussions about the establishment of a separate Welsh legal jurisdiction.
- 1.5 Hugh James' response has been set out in summary format. Should the Committee require further information, Hugh James is prepared to assist it in any way that it can. Hugh James also intends to participate in any forthcoming consultation on a separate Welsh legal jurisdiction led by the Welsh Government.

## 2. RESPONSE

- 2.1 The shape and extent of any Welsh legal jurisdiction will ultimately be a political decision which in turn will be based on the views and needs of the Welsh people expressed through the democratic process. We feel that the legal profession's role is to take part in any discussions surrounding such a decision but whatever the decision taken it then has a duty to work within whatever structures are put in place. We believe that the legal profession will react and adapt positively to any resulting challenges and opportunities.
- 2.2 The divergence between the law in England and the law in Wales brought about by devolution is increasing but, currently, it is not great. At present the extent of the divergence does not in itself require the setting up of a totally separate jurisdiction at this stage. However, given that the Assembly has now acquired the powers

contained in Part IV of the 2006 Act and the possibility of further responsibilities and legislative competence, the legal arguments for a separate jurisdiction may strengthen. It is possible that before that point is reached the constitutional, social, democratic, economic and practical arguments will in any event have ensured a Welsh jurisdiction.

- 2.3 Within the UK, jurisdictions come in different forms and can be created to fit the particular requirements of a state or devolved administration and can developed as circumstances change. Scotland and Northern Ireland are examples of this.
- 2.4 Any move towards a Welsh jurisdiction should be carefully planned and managed as there are considerable practical implications. One consideration should be the need to ensure that any change does not adversely affect but rather supports the Welsh legal profession's ability not only provide legal services within Wales but also to compete for UK, and for that matter international, legal work.
- 2.5 Following the creation of the Scottish Parliament, whilst much Scottish law is made in Edinburgh, there remains a close relationship with the England and Wales jurisdictions. This is likely to be the case in relation to any Welsh jurisdiction.
- 2.6 Even if a Welsh jurisdiction is not created at this stage there is a need to consider establishing a stronger infrastructure for the administration of justice throughout Wales and one that reflects the current political and constitutional situation.
- 2.7 Although the All Wales Convention expressed the view that a separate Welsh jurisdiction is not a pre-condition for the development of increased legislative competence it also concluded that Wales needs appropriate legal institutions and systems to support the progress of devolution and the developing legislative competence of the National Assembly for Wales,
- 2.8 Currently the English and Welsh legal jurisdiction, its systems, and the legal institutions and professions that serve it are centred in and dominated by London. This means that many jobs, career structures and institutions relating to the administration of justice in Wales are based in London.
- 2.9 London's importance as a legal centre both in UK and international terms will continue even if a Welsh jurisdiction were to be created and Wales and Cardiff should not be seen as competing with London. However, the constitutional changes which have occurred in Wales and those which are to come provide an opportunity

for establishing legal systems and institutions in Wales created to meet the specific needs of Wales.

- 2.10 To a degree this process has commenced with, for example, the successful establishment of the Administrative Court in Wales. However, much legal work, and court and tribunal hearings, involving parties and subject matter from Wales still take place outside Wales and primarily in London. Exceptionally, it may be necessary for some of these cases to continue to be heard in London but there should be an acceptance of the principle that cases from Wales should be heard in Wales.
3. The creation of a Welsh jurisdiction, or failing that the developing and strengthening of legal institutions in Wales, is likely to bring economic benefit to Wales across all sectors of the community and bring the administration of justice closer to the people whom the justice system should serve.

## Inquiry into the establishment of a separate Welsh jurisdiction Response from Legal Services Board



### Evidence for the Constitutional and Legislative Affairs Committee's inquiry into the establishment of a separate Welsh jurisdiction

#### About our response

1. The Committee seeks views on four key areas. Given the remit of the Legal Services Board's (LSB) responsibilities, this response is focused on the practical implications of a separate jurisdiction for the legal profession and the public, specifically in relation to regulation of the legal sector.
2. The LSB does not set out a view either way as to the policy desirability of a separate jurisdiction. However, we would state that a separate legal jurisdiction for Wales would not to us necessarily have to mean a different approach to legal services regulation for Wales. It would be difficult to imagine a scenario where the Welsh Assembly Government's (WAG) objectives for regulation would be significantly different to the regulatory objectives set out in the Legal Services Act 2007. In particular if the intention is for there to be easy cross-over between Wales and other similar jurisdictions.
3. Set out in this response is information about the LSB and a summary of some of our key activities which we consider may be of particular interest to the Committee: scope of regulation, education and training, redress for consumers, Alternative Business Structures, legal services internationally and our research work.
4. In particular, the Committee might wish to note that the LSB is working with Cardiff Law School and Cardiff University Wales Governance Centre to present an event on 10 May, which will be focused on the implications of Welsh justice reforms and how they might affect our workforce development activities. The event will be hosted by Emyr Lewis, Senior Fellow in Welsh Law at Cardiff University's Wales Governance Centre, with the LSB's Chief Executive, Chris Kenny, joining him on the panel.
5. This submission also contains some information and data that we have gathered as a result of our research activities which the Committee might find useful to informing its considerations.

#### About the LSB

6. The LSB was created by the Legal Services Act 2007. The Board came into being on 1 January 2009 and became fully operational on 1 January 2010. Our mandate is to ensure that regulation of the legal services sector is carried out in the public interest and to reform and modernise the legal services market so that the interests of consumers are placed at the heart of the system.
7. The Board itself is responsible for overseeing legal services regulators in England and Wales. It is independent of Government and of the legal profession. It oversees ten separate bodies, the approved regulators, which themselves regulate the circa 140,000



lawyers practising throughout the jurisdiction. Of these, approximately 4,346 are based in Wales (see **Annex A** for a list of the approved regulators).

8. The Board also oversees the organisation established by the Act to resolve consumer complaints about lawyers, the Office for Legal Complaints (OLC). The OLC runs the Legal Ombudsman, which started accepting complaints about lawyers in October 2010.
9. Our clear focus is to deliver the eight regulatory objectives, set out prominently in the Act. These are set out at **Annex A**.
10. We took our initial priorities straight from the Legal Services Act 2007 and focused on independence of regulation, improving complaints resolution and developing the framework to allow for Alternative Business Structures (ABS).
11. While we will not lose sight of our initial three priorities, our next phase of activity will shift the focus to maintain momentum in legal services reform. Going forward our regulatory activity will be organised into three main strands: regulator performance and oversight, strategy development and research and statutory decision making.

#### *Data about Welsh legal services<sup>1</sup>*

12. Wales has about 5% of all solicitors firms in England and Wales. These tend to be small in size with 86% being made up of firms with four or fewer partners. Solicitors firms based in Wales employ proportionately more non-solicitor fee earners – 14% of the total number of non-fee earners employed in England and Wales. Around 2% of fee earners in these firms are from a BME background, and 42% are female.
13. The main sources of income for solicitors firms in Wales are in relation to legal services for individual consumers as opposed to business consumers – with 78% of total turnover coming from services provided to individuals. This compares to 47% for the whole of England and Wales. The largest single category of work providing turnover for solicitors firms in Wales in 2010 was accident or injury claims (23%) followed by conveyancing (17%).
14. Seven per cent of solicitors firms in Wales provide advice funded by legal aid, which accounts for 16% of total solicitor firm turnover in Wales. Legal aid provided by Welsh firms accounts for 5.1% of the total amount of legal aid turnover reported by solicitors firms in England and Wales.
15. There is less information available about other types of legal service providers – so those not working at solicitors firms. However, we know that 7% of Licensed Conveyancers and 6% of Cost Lawyers, compared to 4% of Notaries and 1% of self-employed barristers are based in Wales.

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<sup>1</sup> Figures based on the LSB's analysis of 2010 information collected as part of its Regulatory Information Review exercise. A full information pack is available upon request. This exercise included analysis of The Law Society's REGIS database by size and regional location of law firm head office, analysis of the SRA's data about the turnover of firms it regulates, as well as information from other approved regulators about those they regulate mapped by location. BME firms are defined as those with more than 50% of fee earners from a BME background.

## *Scope of regulation*

16. Legal services regulation is built around what are known as 'reserved' legal activities. These are listed in the Legal Services Act 2007 and include appearing in court, conducting litigation, certain conveyancing and probate work, notarial activities and administering oaths. Only persons authorised and regulated by an approved legal services regulator can undertake these activities.
17. However, many types of legal advice work may be provided, unregulated, by any firm or individual to the public. These include writing wills and providing advice in relation to mental health, welfare benefits, housing and most other general legal advice. It is only those authorised and regulated by an approved legal services regulator who are regulated in all of their legal work (for example, solicitors or barristers) that are regulated when undertaking such 'unreserved' activities.
18. The result of this is that regulation is uneven for the same activity, which puts a bigger burden on lawyers whilst leaving consumers uncertain over the level of protection they will receive.
19. The Legal Services Act 2007 did not address the question of why certain services need to be subject to legal services regulation whilst others do not but it included a mechanism for the LSB to add or subtract from the set of reserved activities. We have therefore been developing our approach for assessing whether or not a legal service should be reserved and the level of consumer protection that is required. We are also considering which legal services may be in need of review.
20. We want to ensure that legal services regulation is proportionate and targeted at where it needs to be. Too much regulation imposes high and unnecessary cost and stifles innovation and competition. Too little regulation can undermine consumer confidence and protections. Reservation to specific types of lawyer is an extreme form of regulatory intervention.
21. The Committee might wish to consider the potential impact that changes to the scope of regulation in England might have on legal services provision in Wales, in the event of a separate jurisdiction for Wales.

## *Education and training review*

22. Section 4 of the Act provides the LSB with a duty to assist in the maintenance and development of standards of regulatory practice and the education and training of lawyers. This recognises that the LSB's role in ensuring that regulation through education and training requirements both encourages appropriate regulatory protections and service quality but also supports the objectives of access to justice and improving diversity. We therefore are working to ensure that the training of lawyers, at all stages, is relevant to the changing market. In particular, we will be providing support to the three largest regulators (the Solicitors Regulation Authority, the Bar Standards Board and ILEX Professional Standards) who are currently undertaking a review of education and training of those they regulate.
23. We are holding a series of seminars between February and May this year to highlight and encourage debate about specific areas of the education and training review. Our

seminar in Wales on 10 May will consider the implications of a separate Welsh jurisdiction on the legal workforce.

24. The Committee might wish to consider the specific learning and training requirements of Welsh jurisdiction lawyers, as well as the outputs from the seminar on 10 May.

#### *Ensuring effective redress for consumers*

25. Complaint resolution was a key driver of the reform to legal services regulation. This included establishing the Office for Legal Complaints and ensuring that approved regulators worked with their regulated communities to focus on improving complaints handling.
26. A consideration for the Committee might be how legal complaints under a separate jurisdiction would be handled.

#### *Alternative Business Structures*

27. Prior to the passage of the Legal Services Act 2007, non-lawyers were not allowed to own businesses providing legal services. This prevented investment and contributions from non-lawyers and could be said to have had an anti-competitive effect through limiting participation in the market. The Legal Services Act 2007 aimed to open up the market through the removal of these restrictions.
28. We are now seeing the first so called Alternative Business Structures enter the market. We expect this to mean more choice, whilst allowing providers more flexibility for providers to tailor their offers for consumers. New entrants, generating greater competitive pressures, will be likely to increase value-for-money and create better incentives for high-quality practice.
29. It is worth noting that while an organisation may be physically located within a locale, the geographic range of its service provision may differ. One piece of research which looked at the geographic specificity of service provision for legal aid firms found that 70% of solicitors' legal practices provide services wider than their local neighbourhood.<sup>2</sup>
30. The Committee might wish to consider the implications that a separate Welsh jurisdiction might have for 'cross-border' practice by both ABS firms and other law firms.

#### *International considerations*

31. The changes to legal services regulation in England and Wales have attracted much global interest in innovation in legal services – with lawyers delivering legal services which are integrated across professional services disciplines for all sorts of clients. England and Wales is likely to become more attractive for global investment as the world sees the innovative legal sector in England and Wales as the place to do business.
32. The Committee might wish to consider the impact on changes in Wales on the wider international growth of the legal services sector.

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<sup>2</sup> Smith, M. and Tam, T. "Findings from the Legal Advice Sector Workforce Survey", London: Legal Services Commission, LSRC Research Paper No. 18 (2007)

## *Research and evidence*

33. We are working with the Ministry of Justice and The Law Society to research and improve our understanding of 'High-Street' solicitors. This will consider solicitors' practices by location and therefore may provide the Committee with useful evidence for assessing the extent of the impact on solicitors of changes to jurisdiction.
34. We will also be undertaking work to assess and evaluate the impact of the Legal Services Act 2007 and the reforms that it has introduced. The evaluation will be part of an ongoing collection and assessment of evidence to understand the impact of reforms on the market and using this to understand where our regulatory action may need adjusting.
35. We would be happy to share any information that we collect in this work about Wales that might be of use to the Committee.

## **Annex A: The Regulatory Objectives, professional principles and the Approved Regulators**

**Section 1 of the Legal Services Act 2007 sets out the regulatory objectives for the LSB, approved regulators and OLC. These are to:**

- protect and promote the public interest
- support the constitutional principle of the rule of law
- improve access to justice
- protect and promote the interests of consumers
- promote competition in the provision of legal services
- encourage an independent, strong, diverse and effective legal profession
- increase public understanding of the citizen's legal rights and duties
- promote and maintain adherence to the professional principles.

**Section 1 of the Act further defines the professional principles as:**

- acting with independence and integrity
- maintaining proper standards of work
- acting in the best interests of clients
- complying with practitioners' duty to the Court to act with independence in the interests of justice; and
- keeping clients' affairs confidential.

Section 4 of the Act also gives the Board a duty to assist in the maintenance and development of standards of regulatory practice and the education and training of lawyers.

**We are responsible for overseeing the ten approved regulators, who between them directly regulate approximately 147,000 lawyers operating throughout the jurisdiction.**

- The Law Society, who through the Solicitors Regulation Authority, regulate around 120,000 practicing solicitors
- The General Council of the Bar, who through the Bar Standards Board, regulate around 15,000 practicing barristers
- The Institute of Legal Executives, who through ILEX Professional Standards Limited, regulate around 7,500 practicing fellows
- The Council for Licensed Conveyancers, the regulator of over 1,000 practicing licensed conveyancers
- The Chartered Institute of Patent Attorneys, who through the Intellectual Property Regulation Board, regulate around 1,800 practicing chartered patent attorneys
- The Institute of Trade Mark Attorneys, who through the Intellectual Property Regulation Board, regulate around 800 practicing trade mark attorneys
- The Association of Costs Lawyers, who through the Costs Lawyer Standards Board, regulate just over 400 practising costs lawyers
- The Master of the Faculties who regulates 845 notaries.

**In addition, two further bodies from outside the traditional legal services sector are formally designated as approved regulators for probate activities, though neither has any members offering these services at present. They are:**

- The Institute of Chartered Accountants in Scotland (ICAS)
- The Association of Chartered Certified Accountants (ACCA)

## Inquiry into the establishment of a separate Welsh jurisdiction

Response from the Central Government and Justice Unit, Welsh Language Board  
 BWRDD YR IAITH  
 GYMRAEG • WELSH  
 LANGUAGE BOARD



21/02/2012

Clerc y Pwyllgor  
 Y Pwyllgor Materion Cyfansoddiadol a  
 Deddfwriaethol  
 Tŷ Hywel  
 Cynulliad Cenedlaethol Cymru  
 Caerdydd  
 CF99 1NA

Llys Clwyd  
 Ystad Ddiwydiannol Lon Parcwr  
 Rhuthun  
 Sir Ddinbych  
 LL15 1NJ  
 Rhif ffôn: 01824 705677

## Ymchwiliad i sefydlu awdurdodaeth ar wahân i Gymru

Annwyl Syr

1. Mae Bwrdd yr Iaith Gymraeg (y Bwrdd) yn gwerthfawrogi'r cyfle i ymateb i'r ymchwiliad uchod. Hoffem gynnig y cyngor isod yn unol ag Adran 3 Deddf yr Iaith Gymraeg 1993 (y Ddeddf).

Deddf yr Iaith Gymraeg 1993

- i. Rhan 1
- ii. Adran 3. –(2) ...bydd y Bwrdd –
  - (a) yn cynghori'r Ysgrifennydd Gwladol ar faterion ynglŷn â'r iaith Gymraeg;
  - (b) yn cynghori personau sy'n ymarfer swyddogaethau o natur gyhoeddus ar y ffyrdd o weithredu'r egwyddor, wrth gynnal busnes cyhoeddus ac wrth weinyddu cyfiawnder yng Nghymru, y dylid trin y Gymraeg a'r Saesneg ar y sail eu bod yn gyfartal;
  - (c) yn cynghori'r rheiny a phersonau eraill sy'n darparu gwasanaethau i'r cyhoedd ynghylch defnyddio'r iaith Gymraeg yn eu hymwneud â'r cyhoedd yn Nghymru.

## Bwrdd yr Iaith Gymraeg

2. Sefydlwyd Bwrdd yr Iaith Gymraeg (y Bwrdd) fel corff statudol trwy'r Ddeddf i hybu a hwyluso'r defnydd o'r iaith Gymraeg. Y mae'r Ddeddf yn sefydlu'r egwyddor y dylid, wrth gynnal busnes cyhoeddus ac wrth weinyddu cyfiawnder yng Nghymru, drin yr iaith Gymraeg a'r iaith Saesneg yn gyfartal.



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### Deddf yr Iaith Gymraeg

3. Mae nifer o sefydliadau sy'n darparu gwasanaethau cyfreithiol a chyfiawnder yng Nghymru wedi paratoi Cynlluniau Iaith Gymraeg yn unol â gofynion y Ddeddf. Maent yn cynnwys yr heddluoedd tiriogaethol, Gwasanaeth Llysoedd Ei Mawrhydi, Gwasanaeth Erlyn y Goron, Ymddiriedolaeth Prawf Cymru a'r Comisiwn Gwasanaethau Cyfreithiol. Mae'r cynlluniau'n egluro sut y bydd y sefydliadau hyn yn rhoi ar waith yr egwyddor y dylid trin yr iaith Gymraeg a'r iaith Saesneg yn gyfartal wrth weinyddu cyfiawnder. Nodir bod mwyafrif y sefydliadau uchod yn gweithredu yng Nghymru yn unig a bod gan y rhai sy'n gweithredu'n ehangach unedau gweinyddol ar gyfer Cymru'n benodol. Golyga hynny bod y sefydliadau hyn wedi ei chael yn haws mynd ati i gynllunio i brif ffrydio'r Gymraeg i'w gwaith, na phe bai'r gwaith gweinyddol yn digwydd tu allan i Gymru.
4. Mae'r Ddeddf hefyd yn rhoi hawliau i unigolion ddefnyddio'r Gymraeg mewn achosion cyfreithiol yng Nghymru. Prif bwrpas yr hawl hwnnw yw sicrhau gweinyddiaeth cyfiawnder teg yng Nghymru, drwy sicrhau y rhoddir ac y derbynnir tystiolaeth gywir ym mha bynnag iaith y mae unigolion yn cyfathrebu orau ynddi.

### Statws swyddogol yr iaith Gymraeg

5. Ym mis Chwefror 2011 cafodd Mesur y Gymraeg (Cymru) 2011 gydsyniad brenhinol. Mae'r Mesur yn cadarnhau statws swyddogol y Gymraeg yng Nghymru. Er hynny ni ellir cofrestru priodas yng Nghymru yn Gymraeg. Gall unigolion yng Nghymru dderbyn datgeliad troseddol yn Saesneg ond nid yn Gymraeg. Gall unigolyn yng Nghymru ddefnyddio Saesneg wrth wneud cais am wasanaeth amlosgi ond nid Cymraeg. Mae angen mecanwaith yn ei le a fydd yn sicrhau grym yng Nghymru i ddylanwadu ar ddeddfau Prydeinig o safbwynt cynnwys ymrwymadau ieithyddol fel nad yw cyfreithiau Prydeinig yn tanseilio statws y Gymraeg yng Nghymru.
6. Mater arall cysylltiedig yw nad oes statws gyfartal i fersiwn Gymraeg o ddeddfau Prydeinig. e.e. Deddf yr Iaith Gymraeg 1993. Llunnir deddfau Llywodraeth Cymru yn y Gymraeg a'r Saesneg a rhoddir statws gyfartal i'r ddwy iaith. Mae sicrhau fod geiriad deddfau Cymru ar gael yn y ddwy iaith yn ei gwneud yn rhwyddach i farnwyr ac eraill ddefnyddio'r Gymraeg yn naturiol mewn achosion yng Nghymru, wrth dehongli cyfreithiau Cymru. Mae hyn yn un mater i'w ystyried felly.



## Manteision ymarferol cyflwyno awdurdodaeth ar wahân i Gymru

7. Ymddengys i'r Bwrdd y byddai cyflwyno awdurdodaeth gyfreithiol ar wahân i Gymru yn cynnig manteision ymarferol penodol i weinyddiaeth cyfiawnder drwy gyfrwng y Gymraeg yng Nghymru e.e.
  - hwyluso cynllunio sgiliau iaith Gymraeg ymarferwyr cyfraith a chyfiawnder;
  - ei gwneud yn haws i hyrwyddo'r Gymraeg o fewn gweinyddiaeth fewnol sefydliadau cyfiawnder Cymru;
  - Technoleg Gwybodaeth - nododd Mr Ustus David Lloyd Jones<sup>1</sup>, Uwch Farnwr Llywyddol Cymru, mewn araith flynyddol i Gymdeithas y Cyfreithwyr fod llysoedd yng Nghymru wedi cael trafferthion mawr wrth geisio cyflwyno systemau technoleg gwybodaeth sy'n darparu gwasanaeth dwyieithog. Fe fyddai cyflwyno awdurdodaeth ar wahân i Gymru yn cynnig cyfleoedd i gynllunio prosesau a systemau sy'n ateb gofynion penodol gweinyddu'r llysoedd yng Nghymru, er enghraifft yr angen i systemau technoleg gwybodaeth drin y Gymraeg â'r Saesneg yn gyfartal.
8. Deallwn ei fod yn fwiad gan Gwasanaeth Llysoedd a Thribiwnlysoedd Ei Mawrhydi (GLITEM) i symud rhan o waith gweinyddu achosion sifil Cymru a Lloegr i Loughborough a Salford o fis Ebrill 2012. Gallasai canoli gweinyddiaeth y llysoedd sirol yng Nghymru i Loegr effeithio'n negyddol ar wasanaethau Cymraeg ac ar allu GLITEM i gydymffurfio â'i gynllun iaith Gymraeg statudol.

## Rheithgorau Dwyieithog

9. Tra bod trefniadau presennol mewn llysoedd yn galluogi unigolion i siarad Cymraeg mewn achosion, gan gyfieithu'r cyfraniadau hynny i Saesneg ar gyfer rhywrai yn y llys nad ydynt yn deall Cymraeg, yn aml mae gallu unigolion i ddefnyddio'r Gymraeg wedi ei gyfyngu i hynny'n unig. Nid yw pob llys ymhob rhan o Gymru yn medru darparu pob ymagwedd ar achos cyfreithiol yn y Gymraeg, ble fo partiön sydd ynghlwm wrth achos yn dymuno hynny. Er enghraifft, nid yw bob amser yn bosibl i unigolion glywed tystiolaeth eraill yn Gymraeg. Daeth hynny i'r amlwg wrth i'r Llywodraeth Brydeinig ymgynghori rhai blynyddoedd yn ôl ar gyflwyno rheithgorau dwyieithog yng Nghymru.
10. Mynegwyd barn amlwg bryd hynny gan ymarferwyr cyfiawnder ac eraill yng Nghymru, y dylai llysoedd sirol yng Nghymru gynnal achosion yn gyfan gwbl drwy gyfrwng y Gymraeg, mewn achosion perthnasol. Roedd consensws barn bryd hynny na ddylid cyfyngu'r hawl i achos cyfreithiol Cymraeg i'r hawl i siarad Cymraeg yn unig, ac mae'r farn honno wedi ei mynegi'n gyson fyth ers hynny, er enghraifft gan aelodau'r farnwriaeth yng Nghymru. Serch hynny, gwrthododd y Llywodraeth gyflwyno rheithgorau dwyieithog.

<sup>1</sup> <http://www.lawsociety.org.uk/documents/downloads/wales-office-annual-lecture-wel10.pdf>



11. Gallasai sefydlu awdurdodaeth ar wahân i Gymru fod yn fodd o sicrhau llais cyfreithiol penodol i Gymru.

Hyderwn y bydd y sylwadau uchod o ddefnydd i'r Pwyllgor wrth gynnal ei ymchwiliad. Byddai'r Bwrdd yn fodlon cyfrannu ymhellach at y drafodaeth hon pe bai hynny o ddefnydd.

Yn gywir



**ALUN LLOYD JONES**

*Swyddog Datblygu*

*Uned Llywodraeth Ganol a Chyfiawnder*

**CLA WJ 28**

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from Mr Emyr Lewis and Professor Dan Winton (Cardiff  
University)**

**MEMORANDUM TO THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS  
COMMITTEE OF THE NATIONAL ASSEMBLY'S INQUIRY INTO THE  
ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION**

**Professor Dan Wincott**

Blackwell Professor of Law and Society at Cardiff Law School  
Co-Chair of the Wales Governance Centre, Cardiff University

**Emyr Lewis**

Partner, Morgan Cole Solicitors  
Senior Fellow Wales Governance Centre, Cardiff University

## Summary

- 1.1 Jurisdiction relates to the question of “Who has legal authority within a particular legal framework to do what in respect of what, whom and where?”
- 1.2 Within the framework of the UK constitution, there already exist a distinct Welsh legislative and executive jurisdiction, and in certain limited areas, judicial jurisdiction through distinct tribunals and other fora for particular types of cases.
- 1.3 The concept of jurisdiction within the UK is complex. Even the currently recognised jurisdictions can only be said to be “separate” up to a point.
- 1.4 There already exists such a thing as a body of law which applies to Wales. The differences between this and the law which applies in England are likely to increase over time.
- 1.5 It is essential that Courts in Wales decide cases on the basis of distinct Welsh Law and that Lawyers can advise and represent their clients on this basis.
- 1.6 There is a need to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.
- 1.7 Whatever happens, lawyers advising clients in Wales and judges hearing cases in Wales must have the necessary knowledge of Welsh law.
- 1.8 Jurisdiction over only devolved matters, as in a federal state, would not be in accordance with the UK model, and could create intractable problems.
- 1.9 Detailed analysis is needed of how cross-border issues work between current UK jurisdictions, and how these might work for a Welsh jurisdiction and of the likely economic costs and benefits of a distinct Welsh jurisdiction.
- 1.10 If there were to be a distinct Welsh jurisdiction, the Northern Ireland model seems a suitable precedent. This would have implications for the Supreme Court.
2. **The word “jurisdiction”**
  - 2.1 The word “jurisdiction” is capable of meaning several different things, and of being applied in several different contexts.

- 2.2 For instance, at one end of the scale, in international law, jurisdiction is spoken of as an aspect of the sovereignty of states. States are said to have legislative, executive or judicial jurisdiction in respect of their territory and their people. This means that they have the legal authority within the framework of international law, to make, to implement and to enforce binding laws which apply at least within their territory, and may apply in respect of their people outside their territory. In this context, jurisdiction is described as an aspect of the sovereignty of the state.
- 2.3 At the other end of the scale, in the context of Magistrates' Courts "jurisdiction" is used to describe the extent of the powers of the courts to hear and determine cases etc. So, magistrates are said to have no jurisdiction to hear criminal cases of particular kinds, which must be heard in the Crown Court. Magistrates' Courts in coastal areas have jurisdiction in respect of certain crimes committed on board ship. Before the law was changed in 2006, Magistrates' Courts had jurisdiction to hear civil cases only in relation to their local area.
- 2.4 If there is a general theme which runs through these uses of the word, it is the question "Who has legal authority within a particular legal framework to do what in respect of what, whom and where?"
- 2.5 So, if we look at Wales today, we can say that:
- 2.5.1 the Welsh Assembly has legislative jurisdiction by having legal authority to make laws relating to the subjects in Schedule 7 of the Government of Wales Act 2006; which apply only in relation to Wales and which do not extend beyond England and Wales;
- 2.5.2 the Welsh Ministers have executive jurisdiction by having legal authority to take executive action within Wales in respect of the areas devolved to them.

### 3. **"Separate" Jurisdiction**

- 3.1 In the context of recent developments in Welsh law, the word "jurisdiction" has tended to be used in the context of a "separate" or "distinct" legal jurisdiction for Wales, referring to the creation (or possibly, more accurately, re-establishment) of a distinct system of courts for Wales.
- 3.2 In considering jurisdiction, it is useful to bear in mind, however, that jurisdiction in the sense of legal authority to do things can be quite a complex and many-layered phenomenon. For instance, jurisdiction may be exclusive or not exclusive, conditional or unconditional.

- 3.3 So, for instance, the Welsh Assembly’s legislative jurisdiction is not exclusive, since the UK Parliament retains concurrent power to legislate over all devolved areas (the requirement for Assembly consent if Parliament legislates is a matter of convention, not law). The Welsh Ministers’ executive jurisdiction is in some cases exclusive, in others concurrent with UK Ministers and in others conditional on Treasury consent.
- 3.4 In the case of judicial jurisdiction, there is also variety and complexity.
- 3.5 In the Court system, the Courts of England and Wales, of Scotland and of Northern Ireland have exclusive jurisdiction over most cases which arise in the respective territories, but they are all subject to the ultimate authority of the Supreme Court of the United Kingdom, and all these courts are subject to, and can be overruled by, the European Court of Justice in certain cases.
- 3.6 Outside the Court system, in some areas, it can be said that a distinct Welsh jurisdiction already exists. In many areas, there are distinct Welsh Tribunals or other fora, with jurisdiction over Welsh cases. Some of these are administered by the Welsh Government, some are not. One tribunal has been created by legislation of the Welsh Assembly, and has no counterpart outside Wales.<sup>1</sup> There is no reason why other tribunals (or indeed arguably courts) cannot be created by the Welsh Assembly to resolve cases relating to matters within its legislative competence.
- 3.7 So it is important to recognise (1) that a jurisdiction for Wales would only be separate up to a point; and (2) in respect of certain limited cases, there is already a distinct Welsh jurisdiction.

#### 4. **A body of “Welsh law”**

- 4.1 Many of the most strongly articulated arguments for and against introducing a distinct jurisdiction (including some of those quoted in the Committee’s scoping paper) are based on principle. Our focus in the rest of this paper is largely on what appear to us to be practical aspects of the question. We consider it worthwhile nevertheless to address one argument of principle, namely that notwithstanding devolution there is only one law of England and Wales, and consequently there should be only one system of courts.

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<sup>1</sup> See section 120 Welsh Language (Wales) Measure 2011

4.2 It is stated that in the UK there are three legal jurisdictions: (1) England and Wales, (2) Scotland and (3) Northern Ireland.<sup>2</sup> Each jurisdiction has its own body of law, and its own court system. In the case of Scotland, Scots law (and Courts) pre-dates the union, and differs in many fundamental respects from the law of England and Wales. In the case of Northern Ireland, there is less difference in substantive law. The separate Northern Ireland Courts have their origin in the Government of Ireland Act 1920, which effected the partition of Ireland. Previously there had been one system of courts in Ireland. Even after 1920, there remained an all-Ireland Court of Appeal.

4.3 A striking example of the way in which the twin issues (a discrete body of law and a separate court system) are brought together in discussions of a “separate” or “distinct” jurisdiction for Wales can be found in an extract from a joint Memorandum from the then Secretary of State for Wales and the then First Minister for Wales to the Welsh Affairs Committee, as quoted in paragraph 374 of the Explanatory Notes to the Government of Wales Act 2006. The extract (appended to this Note) explains that a “conferred powers” as opposed to a “reserved powers” model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction. The link between separate laws and a separate jurisdiction is made explicit in the following passage:

*If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.*

4.4 It is worth noting that the devolution dispensation in Wales has been subject to very rapid and far-reaching change since 1998 – and particularly since 2006. The evidence suggests that at the time of drafting the architects of the Government of Wales Act 2006 expected Part 3 to remain in force for a considerable period of time, as did many commentators. The Explanatory Notes might be read as referring to the highly original, and arguably idiosyncratic, systems of competence transfer and legislation created for Wales under Part 3 of the Government of Wales Act 2006 (at least in the early years of Schedule 5), but might be regarded as rather less persuasive in relation to Part 4. (Moreover, some commentary on the ‘jurisdiction’ question between 2006 and 2011 (and in particular the referendum on the switch from

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<sup>2</sup> Although Himsworth submits that ‘precise authority’ for this proposition is ‘difficult to cite’ and that ‘perhaps the most direct *statutory* reference is now to be found in s 41(1) of the Constitutional Reform Act 2005 (2007) MLR at 33

Part 3 to Part 4) may have been predicated on an assumption of Part 3 remaining in force for rather longer than it did.)

- 4.5 In the context of the present legislative powers of the National Assembly, the view expressed in the Explanatory Notes needs to be considered in the light of two significant aspects of Part 4 of the Government of Wales Act 2006 (which came into force after last year's referendum);
- 4.5.1 The Assembly can legislate in respect of matters which **relate to** subjects under headings in Schedule 7
- 4.5.2 This applies unless Schedule 7 **expressly excludes** a particular matter, or another part of the 2006 Act **expressly restricts or prohibits** the Assembly from legislating.
- 4.6 This means that the *basic principles of law and rules of law of general application* to which the Explanatory Note refers, and which it appears to consider immutable, can themselves be changed by a provision of an Act of the Assembly, provided the enactment in question relates to a Schedule 7 subject, and the change is not excluded by Schedule 7 or otherwise restricted or prohibited.
- 4.7 An example is given by the law in relation to the smacking of children.
- 4.7.1 Parents (and others *in loco parentis*, such as teachers) can avoid conviction for certain types of assault against children if the court accepts that what was happening was reasonable chastisement of the child. While the scope of the defence has been substantially restricted by Acts of Parliament, the defence still exists and can be said to be a *basic principle of law*, since it forms part of the Common Law of England and Wales.<sup>3</sup>
- 4.7.2 Under Heading 15 of Schedule 7 of the 2006 Act (Social Welfare), the Assembly has the power to make laws relating to "protection and well-being of children".
- 4.7.3 If it be accepted that an Act removing the defence of reasonable chastisement in all cases would relate to the protection and well-being of Children, then unless there is an express exclusion, prohibition or restriction which would prevent the Assembly from passing such an Act, the Assembly can do so. There is no such exclusion, prohibition or restriction. Other examples could be given where it would be possible for the Assembly to change *basic principles of law and rules of law of general application*.

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<sup>3</sup> e.g. *R v Griffin* (1869) 11 Cox CC 402

- 4.8 It is generally accepted that the law which applies in Wales is already different from that which applies in England, and all the signs are that the differences will increase. If our analysis above is correct, the scope for divergence is perhaps greater than the architects of the 2006 Act envisaged. The adoption of a conferred powers model, as opposed to a reserved powers model, does not decrease the likelihood of a body of law emerging in Wales which is significantly different from the law which applies in England.
- 4.9 It should also be borne in mind, of course, that divergence is not driven by legislation in Cardiff only. Increasingly the UK Government is bringing forward in Parliament England-only legislation in areas where Wales has not seen the need to change the law.<sup>4</sup>
- 4.10 In the light of these developments, it does not appear to us to be a sustainable point of view to say that there is no “Welsh law” and no “English law”, just one law of England and Wales that is substantively different either side of Offa’s Dyke. It may be, as some commentators have suggested, that there comes a “tipping point” at which the degree of difference is such that one can speak of “Welsh law”, and that the point has not yet been reached. That seems however to be more of a metaphysical than a practical approach to the question.
- 4.11 In our view, the practical question is not whether the law of England and Wales retains its mystic unity notwithstanding divergence, but whether there should be a distinct court system for Wales, and if so how should it operate. That, in our view, is what is meant by a distinct Welsh legal jurisdiction.

## 5. **Divergent laws and a jurisdiction**

- 5.1 What might the implications of a distinct body of Welsh Law be for the legal system? Whether it be called a separate Welsh jurisdiction or in the words of Jack Straw “organic development of greater autonomy of the Welsh system” at a minimum, it is essential that Courts in Wales decide cases on the basis of distinct Welsh Law – and that Lawyers can advise and represent their clients on this basis as well. From the perspective of individual citizens of or visitors to Wales, it must be the case that they are entitled to expect that the lawyers who advise them and the judges who hear their cases are well versed in the law which applies.
- 5.2 In principle, this might happen within a single ‘England and Wales’ jurisdiction. However, even within this system – and before the shift to

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<sup>4</sup> The legal consequences may be felt in unanticipated areas, which have nothing to do with devolved legislative competence. For instance, it is arguable that recent and proposed reforms in the health system in England are turning health service bodies into economic operators who compete in a market place, with potentially far-reaching consequences for how the law of public procurement and state aid affects them and the NHS in England generally.



Part 4 of Government of Wales Act 2006 – a series of changes to the organisation/administration of the Courts has delineated Wales increasingly clearly as a distinct territory (the changes are described nicely in the call for evidence). Furthermore, in terms of the day-to-day lives of many legal practitioners and their clients, there is already a material difference in many areas between what happens in Wales and what happens in England. Legislative momentum and/or inertia in Cardiff and London are likely to increase the difference.

- 5.3 The possibility exists that some elements of a Welsh Judiciary might emerge as judges working within these territorially delineated Courts decide on matters of distinctive Welsh Law. Should this happen in a gradual, ad hoc and unmanaged manner, that is unlikely to be satisfactory. In our view it is preferable to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.

## 6. **Legal Training, Education and the Professions**

- 6.1 Regardless of whether a distinct court system is developed, lawyers advising clients in Wales, and judges hearing cases in Wales will need to be able to show that they are competent to do so.
- 6.2 If the concepts of a unified jurisdiction and single law of England and Wales hold sway, it seems to follow that the law which applies in Wales (and how it applies) should be as much part of the training of all professional lawyers in England and Wales as is the law which applies in England (and how that applies).
- 6.3 Should the unified jurisdiction of England and Wales be maintained, there will be nonetheless a need to ensure that lawyers practicing in Wales can demonstrate competence in the law which applies in Wales, including primary law, and have access to appropriate legal training and education. This need will grow as and when the substance of the laws applying in Wales and those applying in England diverge. A test of competence to practice as a lawyer in Wales might become necessary. Similar considerations will apply to the need for special training for judges sitting in Wales
- 6.4 If there were to be established a distinct Welsh jurisdiction, all lawyers qualified in England and Wales at the time of its creation could continue to work in both jurisdictions, and similarly all England and Wales judges might sit in Wales.
- 6.5 The creation of a distinct jurisdiction for Wales would raise questions about the qualifications required to practice as a lawyer within it. There would also be a question about whether lawyers could normally continue to practice on both sides of Offa's Dyke after the creation of a

distinct jurisdiction in Wales. Similar considerations would apply to the appointment of judges.

- 6.6 As far as the academic stage of legal education is concerned, there is no reason why the arrangements which currently exist in respect of Northern Ireland should not apply to Wales. This academic stage of the qualifying law degree is basically the same. Students with degrees from law schools in England and Wales are qualified to enter the professional stage of legal education in Northern Ireland (although they must have studied the Law of Evidence, a criterion which would not apply in respect of Wales). The implications of a distinct jurisdiction in Wales for the professional stage of legal education require further consideration.

## 7. **Distinct Jurisdiction over devolved areas only?**

- 7.1 Most Federal States within the common law family (the US, Canada, Australia) have both Federal and State jurisdictions and there are Courts of each of these jurisdictions that operate within every State.
- 7.2 The system of jurisdictions in operation within the UK is different, in that (aside from the Supreme Court of the United Kingdom – and previously the Appellate Committee of the House of Lords and, for some purposes, the Judicial Committee of the Privy Council) each of these jurisdictions in effect deals with all matters of law within its defined territory (whether or not legislative competence over that issue has been devolved. Indeed, in the recent era, the jurisdictions have existed without any devolution of legislative competence).
- 7.3 A possible objection to the creation of a distinct jurisdiction (in the sense of a Court system) in Wales might be that it would not be appropriate for issues over which the National Assembly did not have legislative competence – i.e. non-devolved issues – potentially to be decided differently in the Welsh courts and in the English ones. On the other hand, precisely that possibility exists at the moment in both Scotland and Northern Ireland.<sup>5</sup>
- 7.4 Furthermore the prospect of squabbles over which court should have jurisdiction seems more likely where jurisdiction is thematically rather than territorially defined. This is even more so given that the conferred powers model of legislative devolution means that it is by no means clear what is excluded from the Assembly's legislative competence.
- 7.5 It is also conceivable that there could exist separate exclusive jurisdiction in respect of certain types of cases. It could be argued for instance that, even if nothing else happens, the Administrative Court in

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<sup>5</sup> Indeed, in the case of Scotland, Himsforth makes a powerful argument that the jurisdictional difference as between 'Scotland' and 'England and Wales' has generated instances in which different forms of citizenship rights have emerged from the same non-devolved law on either side of Hadrian's Wall.

Wales should have exclusive jurisdiction over judicial review cases in Wales. The current arrangements require cases which relate to Wales but are issued in London to be transferred to Wales, but it can take a disproportionately long time before the papers reach a judge who makes a decision on the transfer.

## 8. **Barriers and Costs - the need for detailed analysis**

8.1 In order to understand properly the implications of a distinct Welsh jurisdiction, there is a lot of detailed work that needs to be done. In our view, the two areas which require the closest attention are cross-border issues and costs.

8.2 Jack Straw, as quoted in the Committee's scoping paper, has spoken of "enormous practical implications" of a move to a separate Welsh jurisdiction. The issues he raises are largely technical matters relating to the relationship between the courts in England (where, of course, a new jurisdiction will also be created) and those in Wales. He is undoubtedly right in raising the issues. Once more, however, there are precedents. There is no reason in principle why cross-border issues between Wales and other jurisdictions within the UK should not be treated in the same way as those between the three existing jurisdictions. We need to understand how these work, and whether and to what extent they would need to apply differently to Wales, bearing in mind for instance that Wales' land border with England is longer and more densely populated than Scotland's.

8.3 In relation to costs, there is a need for a detailed analysis of the current economics of the administration of justice in England and Wales. Suitable methods for allocating current expenditure equitably between England and Wales would need to be considered in order to determine how much better or worse off Wales might be if it had its own court system with its own budget. To what extent might savings in London overheads be outweighed by loss of economies of scale? To what extent might it be possible to direct funding to issues such as ensuring access to justice to people in remote and deprived communities?

## 9. **The possible components of a Welsh jurisdiction and the impact on the Supreme Court**

9.1 If the Northern Ireland model were to be followed, there would be a Welsh Lord Chief Justice and Court of Appeal, mirroring the position in England and Wales. Equity suggests, and we would agree, that Wales should have the same model, but it need not necessarily be so. We consider, however that a Welsh Law Commission would be essential, in that it would be able to prioritise consideration of those issues which are important for the people of Wales.

9.2 A further set of questions is raised about The Supreme Court of the UK. There is some debate in Scotland about whether this Court (particularly in bringing together roles played by the House of Lords and the Judicial Committee of the Privy Council) is (or is becoming) a UK Court, as its name might suggest (whereas the House of Lords was understood to sit as a Scots Law court in relation to Scottish cases). At present the membership of the Supreme Court is usually understood to include members representing each of the three jurisdictions (one Northern Ireland and two Scots as well as the “England and Wales” judges). Should a Welsh jurisdiction be created, there might be a presumption that there should also be a Welsh judge on the Supreme Court. It could also be argued that the existence, and over time the growing significance, of a distinct body of Welsh primary law might suggest that there should in any event be a judge with expertise in Welsh law on the Supreme Court.

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from Legal Wales Standing Committee**

Submissions of the Legal Wales Standing Committee  
on  
Jurisdictional Devolution  
to  
The Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
19 February 2012

**Legal Wales Standing Committee and a summary of its  
submissions**

1. This is the submission on behalf of the Legal Wales Standing Committee which comprises barristers, solicitors, legal executives, judges, members of tribunals, the CPS and legal academics.<sup>1</sup> In summary, these submissions set out what the standing committee believes to be the constitutional and other arguments in favour of devolving responsibility for the administration of justice in Wales to the National Assembly for Wales (the Assembly). We deal also with the principal arguments against devolving that field of responsibility.

**Introduction**

2. The administration of justice is a field of responsibility which is presently administered on an England and Wales basis by the Ministry of Justice, and Her Majesty's Courts and Tribunal Service (HMCTS). At the Legal Wales Annual Conference in October 2011, the First Minister announced that he proposed to initiate a public debate on the question whether that responsibility should be devolved to the Assembly and that it was his government's intention to issue a Green Paper to seek the views of the people of Wales. On the 9th December 2011, the Constitutional and Legislative Affairs Committee of the Assembly (the committee) under the chairmanship of Mr. David Melding AM announced that it proposed to carry out an inquiry into the establishment of a 'separate Welsh jurisdiction'. The terms of reference of the inquiry are described on page 6 of the scoping paper. These are

"The committee has no wish to pre-empt the wide-ranging public debate promised by the First Minister. The objective of the

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<sup>1</sup> As the principal question for the inquiry is whether the law should be changed (by adding a new field or responsibility to the Assembly's existing fields of responsibility), the exercise is entirely political (See *IRC V Yorkshire Agricultural Society* [1928] 1KB 61 Senior Assembly Civil Servants and the Counsel General are therefore unable to associate themselves with these submissions. Judicial members may not express views on matters of policy.

inquiry ..... is for the Committee to contribute to the public debate on the need for a separate Welsh jurisdiction by taking expert evidence on

- the meaning of the term “separate Welsh jurisdiction”;
- the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;
- the practical implications of a separate jurisdiction for the legal profession and the public;
- the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.

### **About the terms of reference**

3. These submissions address the terms of reference as set out in the scoping paper and the letter of the 9<sup>th</sup> December.

4. The aspects of the administration of justice to which we refer in these submissions are the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. We also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission.

5. Articles in the press may be taken to suggest that the inquiry is limited to fields already devolved. That would involve two justice systems in Wales, one to administer justice in relation to devolved responsibilities and the other dealing with the non-devolved responsibilities, and is not considered to be practicable. Moreover, the inquiry is not concerned with the substance of our laws or the authority to make laws; it is concerned only with the structures by which the justice system is administered in Wales<sup>2</sup>. The courts of Scotland administer the criminal law in relation to drugs, firearms and abortions and its civil courts and tribunals exercise jurisdiction in relation to employment law even though the making of laws in those fields has not been devolved to the Scottish Parliament.<sup>3</sup>

### **“What we mean by jurisdiction”<sup>4</sup>**

7. We are here concerned with the jurisdiction of the National Assembly for Wales (the Assembly) and not that of a court of law. Therefore, the relevant definition of “jurisdiction” is the territory or

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<sup>2</sup> We return to this in paragraph 29.

<sup>3</sup> We mention those areas of law because they are the examples which are cited by the First Minister (see paragraph 5 of the scoping paper).

<sup>4</sup> See First Minister’s address as Counsel General which is quoted in paragraph 5 of the scoping paper.

sphere of activity over which the legal authority of the Assembly extends. However, the pursuit of a definition of “jurisdiction” or “separate jurisdiction” is in danger of overcomplicating the inquiry and distracting its focus which in its essence is concerned with the question whether responsibility for administering justice in Wales should be devolved to the Assembly or not. In that context, “jurisdiction” simply means ‘responsibility for the administration of justice’. That is the sense in which the expression is used in this submission. If responsibility for the administration of justice were to be devolved to the Assembly, it would have jurisdiction over the administration of justice in Wales.

## **Background**

8. Significant developments within Wales’s legal landscape have taken place already in the wake of devolution. One such development was the creation of ‘Legal Wales’ or ‘Cymru’r Gyfraith’. The Government of Wales Act 1998 had ushered in significant constitutional changes and it was of the highest importance that Wales’ legal ‘constituencies’ should come together to form a civic society to engage with the new order and that is what Legal Wales is, a new civic society. It has a representative committee the members of which are drawn from every constituency of law in Wales including barristers, solicitors, judges, the law schools of the universities of Wales, lawyers in local government, Assembly lawyers, the Institute of Legal Executives, the tribunals and the specialist law associations of Wales.<sup>5</sup> In 2000, the Mercantile Court for Wales was established in Cardiff. The Court of Appeal Civil Division now sits regularly in Cardiff as does the Court of Appeal Criminal Division. In 2008, there was established the Administrative Court for Wales. Most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are now heard in Wales; Employment Appeals Tribunals now sit regularly in Wales. There has been a Chancery Court in Wales exercising High Court Jurisdiction for a number of years before devolution. A significant change was the rearrangement in April 2007 of the boundaries for the administration of justice in Wales. The administrative region ceased to be Wales and Cheshire and became HMCS Wales. Henceforth, the court services in Wales will be administered on an all Wales basis. As recently as 2010, there was established the Association of the Judges of Wales which is an association of District Judges, and judges of the Circuit Bench, High Court, Court of Appeal and House of Lords and the Supreme Court. And in April 2010, there was established the Wales Bench Chairmen’s Forum.

9. Specialization, too, is strong in South Wales. It has been so since the early seventies but is now in an expansive phase. It is developing,

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<sup>5</sup> See footnote 1

hand in hand, with the specialist courts which have been established in Wales in recent years and with the National Assembly's expanding responsibilities. With specialization and devolution of government came opportunities and challenges. The legal profession in Wales is up to the challenge and has seized the opportunities. Since devolution, there have been established four specialist associations – the Wales Public Law and Human Rights Association, the Wales Commercial Law Association, the Wales Personal Injuries Law Association and the Wales Parliamentary Bar Association

10. These developments were spontaneous responses to devolution. They are the signs of Wales' emerging legal jurisdiction. "Wales is emerging as a separate jurisdiction which needs to be separately recognised" (Professor Tim Jones and Jane Williams 'Wales as a Jurisdiction'). They are the evidence of what Lord Carlile QC described as 'the evolution of devolution'.

11. As these examples demonstrate, the break-up of the unitary political system brought about by the devolution statutes has been accompanied by at least a loosening of the unified legal system of England and Wales. The differences are likely to become more pronounced and more significant constitutionally as the process of devolution continues and especially now that the Assembly has acquired increased legislative competence. The description of Wales as an "emerging jurisdiction" exudes energy and promise.

### **The arguments for jurisdictional devolution**

12. It should not be thought that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is to be attributed entirely to devolution. The process of change began much earlier. It has been taking place albeit very gradually for about 63 years. The Welsh Courts Act, 1942 might have been the smallest possible step forward but it began a process of change to which momentum was added by the Welsh Language Acts of 1967 and 1993 and the pace of which quickened following the passing of the Government of Wales Act 1998. Since 1942, therefore, the scope for doing it differently in the practice and the teaching of the law and the administration of justice in Wales has increased. Once we come to understand the significance of Legal Wales and the significance of the fact that Wales is an emerging jurisdiction, once we acknowledge these significant developments, the case for devolving justice becomes a very persuasive constitutional argument.

13. But these are the historical arguments. What are the constitutional arguments? The principal arguments, we believe, are (i) that it would be internally logical, consistent and coherent, (ii) it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales, (iii) it would bring justice closer to the people for whom the



laws were made and (iv) it makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction?

### **The arguments against jurisdictional devolution**

14. There are substantial arguments against devolving responsibility for the administration of justice. We set these out below but not in any order of importance or strength.

15. Firstly, it can be argued that devolving responsibility for the administration of justice would be too radical a change at this time (the too radical argument.).

16. This argument needs to be measured against the fundamental changes to the British Constitution which took place in the closing years of the last century. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament. Those changes did not happen alone. Other significant changes were the Human Rights Act 1998 by which the European Convention on Human Rights became incorporated into the domestic law of the UK; Freedom of Information Act 2000 which aims to make government more open and less secretive; the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber and the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European parliament. Professors Jowell and Oliver have described these changes as hammer blows to our established constitutional principles. The late Professor Sir David Williams described the Welsh devolution settlements as having brought about “an astonishing burst of constitutionalism”. Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century “have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... even an established democracy needs constantly to be reviewed and renewed” (Jowell and Oliver).

17. The momentum for fundamental reforms is a continuing one. The present Government’s proposed reforms include the introduction of

fixed term parliaments, reforming the voting system and further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state. There were many reasons which drove devolution but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively or meeting the demands of democracy of the latter half of the 20<sup>th</sup> century not to mention those of the 21<sup>st</sup> century. Devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home countries; between the state and the citizen and between citizen and citizen.

18. We need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and Northern Ireland have their own systems for administering justice. It is the case that Scotland always did have its own distinct legal system but Northern Ireland's separate justice system is the product of recent legislation. Only Wales and England are administered jointly for these purposes but that was not always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters".(Professor John Davies, A History of Wales).

19. There are sound constitutional reasons why the judiciary cannot involve themselves with the question of whether responsibility for the administration of justice in Wales should be devolved or not; that is a political matter. Nevertheless, the judiciary at every level including the magistracy and HMCTS Wales, the HM Government Department responsible for administering Justice in Wales, have demonstrated a strong awareness and understanding of Wales' developing distinct identity in legal matters and of the importance of the Welsh language in the Administration of Justice in Wales. When opening the Mercantile Court in Cardiff, Lord Bingham as Lord Chief Justice of England and Wales, said

"This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a proud, distinctive and successful nation."

20. A second argument against is that the system of justice in the UK is the envy of the whole civilised world. Our judges are independent, of outstanding quality and are devolution aware. Unless a devolved justice system is at least as good in terms of quality as the justice

system presently enjoyed in Wales, the case for change is not made out (the quality argument).

21. Devolving responsibility for the administration of justice would not dilute these strengths one bit. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The question is concerned only with the structures by which the administration of justice is administered.

22 A third argument is that the evolutionary changes in the administration of justice in Wales (which we describe in paragraphs 8, 9 and 10) have occurred even though justice is not a devolved field and whilst it might be doubtful that they would have occurred to the extent they have were it not for devolution they have occurred without justice being a devolved field (devolution by evolution argument).

23. This is an aspect of the argument described by Lord Carlisle QC as devolution by evolution. The Richard Commission criticised it as devolution of a kind which did not follow any discernible or comprehensible policy.

24. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility today confuses our present needs with what our needs might be in the future if there were further evolutionary changes or “spontaneous adjustments”<sup>6</sup> in the field of administration of justice. The case for change cannot be sustained at present. (the argument that we are confusing present needs with possible future needs) Tomorrow, maybe, but not today

25. We have drawn a clear distinction between the past and present on the one hand (paragraphs 12 and 13 above) and the future on the other (paragraph 11 above). Paragraph 11 expressly states that the arguments for change will strengthen in the future. The case in paragraph 13 is one that can be sustained at present. Gwynedd Parry (FRHistS) Professor of Law and History at Swansea University, says of the argument at paragraph 13 that it is probably the strongest argument of all for jurisdictional devolution.

26. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory (the piecemeal reform argument).

27. We would submit that the following arguments against piecemeal reform are very persuasive.

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<sup>6</sup> See paragraph 10 above

*“it is difficult to deny that .....devolution has led to a system of amazing untidiness.... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other”.* Vernon Bogdanor, Professor of Government, Oxford University in his book *The New British Constitution*

*[The Labour Government’s preference for allowing institutions to develop pragmatically may] “explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory”* Rodney Brazier, Professor of Constitutional Law, University of Manchester in his book, *Constitutional Reform*

*“Asymmetrical devolution – different degrees of power devolved to Scotland and Wales – amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice”* Larry Siedentop, emeritus fellow, Keble College Oxford, *Financial Times*, 31 May 2010.

28. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change (the laws in Wales are no different to the laws of England argument)

29. However, the differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which gives rise to the question of whether responsibility for the administration of justice should be devolved to the Assembly and not the difference between the substances of our laws when compared to those of England. We have set out constitutional arguments for the change in paragraphs 12 and 13 above.

30. Moreover, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government’s legislative programme of no less than 20 Bills during the next four/five years and Westminster will continue to make Wales only legislation in the non-devolved fields.

## Inquiry into the establishment of a separate Welsh jurisdiction Response from Law Commission

### LAW COMMISSION WRITTEN EVIDENCE: INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION

#### The Law Commission

- 1 The Law Commission welcomes the opportunity to give written evidence to the Committee.
- 2 The Law Commission was established by statute in 1965 to (among other things) keep the law of England and Wales under review, and propose reforms to it. In the same legislation, a separate Commission was established for Scotland. Since 2007, the Northern Ireland Law Commission, established by legislation in 2002, has been fully operational for the third jurisdiction of the United Kingdom.
- 3 The Law Commission and the Scottish Law Commission have frequently embarked on joint projects, where the relevant law extended to Great Britain. We have recently embarked on our first tripartite law reform project with both the Scottish and Northern Ireland Commissions.
- 4 The Law Commission does not have a view on the desirability of the establishment of a separate jurisdiction for Wales; nor on the technical steps that would be necessary for such a development. The substantive views of the Commission on law reform are developed by undertaking projects on those matters referred for its consideration by Government, or contained in one of the Law Commission's periodic Programmes of Law Reform.
- 5 However, we recognise that, if a separate jurisdiction were to be established, the question of whether a separate law commission should be established for Wales may arise. The existence of a separate jurisdiction would not *determine* the question: the Welsh institutions might consider retention of a single law commission desirable even with a separate jurisdiction. Contrariwise, differences in the substantive law applicable in Wales may become so pronounced, even without a separate jurisdiction, that a Welsh Law Commission may appear appropriate.
- 6 In advance of that debate, we take this opportunity to set out how we have worked with both the Welsh Government and Welsh stakeholders in recent years. Much of the Commission's work is in non-devolved areas such as criminal, commercial or family law. Some of our recent law reform projects have, however, directly engaged with devolution.

#### Engagement with Welsh devolution: three projects

##### *Renting Homes*

- 7 The first of these was Renting Homes, a fundamental review of housing tenure law, which lasted from 2001 to 2006. In the early stages of that project, we did not fully appreciate the significance of the then comparatively new devolution settlement. However, subsequently, we undertook a substantial and distinct consultation process with the full range of Welsh stakeholders. In doing so, we came to appreciate the importance of understanding the distinctive positions and

outlook of Welsh stakeholders and policy makers, which were frequently importantly different from those of similar organisations in England.

- 8 In the result, our proposals were widely supported by stakeholders in both countries, but there was a higher level of support in Wales than in England. The Welsh housing association sector, for instance, did not have the reservations expressed by some of their colleagues in England about proposals which would have had the effect of enhancing the rights of their tenants in certain respects. In relation to supported housing, we had worked with stakeholders in both countries to improve and refine proposals, but again the final outcome was more positively received in Wales than England, largely as a result of differences in the significance of tenure issues because of different approaches by Government in each country.
- 9 We published our final recommendations, with a draft Parliamentary bill, in that project in the summer of 2006. The draft bill therefore reflected the Government of Wales Act 1998. The draft bill provided that the single most important rule in our proposed system – the rule that gave council and housing association tenants the same high security tenancy – should be in primary legislation. However, we also recommended that it should be subject to a Henry VIII power for the National Assembly to amend it in future, but with no equivalent power for the Secretary of State in respect of England. As will be clear from the timing, we were finalising the report at the same time that what became the Government of Wales Act 2006 was making its way through Parliament. Although our draft bill was required to reflect the law as it was, in our narrative recommendations, we proposed that, while there should be a single England and Wales bill to implement our recommendations, it should add “housing tenure” as a matter in the relevant field, to allow policy makers in Wales to legislate in the future, under the Part 3 system. Further, we recommended that, if Whitehall was not interested in implementing our proposals, then the Welsh Assembly Government should seek a legislative consent order to do so on a Wales-only basis.
- 10 In our 2007-2008 annual report, we contrasted the “imaginative and positive policy reaction” from Welsh Ministers and officials with the position in England. Finally, the Government were to reject the proposals in respect of England, whereas they were accepted in principle by Welsh Ministers. An Legislative Consent Order which would have allowed for legislation on much of Renting Homes was passed by the last Assembly.
- 11 With the move to the Part 4 system, and the announcement of a housing bill in the legislative programme in July 2011, the Welsh Government has embarked on a major policy initiative to consider an ambitiously wide range of policy options in relation to housing. Part of that is a close and detailed reconsideration of our 2006 proposals. We have been involved, with other stakeholders, in the co-production policy process set in train by the Welsh Government. Decisions are yet to be made, but we hope that housing legislation in the Assembly, at least in the longer term, implement the core of our proposals, to the benefit of both landlords and tenants in Wales.

#### ***Adult social care***

- 12 The second very large scale project in a devolved area was that we completed

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last year on the law relating to adult social care. Although at the outset, Welsh Ministers decided not to make it a joint project (that is, one jointly sponsored by the Welsh Government and the Department of Health), we have striven to ensure that there was nonetheless a full and stimulating consultation process in Wales.

- 13 Given the range of those affected by adult social care law, we thought it essential to engage as widely and as deeply as we could with the full range of stakeholders. Members of the team at the Law Commission, including the Chairman and the Commissioner leading on the project, therefore attended a large number of conferences, workshops, seminars and other events during the consultation period. The largest single event in the whole consultation was a major conference organised on our behalf by the Older People's Commissioner and Age Cymru. We attended events all over Wales, not just in Cardiff, and overall, 15% of all consultation events took place in Wales.
- 14 When we started the project, there were some legal differences between England and Wales, but they were few and minor. There was, however, a distinct, and growing, difference in the general direction of policy at the governmental level. This was in due course to express itself in two Measures passed during the currency of the project, on charging for adult social care services and on consultation with carers.
- 15 The development of distinctive policy outlooks, and the changes in the devolution settlement, can be tracked in our treatment of implementation in England and Wales through the progress of the project. In our consultation paper, published in February 2010, we provisionally proposed "that the vehicle for our reform should be a unified adult social care statute covering both England and Wales". Such differences of law as there were, we thought, did not justify separate statutes for each country. But at that point, the choice was between a single, combined England and Wales Act and the model provided by the NHS Acts 2006 – two Acts, one for England and one for Wales, both enacted by the UK Parliament. We did, however, in the consultation paper refer to the expected referendum on introducing Part 4 of the Government of Wales Act 2006, and say we would keep the issue under review.
- 16 Our final report was published immediately after the last Assembly elections and the introduction of the Part 4 system. Adult Social Care was an unusual project, in that it was not accompanied by draft legislation. By this time, our view had become that "it would be constitutionally infelicitous to propose that the UK Parliament legislate for Welsh adult social care, whether in one UK bill covering both England and Wales, or in separate Westminster bills for each country." We went on to recommend that our proposals should be implemented in Wales by an Act of the National Assembly. We said "this would allow for the legislation itself to be made in Wales and would give the Welsh Assembly the freedom to implement our recommendations in the way they preferred".
- 17 Since then, the legislative programme has been announced, and includes a social services bill. Again, policy development is continuing on a much broader front than just our proposed reforms to adult social care. Nevertheless, we hope that our system will be implemented in that bill for Wales (as we continue to hope for a bill in Westminster for England).

### ***Wildlife management***

- 18 The third major project in a devolved area is that on the law relating to wildlife. This is a project contained in our 11th Programme of Law Reform, which started in July 2011. The project aims to deal with the law relating to species protection (both in the conservation and welfare contexts), invasive non-native species, and game (but not the Hunting Act 2004).
- 19 As far as England is concerned, this was proposed as a stand-alone project to modernise and simplify an area of law spread over multiple statutes, and with a high degree of input from EU law. In Wales, however, policy is developing on a much more comprehensive basis in relation to the environment and sustainable development more generally, under the umbrella of the development of the National Environmental Framework. This context envisages significant legislation in Wales, in this Assembly and possibly indeed the next.
- 20 It is early days yet for this project. The aim is to produce draft legislation by July 2014. The policy process has been an open and accessible one. Welsh Government officials have welcomed our involvement, and we are working with them to ensure that what we produce can feed into the broader policy initiative, and in turn be informed by it. Quite what our final recommendations will be remains to be seen, but our hope is that what we produce can be dovetailed into the final legislative instrument for this over-arching initiative.

### ***Other projects***

- 21 In emphasising these three projects, we do not suggest that there has not been meaningful engagement in other projects where there is less direct Welsh devolved concern. During the project on marital property agreements, we held a very useful event at Cardiff University for practitioners, academics and members of the public. In our work the Public Services Ombudsmen project, we had direct and fruitful meetings and liaison with the Public Services Ombudsman for Wales. Other work includes projects on the law relating to railway level crossings, other housing and landlord and tenant projects, the regulation of healthcare professionals, the regulation of taxis and private hire vehicles and electoral administration.

### ***A Wales-only project***

- 22 We have as yet not conducted a Wales-only law reform project. In 2010, we consulted on what should feature in our 11th Programme of Law Reform. During that consultation, we contacted a wide range of Welsh policy stakeholders, and had the benefit of a seminar hosted by Cardiff Law School, attended by members of all six law schools in Wales. In the event, we did not receive a suitable proposal for a Wales-only project. The Commission would, however, welcome the opportunity to consider proposals for suitable Wales-only projects, and we look forward to the opportunity to do so.

### ***Concordat with the Welsh Government***

- 23 An agreement between the Law Commission and the Welsh Assembly Government was formally adopted in 2004. Discussions on a concordat to replace that agreement are currently on-going. We consider that an up to date



concordat would be a helpful statement of the relationship between the Welsh Government and the Law Commission, and we look forward to its conclusion. However, as we believe the foregoing account demonstrates, our engagement with the Welsh Government and Welsh stakeholders has not depended on the existence of a formal document.

### **Conclusion**

- 24 Our engagement, on key projects, with Welsh institutions and stakeholders has been a major and creative part of our work on those projects since the early years of last decade. As the law effective in Wales becomes increasingly distinct from that in England, we consider that maintaining and deepening that engagement becomes more, not less, important. We would welcome a discussion with Welsh institutions on how we can develop relationships further.

# Eitem 4.1

A Welsh Jurisdiction

## A Welsh jurisdiction.<sup>1</sup>

**Professor John Williams, Centre for Welsh Legal Affairs, Department of Law and Criminology, Aberystwyth University.**

### Introduction

'The first elections to the National Assembly for Wales on 6 May will not represent some constitutional "big bang". Devolution is not a single defining event but a process.'

This oft-quoted statement by Ron Davies captures the reality of the way political devolution is evolving within Wales. The devolution settlement for Wales is markedly different from that for Scotland and Northern Ireland. So too is the legislative structure. The Assembly comprises of 60 members as opposed to 129 SMP and 108 members of the Northern Ireland Assembly. Unlike Scotland, Wales does not have the power to adjust the basic rate of income tax. Nevertheless, post the referendum on law making powers the process of political and law making devolution has taken a significant step forward. Quite rightly this has given fresh impetus to the question of a Welsh jurisdiction. As with political devolution, this is a process and the ultimate decision on a Welsh jurisdiction will depend upon whether a number of factors are present.

### Wales as an emerging jurisdiction?

A jurisdiction requires a population; however, it does not have to be a large population. Northern Ireland (1.8 million) and the Isle of Man (80,543) are both jurisdictions. With a population of nearly three million, Wales comfortably meets this requirement.

Tim Jones and Jane Williams identify three common characteristics of a jurisdiction:

1. defined territory;
2. distinct body of law; and
3. a court structure and legal institutions.

Since the Local Government Act 1972, Wales has a defined territory. In addition, Wales has a distinct and growing body of law. Whether the body of Welsh law is yet sufficiently large enough to support an independent Welsh court structure and legal institutions is debatable. One obvious but important observation to make is that there must be enough work for the courts to undertake, and enough work to support a Welsh legal profession. The body of law must also be sufficiently large to justify the necessary changes that would have to be made to legal education within Wales.

Mr Justice Roderick Evans in his 2010 Lord Callaghan lecture identified their judicial structures as an important feature of the Scottish and Northern Irish jurisdictions. Wales, however, is part of the unitary jurisdiction of England and Wales. One of the reasons given in the 1973 Royal Commission

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<sup>1</sup> Based on a paper delivered to the Irish-Scottish Forum (AHRC Centre for Irish-Scottish Studies at the University of Aberdeen) Scottish Parliament, November 2010

on the Constitutions for not recommending for Wales the same powers as Scotland was that Scotland was a jurisdiction and Wales was not.

There is increasing potential for Wales to become a jurisdiction, although in the absence of separation it cannot become completely politically and legally divorced from England/United Kingdom. The decision on a separate Welsh jurisdiction is ultimately one for politicians and not one that the judiciary or the legal profession can impose. It would require the devolving of the administration of justice (or parts of it) to Wales. However, that decision must be based upon a body of evidence supporting the idea of sustainable jurisdiction that can operate effectively and ensure that it attracts good quality members of the legal profession and the judiciary.

In part, the debate centres on the need to decide whether a separate Welsh jurisdiction is a precondition of greater legislative powers for the Assembly, or whether it is a product of enhanced powers.

Plaid Cymru, in its very informative paper *Developing a Welsh Legal Jurisdiction*, suggests that 'focus should be given to establishing the minimum amount of distinctive Welsh jurisdiction compatible with transferring powers on the Scottish model.' It proposes that the GWA 2006 should be amended to include the administration of justice as a field devolved to the National Assembly. This would include an independent prosecution service for Wales, further devolving the court administration in Wales, a Welsh Judicial Appointments Commission, and a distinctly Welsh legal aid system. To this we would need to add, a distinctly Welsh qualification for practitioners in Wales. This could be a component of a qualification that would cover both the English and the Welsh jurisdictions.

However, the All Wales Convention emphasised that the legal structures in Wales should keep pace with political devolution. It concluded that,

'... a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence for the National Assembly for Wales, even if the National Assembly for Wales has the substantial powers of the Scottish model.'

Roderick Evans stated that the ultimate decision on a Welsh jurisdiction, or an amended Wales and England jurisdiction, 'may be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.' How responsive has it been?

### **The current framework**

The unitary model of the administration of justice has evolved since devolution and has responded in part to the changed constitutional arrangements within the United Kingdom. In 2007 the Wales and Chester Circuit was disbanded and Wales became a separate circuit. Her Majesty's Courts Service (HMCS), which is responsible for managing the administration of the courts across England **and** Wales, is now organised into English regions, the Royal Courts of Justice, *and* Wales. Court administration in Wales now reflects legal and political boundaries.

Lord Bingham when Lord Chief Justice broke tradition by adding 'Wales' to his title; there is now a Lord Chief Justice of England and Wales. Both divisions of the Court of Appeal (Criminal and Civil) sit in Cardiff, although it is still administered from London. The Administrative Court also sits in Cardiff

and most proceedings can be issued at the District Registry in Cardiff. Importantly, these include challenging the National Assembly.

These initiatives have strengthened the legal identity of Wales, although they are a component part of a wider programme of decentralisation throughout England and Wales.

Sir Malcolm Pill at the 2009 Legal Wales Conference said,

‘(A)s central government recognises the legitimacy of the Assembly and devolved administration, it is important, in my view, that the unitary system gives equivalent recognition in the judicial structure suitable for Wales.’

The unitary model currently enables Wales and England to benefit from a strong unified legal profession and judiciary and a shared court structure. This is important and builds on many years of experience. Since devolution, the administration of courts and tribunals in Wales has responded to the emergence of Legal Wales. It has been a cautious approach and linked in part to the pace of development within the law making capacity in Wales and the size of the body of Welsh law. As law-making capacity increases, and as the body of Welsh law grows, the unitary model needs to adapt further. Thus far, it has proved to be reasonably flexible in accommodating developments.

As devolution progresses, the challenges will increase and tensions will arise. How should appointment procedures for the judiciary reflect the needs of a more dualistic body of law? What are the implications of more Welsh Law and greater devolution of the administration of justice for the Welsh legal education? Should there be a Wales only law degree and professional qualification? What does the legal profession in Wales need to do to respond to the demands of Legal Wales? Should we have a separate professional body for lawyers who practice in Wales? What are the implications are for cross border practitioners? The law schools and the profession must build up the capacity within the profession to meet the needs of Legal Wales, but also to accommodate the ongoing relationship with England. However, law schools in Wales and professional legal training providers face a dilemma. To what extent can they further develop a Welsh based law degree/professional qualification without losing the all-important market of potential students living in England, other EU countries and overseas? That is a significant challenge facing the sector.

As an aside, it is also necessary for Wales to enhance its law reform capacity. I have argued elsewhere that the setting up of a Wales Law Reform Commission is desirable. It need not follow the format of the Law Commission of England and Wales, but the presence of such a body with a specific Wales focus, whilst not a prerequisite of being a jurisdiction, would assist greatly in the development of the necessary corpus of law.

Devolving the administration of justice must reflect the growth of the corpus of Welsh law and, very importantly, political devolution. It cannot lead the way, although it is essential that it does not fall too far behind. The unitary model works and will do so for the near future. However, as the body of distinct Welsh law grows in devolved areas, so too will the tensions within the unitary system.

A separate Welsh jurisdiction is not inconsistent with remaining part of the wider England and Wales/United Kingdom jurisdiction. For non-devolved matters, the unitary jurisdiction will be needed. Whether Welsh jurisdiction judges could or should hear cases involving non-devolved matters, effectively acting on behalf of the unitary jurisdiction, is a matter for discussion. In

Professor John Williams.

principle, that should not be a problem and may assist in ensuring that the courts are fully utilised. Difficulties will arise when devolved and non devolved matters arise in the same case. It will be necessary to devise criteria for deciding which court should hear the case. Of course, if Welsh jurisdiction judges are also able to hear non-devolved cases, then this problem will be avoided.

## **Conclusion**

Yes, devolution is a process rather than an event for the Judiciary, the legal profession and the law schools in Wales as much as in the world of politics. Similarly, the development of a Welsh jurisdiction is a process. At some stage, the political decision will have to be taken to break away in part from the existing unitary jurisdiction model. Devolving the administration of justice must match the pace of devolution and the growth of the corpus of Welsh law. It cannot lead the way, although it is essential that it does not fall too far behind.

The unitary model works and will do so for the near future. However, as the body of distinct Welsh law grows in devolved areas, so too will the tensions within the unitary system. Primary law making powers will lead to a more identifiable body of Welsh law and strengthen the argument for further devolving the administration of justice and the courts in Wales. The parameters of a Welsh jurisdiction working alongside rather than completely absorbed within the English jurisdiction will become apparent. At some stage in the future, a clearly defined Welsh jurisdiction may be necessary. Meanwhile, the process of devolving the administration of justice should continue within the unitary model at a pace reflecting greater legislative powers and the growth in Welsh law.

# Eitem 5.1

Theodore Huckle QC/CF  
Y Cwnsler Cyffredinol/ Counsel General



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref: LF/CG/5156/11

David Melding AM  
Chair of the Constitutional and  
Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

24 January 2012

Dear David,

## **PUBLICATION OF WELSH GOVERNMENT GUIDELINES ON CHOICE OF AFFIRMATIVE OR NEGATIVE PROCEDURE IN SUBORDINATE LEGISLATION**

I would like to draw your attention to the publication of Welsh Government Guidelines on the choice of affirmative or negative procedure in subordinate legislation. A copy of those Guidelines is attached, and another has been laid in the Assembly Library.

Coinciding with the work of the (then) Constitutional Affairs Committee in respect of their report on the Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years, the former Counsel General, John Griffiths AM, conducted review of the experience of the Welsh Government relating to legislation processes during the third Assembly and what improvements could be made. This was achieved via co-operation with Ministers, Members, Committees, officials and external interested parties.

A significant issue which arose from that review was a lack of clarity amongst Assembly Members and scrutiny committees as to exactly how the choice of Assembly procedure used in relation to statutory instruments made by virtue of powers conferred by Assembly Measures (now Assembly Acts of course) was actually arrived at.

These Guidelines set out the criteria that the Welsh Government applies in determining the procedure to be adhered to in relation to such Welsh subordinate legislation.

It is envisaged that the publication of these Guidelines will constitute a vital enhancement to the fundamental values of clarity and transparency in the Welsh Government's legislative process.

I am sending a similar letter to Rosemary Butler AM, the Presiding Officer.

Yours sincerely

Theodore Huckle QC  
Cwnsler Cyffredinol  
Counsel General

Cathays Park  
Cardiff  
CF99 1NA

Phone/ffon 029 2082 3508  
correspondence.Counsel.general@wales.gsi.gov.uk

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## Welsh Government Guidelines

### Subordinate Legislation

#### Draft Affirmative or Negative Assembly Procedure

##### When do these guidelines apply?

These guidelines apply when considering the choice between draft affirmative and negative Assembly procedure:

- (i) when Bills for Assembly Acts that confer powers to make statutory instruments are being prepared;
- (ii) when the Welsh Ministers seek provisions in Bills for UK Parliament Acts that confer powers in devolved areas to make statutory instruments; and
- (iii) when legislation provides for a choice to be made between those types of procedure when making statutory instruments in devolved areas.

##### Background

Powers to make subordinate legislation about devolved matters are conferred on, for example Welsh Ministers, by virtue of Assembly Acts<sup>1</sup> or by UK Parliament Bills. In such cases consideration is given to what form of Assembly procedure should be applied to an instrument made under that power.

The two most commonly used procedures are set out here for ease of reference. Draft affirmative procedure is where the instrument cannot be made unless a draft of it is laid before and approved by a resolution of the Assembly. It must be made in the form of the draft laid and therefore cannot be amended. Negative procedure is where the instrument can be made (and come into force) but must be laid before the Assembly and can be 'negated' or 'annulled' by a resolution of the Assembly is sometimes called "annulment" procedure. It is, however, referred to in this note as "negative procedure".

##### Application of Guidelines

This paper sets out guidelines to be taken into account by the Welsh Government in determining (e.g. when preparing Assembly Bills that confer power to make statutory instruments) whether such an instrument should be subject to that *usual* form of draft affirmative or negative Assembly procedure<sup>2</sup>.

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<sup>1</sup> Or in or under Assembly Measures that remain in force following Part 3 of GOWA 2006 ceasing to have effect.

<sup>2</sup> These are not, however, the only forms of 'affirmative' or 'negative' procedure – see Statutory Instruments Practice - <http://www.opsi.gov.uk/si/statutory-instrument-practice>.

The guidelines recognise that in each case there is a balance to be struck between:

- scrutiny by the Assembly;
- consumption of Assembly (or committee) time;
- the significance of the provisions in question; and
- the making of legislation in the most efficacious manner.

Some factors that are to be taken into account are set out below but these are not exhaustive lists. It is not, therefore, practicable to give a set of precise criteria to be applied rigidly in every case.

The guidelines apply to subordinate legislation in respect of a devolved matter that takes the form of a statutory instrument.

Whilst the intention of the Welsh Government is that these guidelines will apply equally in cases where such powers are being sought in a UK Parliament Bill it is recognised that, ultimately, neither the Welsh Government nor the Assembly has control over that process.

There are some factors that may, to a greater or lesser extent depending on the context:

- (a) tend to suggest the application of the “draft affirmative” procedure; or
- (b) require particular justification if a procedure other than “draft affirmative” procedure is applied.

The factors referred to above are:

- 1) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly<sup>3</sup>;
- 2) powers, the main purpose of which is, to enable the Welsh Ministers, First Minister or Counsel General to confer further significant powers on themselves;
- 3) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
- 4) powers to impose or increase taxation or other significant financial burdens on the public;
- 5) provision involving substantial government expenditure;
- 6) powers to create unusual criminal provisions or unusual civil penalties;
- 7) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;

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<sup>3</sup> E.g. Henry VIII powers if wider than necessary for purely consequential amendments as a result of the Act or Measure.



- 8) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
- 9) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).

Factors that may reasonably tend to suggest the application of the “negative” procedure include, in particular:

- 1) where the subject-matter of the subordinate legislation is relatively minor detail in an overall legislative scheme or is technical;
- 2) where it may be appropriate to update the subject-matter of the subordinate legislation on a regular basis;
- 3) where it may be appropriate to legislate swiftly (e.g. to avoid infraction proceedings or for the protection of human or animal health or of the environment)<sup>4</sup>;
- 4) where the discretion of the Welsh Government over the content of the subordinate legislation is limited (e.g. legislation that gives effect to some provisions of EU law);
- 5) where it would be appropriate to combine provision to be made under the power with provision that can be made under another power where the latter may be subject to negative procedure.

January 2012

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<sup>4</sup> In some cases subordinate legislation made for these purposes is not subject to any procedure due to the recognised need to legislate urgently.

## Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

### Constitutional and Legislative Affairs Committee

Theodore Huckle QC  
Counsel General  
Welsh Government  
5th Floor  
Tŷ Hywel  
Cardiff Bay  
CF99 1NA



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Bae Caerdydd / Cardiff Bay  
Caerdydd / Cardiff  
CF99 1NA

16 February 2012

Dear Counsel General

### Choice of Affirmative or Negative Procedure in Subordinate Legislation

Thank you for your letter of 24 January 2012 enclosing the Welsh Government's "*Guidelines on Choice of Affirmative or Negative Procedure in Subordinate Legislation*". The Constitutional and Legislative Affairs Committee considered the guidelines at its last meeting and asked me to write to you setting out the Committee's views.

The Committee welcomed the new guidelines as a useful document that will help increase transparency and understanding of the Government's choice of affirmative or negative procedure for subordinate legislation. The Committee was pleased that a number of the factors set out in the document reflect recommendations and observations made by the Committee and its predecessors.

Although it is a welcome step forward, the Committee noted a number of areas where further information might usefully have been included, such as:

- when a super-affirmative procedure might be considered;
- when statutory instruments (or other forms of subordinate legislation) should not be subject to any procedural control in the Assembly;
- when the affirmative procedure might be appropriate for the first Orders or regulations under an Act, with the negative procedure being used for subsequent ones;
- where an Act might provide the Assembly with a choice of procedure that should be used (such as the Public Bodies Act 2011).

I hope you will agree that it is important for the guidelines to be kept up to date with developing practice. Therefore, it would be helpful if the document could be reviewed and updated regularly to ensure that it reflects legislative experience in the Assembly. I would be grateful for your views on this and, if you agree, whether guidance on the areas I have outlined above might usefully be included in any future version?

I am copying this to the Presiding Officer, who I am sure will agree that the guidelines help provide greater transparency and will enhance the scrutiny of Government legislation by Assembly Committees.

Yours sincerely

A handwritten signature in black ink that reads "David Melding". The signature is written in a cursive style with a long, sweeping tail on the final letter.

**David Melding AM**  
Chair  
Constitutional and Legislative Affairs Committee

Theodore Huckle QC/CF  
Y Cwnsler Cyffredinol/ Counsel General



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref

David Melding AM  
Constitutional and Legislative  
Affairs Committee  
Cardiff Bay  
Cardiff  
CF99 1NA

28 February 2012

Dear David,

Thank you for your letter of 16 February 2012 regarding the Welsh Government's guidelines on choice of affirmative or negative procedure in subordinate legislation.

I am pleased that the Committee has found the new guidelines to be useful and thank them for their comments. As you have acknowledged in your letter, the new guidelines are a step forward and the Welsh Government is committed to increasing transparency and understanding of the procedures involved.

Draft affirmative and negative procedures are the most commonly used procedures and are therefore set out in the guidelines. I feel it would be prudent to allow these guidelines to become fully established and their application (and consequently the understanding of their application) observed before proposing any amendments or additions.

The Committee raises a number of issues and I have asked officials to consider these specifically. Furthermore, I can confirm that the guidelines will generally be kept under review, and revised as appropriate.

I am copying this to the Presiding Officer.

Theodore Huckle QC  
Cwnsler Cyffredinol  
Counsel General

Cathays Park  
Cardiff  
CF99 1NA

Phone/ffon 029 2082 3508  
correspondence.Counsel.general@wales.gsi.gov.uk

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Mae cyfyngiadau ar y ddogfen hon

Carl Sargeant AC / AM  
Y Gweinidog Llywodraeth Leol a Chymunedau  
Minister for Local Government and Communities



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref LF/CS/0053/12

David Melding AM  
Chair,  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Ty Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

 February 2012



### **Local Government Byelaws (Wales) Bill**

During my recent appearance before the Constitutional and Legislative Affairs Committee, I undertook to provide further clarification of a number of issues of interest to the Committee. These are set out below.

#### Concurrent Powers of the Welsh Ministers and Secretary of State (Clause 7)

The Committee was interested in how these arrangements operate in practice.

Section 236(11) of the Local Government Act 1972 ("the 1972 Act") provides that the 'confirming authority' for a byelaw is the authority or person specified in the enactment under which the byelaw is made. If no authority or person is specified, the confirming authority is the Secretary of State. As a consequence of the establishment of the National Assembly for Wales, Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 ("the 1999 Order") provided that the functions of the Secretary of State under section 236(11) were exercisable by the National Assembly concurrently with the Secretary of State. Following enactment of the Government of Wales Act 2006, the concurrent functions of the National Assembly in this regard transferred to the Welsh Ministers by virtue of section 162 of, and paragraph 30 of schedule 11 to the GOWA 2006.

Clause 7(9) of the Bill is consistent with our policy approach of consolidating the existing byelaw provisions from the 1972 Act in this Bill and preserves the current position under the 1999 Order.

The concurrent confirmation power under the 1999 Order reflects the view that there may be byelaw powers that deal with non-devolved areas which are outside of the expertise of Welsh Government officials and are, in practice, and as is appropriate, confirmed by the relevant Secretary of State.

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1NA

English Enquiry Line 0845 010 3300  
Llinell Ymholiadau Cymraeg 0845 010 4400  
Correspondence: Carl.Sargeant@wales.gsi.gov.uk  
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It should be noted that the confirmation power is a concurrent power and not a joint power. In other words, either the Welsh Ministers or the Secretary of State can exercise the power in the appropriate circumstances.

Since the 1999 Order, in practice, requests for confirmation of byelaws under devolved powers are considered by the Welsh Ministers. Accordingly, the concurrent confirmation power is a prudent provision in the event that any such powers are identified at a future point.

### Resolution of Opposing Views

The Committee asked about the process for resolving differing views between community councils and unitary authorities when the making of byelaws was being considered.

Although community councils' powers to make byelaws are more limited, both they and unitary authorities can make byelaws in their own right. However, the Committee will appreciate that community councils, as a group, vary considerably in terms of their resources, capability and ambition. In practice, therefore, there would be benefit in close collaboration between a community council and the unitary authority when seeking to tackle issues by way of a byelaw. This might be particularly so in relation to the enforcement of byelaws.

Similarly, where a unitary authority proposes a byelaw, it should work closely with the relevant community council for the area concerned.

The Bill provides for formal consultation with interested parties when a byelaw is being considered, prior to a final decision that a byelaw is the most appropriate means of addressing the issue causing concern. During this process, each party will have an opportunity to submit their views and to engage in the consultation exercise, making their case either way. However, ultimately, it will be for the legislating authority proposing a byelaw to weigh up all the views received and to decide how to proceed. I would of course expect a unitary authority to give appropriate weight to the views of community councils and vice versa when a community council is proposing a byelaw. I will make this clear in statutory guidance to be issued under clause 18 of the Bill.

We are, of course, promoting closer relations between unitary authorities and community councils in their area. This is in keeping with Part 2 of the Local Government (Wales) Measure 2009, for example, which placed a duty on unitary authorities, community councils and other key partners to collaborate in drawing up and delivering strategies for addressing the needs of their communities. This requires the building of consensus and could provide an opportunity for shared discussions of a range of approaches to tackling issues in communities, of which byelaws may be just one.

### Fixed Penalties - Assembly Procedure for Subordinate Legislation

I said that I would provide further rationale for the choice of Assembly procedure relating to the powers of Welsh Ministers to specify a range for fixed penalties (negative procedure) and that for changing the default amount (affirmative procedure).

The Bill mirrors the provisions of section 237B of the Local Government Act 1972 in relation to the enforcement of byelaws in England, which in turn is consistent with similar provisions in the Clean Neighbourhoods and Environment Act 2005.



Clause 13 of the Bill enables a legislating authority to specify the amount of a fixed penalty and to specify different amounts of fixed penalty in relation to different byelaws.

If no amount is so specified, the default amount is £75. This is the reference point for regulations made by the Welsh Ministers as to the range of fixed penalties that may be set by legislating authorities pursuant to clause 13 of the Bill. As such, it seemed right that the amount should be on the face of the Bill.

The regulation making power at clause 13(3) is appropriate in this instance as the Welsh Ministers will be able to prescribe limits for fixed penalty notices to ensure consistency of approach across legislating authorities. This power would enable the Welsh Ministers, if appropriate, to prescribe different ranges for different types of byelaw. This level of detail provided for by way of regulations will enable the Welsh Ministers to react quickly to changing needs and is an appropriate use of a regulation making power.

The regulation making power will be subject to the negative resolution procedure as the regulations define the operational, technical and administrative detail regarding the amount of FPN. We take the view that this is appropriately dealt with by the negative resolution procedure as the regulations will add detail to the framework provided for on the face of the Bill. The negative procedure affords a sufficient degree of scrutiny of the regulations to the Assembly.

The Bill also makes provision at clause 13(5) for the Welsh Ministers to exercise an order making power to amend the sum of £75 currently provided for within the Bill by substituting a different amount. This allows the Welsh Ministers to make an order to change the default amount, if necessary, ensuring that the level remains in line with similar low-level offences. This provision ensures that the Bill is both reactive to changing future circumstances and also provides responsible legislation.

The affirmative procedure will ensure that there is an appropriate degree of scrutiny of the use of this power by the Welsh Ministers, given that the Order will amend this Act and may include supplementary amendments to other primary legislation. In addition, the affirmative procedure is appropriate as there may be significant interest in the exercise of this order making power as it provides for the Welsh Ministers to specify a default amount for the FPN. Therefore, we take the view that the affirmative procedure will allow for sufficient debate and scrutiny to be undertaken by the Assembly.

I trust this will assist the Committee's further deliberations.

Regards

Ant Saper